



LAW OF NEGLIGENCE AND LIMITATION OF LIABILITY ACT 2008

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NORFOLK



ISLAND

Law of negligence and limitation of liability Act 2008

An Act to reform the law of negligence, to limit liability, define the liability of public Authorities, protect good samaritans and volunteers, and for other related purposes.

PART 1 — PRELIMINARY

1. Short title

This Act may be cited as the *Law of negligence and limitation of liability Act 2008*.

2. Commencement

This Act shall commence on the day on which notification of assent is published in the Gazette.

3. Purposes

The purposes of this Act are—

- (a) to amend and reform the common law of negligence —
- (i) to provide that issues of intoxication and illegal activity must be taken into consideration in certain claims in respect of death or personal injury; and
- (ii) to provide that an apology does not constitute an admission of liability in civil proceedings where the death or injury of a person is in issue; and
- (iii) to protect good samaritans providing assistance, advice or care at emergencies or accidents from civil liability for their actions; and
- (iv) to protect volunteers providing services in relation to community work from civil liability for their actions; and
- (v) to provide for waivers permitting self-assumption of risk by people who choose to participate in inherently risky activities;

and generally to reform and consolidate aspects of the law concerning negligence; contributory negligence; mental harm; and the liability of public authorities; and

- (b) to amend the *Coroners Act 1993* to provide that an apology or waiver or reduction of fees does not constitute an admission for the purposes of coronial findings in an investigation of a death; and
- (c) to repeal and consolidate with this Act, portions of the *Compensation (Fatal Injuries) Act 1971* and the *Law Reform (Miscellaneous Provisions) Act 1971*.

PART 2 — NEGLIGENCE

Division 1 — Preliminary

4. Definitions

In this Part—

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

“**harm**” means harm of any kind and includes—

- (a) injury or death; and
- (b) damage to property; and
- (c) economic loss;

“**injury**” means personal or bodily injury and includes—

- (a) pre-natal injury; and
- (b) psychological or psychiatric injury; and
- (c) disease; and
- (d) aggravation, acceleration or recurrence of an injury or disease;

“**negligence**” means failure to exercise reasonable care.

5. Application of Part

This Part applies to any claim for damages resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise.

6. Application to contract

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

(2) Subsection (1) extends to any provision of this Part even if the provision applies to liability in contract.

7. Effect of this Part on the common law

Except as provided by this Part, this Part is not intended to affect the common law.

Division 2 — Duty of Care

8. General principles

(1) A person is not negligent in failing to take precautions against a risk of harm unless—

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

(2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst 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 social utility of the activity that creates the risk of harm.

- (3) For the purposes of subsection (1)(b)—
- (a) **insignificant risks** include, but are not limited to, risks that are far-fetched or fanciful; and
- (b) risks that are **not insignificant** are all risks other than insignificant risks and include, but are not limited to, significant risks.

9. Other principles

In a proceeding relating to liability for negligence—

- (a) the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible; and
- (b) 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
- (c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in respect of the risk and does not of itself constitute an admission of liability in connection with the risk.

10. Duty to warn of risk—reasonable care

A person (the **defendant**) who owes a duty of care to another person (the **plaintiff**) to give a warning or other information to the plaintiff in respect of a risk or other matter, satisfies that duty of care if the defendant takes reasonable care in giving that warning or other information.

Division 3—Causation

11. General principles

(1) A determination that negligence caused particular harm comprises the following elements—

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

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

(3) If it is relevant to the determination of factual causation to determine what the person who suffered harm (the **injured person**) would have done if the negligent person had not been negligent, the matter is to be determined subjectively in the light of all relevant circumstances.

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

12. Burden of proof

In determining liability for negligence, the plaintiff always bears the burden of proving, on the balance of probabilities, any fact relevant to the issue of causation.

Division 4—Awareness of Risk

13. Meaning of obvious risk

(1) For the purposes of section 14, 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) To remove any doubt, it is declared that a risk from a thing, including a living thing, is not an obvious risk if the risk is created because of a failure on the part of a person to properly operate, maintain, replace, prepare or care for the thing, unless the failure itself is an obvious risk.

14. Voluntary assumption of risk

(1) If, in a proceeding on a claim for damages for negligence, a defence of voluntary assumption of risk (*volenti non fit injuria*) is raised and the risk of harm is an obvious risk, the person who suffered harm is presumed to have been aware of the risk, unless the person proves on the balance of probabilities that the person was not aware of the risk.

(2) Subsection (1) does not apply to—

- (a) a proceeding on a claim for damages relating to the provision of or the failure to provide a professional service or health service; or
- (b) a proceeding on a claim for damages in respect of risks associated with work done by one person for another.

(3) Without limiting section 7, the common law continues to apply, unaffected by subsection (1), to a proceeding referred to in subsection (2).

15. No liability for materialisation of inherent risk

(1) A person is not liable in negligence for harm suffered by another person as a result of the materialisation of an inherent risk.

(2) An **inherent risk** is a risk of something occurring that cannot be avoided by the exercise of reasonable care.

(3) This section does not operate to exclude liability in connection with a duty to warn of a risk.

16. Plaintiff to prove unawareness of risk

(1) In any proceeding where, for the purpose of establishing that a person (the **defendant**) has breached a duty of care owed to a person who suffered harm (the **plaintiff**), the plaintiff alleges that the defendant has—

- (a) failed to give a warning about a risk of harm to the plaintiff; or
- (b) failed to give other information to the plaintiff,

the plaintiff bears the burden of proving, on the balance of probabilities, that the plaintiff was not aware of the risk or information.

(2) Subsection (1) does not apply to a proceeding on a claim for damages in respect of risks associated with work done by one person for another.

(3) Despite subsection (2), subsection (1) applies to a proceeding referred to in subsection (2) if the proceeding relates to the provision of or the failure to provide a health service.

(4) Without limiting section 7, the common law continues to apply, unaffected by subsection (1), to a proceeding referred to in subsection (2) to which subsection (1) does not apply.

(5) Nothing in this section is intended to alter any duty of care to give a warning of a risk of harm or other information.

Division 5—Negligence of professionals and persons professing particular skills

17. Definition

In this Division “**professional**” includes an individual and, where permitted by law, a corporation practising a profession.

18. Standard of care expected of persons holding out as possessing a particular skill

In a case involving an allegation of negligence against a person (the **defendant**) who holds himself or herself out as possessing a particular skill, the standard to be applied by a court in determining whether the defendant acted with due care is, subject to this Division, to be determined by reference to—

- (a) what could reasonably be expected of a person possessing that skill; and
- (b) the relevant circumstances as at the date of the alleged negligence and not a later date.

19. Standard of care for professionals

(1) A professional is not negligent in providing 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 a significant number of respected practitioners in the field (**peer professional opinion**) as competent professional practice in the circumstances.

(2) However, peer professional opinion cannot be relied on for the purposes of this section if the court determines that the opinion is unreasonable.

(3) The fact that there are differing peer professional opinions widely accepted in Australia by a significant number of respected practitioners in the field concerning a matter does not prevent any one or more (or all) of those opinions being relied on for the purposes of this section.

(4) Peer professional opinion does not have to be universally accepted to

be considered widely accepted.

(5) If, under this section, a court determines peer professional opinion to be unreasonable, it must specify in writing the reasons for that determination.

(6) Subsection (5) does not apply if a jury determines the matter.

20. Duty to warn of risk

Section 19 does not apply to a liability arising in connection with the giving of (or the failure to give) a warning or other information in respect of a risk or other matter to a person if the giving of the warning or information is associated with the provision by a professional of a professional service.

Division 6—Non-delegable duties and vicarious liability

21. Liability based on non-delegable duty

(1) The extent of liability in tort of a person (the **defendant**) for breach of a non-delegable duty to ensure that reasonable care is taken by a person in the carrying out of any work or task delegated or otherwise entrusted to the person by the defendant is to be determined as if the defendant were vicariously liable for the negligence of the person in connection with the performance of the work or task.

(2) This section applies to a claim for damages in tort whether or not it is a claim for damages resulting from negligence.

Division 7—Contributory Negligence

22. Standard of care for contributory negligence

(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 in failing to take precautions against the risk of that harm.

(2) For that purpose—

- (a) the standard of care required of the person who suffered harm is that 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.

23. Contributory negligence can defeat claim

In determining the extent of a reduction in damages by reason of contributory negligence, a court may determine a reduction of 100% if the court thinks it just and equitable to do so, with the result that the claim for damages is defeated.

Division 8—Intoxication and Illegal activity

24. Liability – owners and occupiers and generally

In determining the liability of a person for the death or injury to another person the court must take into account —

- (a) where the person may as the owner or occupier of property be liable to the other person —
 - (i) whether the other person was intoxicated by alcohol or drugs voluntarily consumed and the level of intoxication; and
 - (ii) whether the other person entering the premises or remaining therein was or became involved in an illegal activity;

- (b) in determining whether the other person has established a breach of the duty of care owed by the person where the person is alleged to have been negligent —
- (i) whether the other person was intoxicated by alcohol or drugs voluntarily consumed and the level of intoxication; and
 - (ii) whether the other person was or became involved in an illegal activity.

Division 9—General

25. Regulations

The Administrator may make regulations generally prescribing any matter or thing required or permitted by this Part to be prescribed or necessary to be prescribed to give effect to this Part.

26. Effect on other enactments

It is the intention of sections 8(2), 11(2), 11(3), 11(4), 18, 19(5), 22 and 23 to apply despite anything to the contrary in the *Supreme Court Act 1960* or Part 6.

27. Transitional

(1) This Part extends to negligence arising before, on or after the commencement day.

(2) Section 21 extends to liability in tort arising before, on or after the commencement day.

(3) Despite subsections (1) and (2), this Part does not apply to proceedings commenced in a court before the commencement day.

PART 3 – MENTAL HARM

28. Definitions

In this Part—

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

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

“**injury**” means personal or bodily injury and includes—

- (a) pre-natal injury; and
- (b) psychological or psychiatric injury; and
- (c) disease; and
- (d) aggravation, acceleration or recurrence of an injury or disease;

“**mental harm**” means psychological or psychiatric injury;

“**negligence**” means failure to exercise reasonable care;

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

29. Application of Part

This Part applies to any claim for damages resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise.

30. Application to contract

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

(2) Subsection (1) extends to any provision of this Part even if the provision applies to liability in contract.

31. Effect of this Part on the common law

Except as provided by this Part, this Part is not intended to affect the common law.

32. Mental harm—duty of care

(1) A person (the **defendant**) does not owe a duty to another person (the **plaintiff**) to take care not to cause the plaintiff pure mental harm unless the defendant foresaw or 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 purposes of the application of this section, 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 the plaintiff witnessed, at the scene, a person being killed, injured or put in danger;
- (c) the nature of the relationship between the plaintiff and any person killed, injured or put in danger;
- (d) whether or not there was a pre-existing relationship between the plaintiff and the defendant.

(3) This section does not affect the duty of care of a person (the **defendant**) to another (the **plaintiff**) if the defendant knows, or ought to know, that the plaintiff is a person of less than normal fortitude.

33. Limitation on recovery of damages for pure mental harm arising from shock

(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 danger 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 danger; or
- (b) the plaintiff is or was in a close relationship with the victim.

(3) No damages are to be awarded to the plaintiff for pure mental harm if the recovery of damages from the defendant by or through the victim in respect of the act or omission would be prevented by any provision of this Act or any other written or unwritten law.

34. Limitation on recovery of damages for consequential mental harm

(1) A person (the **plaintiff**) is not entitled to recover damages from another person (the **defendant**) for consequential mental harm unless—

- (a) the defendant foresaw or 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; or
- (b) the defendant knew, or ought to have known, that the plaintiff is a person of less than normal fortitude and foresaw or ought to have foreseen that the plaintiff might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken.

(2) For the purposes of the application of this section, the circumstances of the case include the injury to the plaintiff out of which the mental harm arose.

35. Liability for economic loss for mental harm

A court cannot make an award of damages for economic loss for mental harm resulting from negligence unless the harm consists of a recognised psychiatric illness.

36. Regulations

The Administrator may make regulations generally prescribing any matter or thing required or permitted by this Part to be prescribed or necessary to be prescribed to give effect to this Part.

37. Effect on other enactments

It is the intention of sections 33, 34 and 35 to apply despite anything to the contrary in the *Supreme Court Act 1960* or Part 6.

38. Transitional

(1) This Part extends to negligence arising before, on or after the commencement day.

(2) Despite subsection (1), this Part does not apply to proceedings commenced in a court before the commencement day.

PART 4 – THE ADMINISTRATION AND OTHER PUBLIC AUTHORITIES

39. Definitions

In this Part—

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

“**exercise**” in relation to a function includes perform a duty;

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

“**negligence**” means failure to exercise reasonable care;

“**public authority**” means—

- (a) the Administration;
- (b) a public sector agency within the meaning of the *Public Sector Management Act 2000*;
- (c) a territory instrumentality within the meaning of the *Public Sector Management Act 2000*;
- (d) a body, whether corporate or unincorporate, that is established by or under an enactment for a public purpose;

- (e) a person holding an office or position established by or under an enactment;
- (f) a person holding an office or position to which he or she was appointed by the Administrator or an Minister otherwise than under an enactment;
- (g) any other person or body prescribed (or of a class prescribed) as an authority to which this Part applies (in respect of all or specified functions);
- (h) any person or body in respect of the exercise of a public or other function of a class prescribed for the purpose of this Part.

40. Application of Part

(1) This Part (except section 44) applies to any claim for damages resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise.

(2) Subsection (1) and section 44 do not apply if the relevant enactment contains express provision to the contrary.

41. Exclusions from Part

This Part does not apply to a public authority or class of public authority—

- (a) that is excluded by the regulations from the operation of this Part in respect of all of its functions; or
- (b) in respect of specified functions or functions of a specified class, if the regulations exclude those functions or that class of functions from the operation of this Part in respect of that public authority or class of public authority.

42. Effect of this Part on the common law

Except as provided by sections 43, 44 and 45, this Part is not intended to affect the common law.

43. Principles concerning resources, responsibilities, etc of public authorities

In determining whether a public authority has a duty of care or has breached a duty of care, a court is to consider the following principles (amongst other relevant things)—

- (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 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 proceeding relates);
- (c) the authority may rely on evidence of its compliance with the general procedures and applicable standards for the exercise of its functions as evidence of the proper exercise of its functions in the matter to which the proceeding relates.

44. Wrongful exercise of or failure to exercise function

(1) This section applies to a proceeding for damages for an alleged breach of statutory duty by a public authority in connection with the exercise of or a failure to exercise a function of the authority.

(2) For the purpose of the proceeding, an enactment or omission of the public authority relating to a function conferred on the public authority specifically in its capacity as a public authority does not constitute a breach of statutory duty unless the enactment or omission was in the circumstances so unreasonable that no public authority having the functions of the authority in question could properly consider the enactment or omission to be a reasonable exercise of its functions.

(3) For the purpose of the proceeding the public authority is not liable for damages caused by the wrongful exercise of or failure to exercise a function of the authority unless the provisions and policy of the enactment in which the duty to exercise the function is created are compatible with the existence of that liability.

(4) Despite subsection (1), subsection (2) does not apply to a statutory duty that is imposed as an absolute duty on the public authority to do or not to do a particular thing.

45. Exercise of function or decision to exercise does not create duty

In a proceeding, the fact that a public 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.

46. Effect on other enactments

It is the intention of section 43 to apply despite anything to the contrary in the *Supreme Court Act 1960* or Part 6.

47. Transitional

(1) This Part extends to negligence arising before, on or after the commencement day.

(2) Section 44 extends to an enactment or omission occurring before, on or after the commencement day.

(3) Despite subsections (1) and (2), this Part does not apply to proceedings commenced in a court before the commencement day.

PART 5 — PERSONAL INJURY DAMAGES

48. Definitions

In this Part—

“**claimant**” means a person who makes or is entitled to make a claim for personal injury damages;

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

“**dependants**” in relation to a claimant, means any persons who are wholly, mainly or in part dependent on the claimant at the time of the injury;

“**economic loss**” means loss of earnings, loss of earning capacity, loss of value of services or any other pecuniary loss or damage;

“**fault**” includes act or omission;

“**injury**” means personal or bodily injury and includes—

- (a) pre-natal injury; and
- (b) psychological or psychiatric injury; and
- (c) disease; and
- (d) aggravation, acceleration or recurrence of an injury or 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 enjoyment of life;

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

49. Application of Part

(1) This Part applies to an award of personal injury damages, except an award that is excluded by sub-section (2).

(2) The following awards of damages are excluded from the operation of this Part—

- (a) awards where the fault concerned is an intentional act that is done with intent to cause death; or
- (b) injury that is sexual assault or other sexual misconduct.

(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.

(4) This Part has no application to any liability or amount that may be payable under the provisions of Part 3 of the *Employment Act 1988*.

50. General regulation of court awards

A court cannot award personal injury damages to a claimant contrary to this Part or Part 6.

51. Part does not give rise to any cause of action

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

52. Limitation on damages

(1) Damages of any kind in respect of an injury cannot be recovered in proceedings in accordance with this Part other than damages —

- (a) for economic loss but only if—
 - (i) the assessment of damages before any reduction in respect of the person’s responsibility for the injury is more than \$5,000 but less than \$500,000, in which case the amount that can be recovered is that amount so assessed as reduced in respect of the person’s responsibility for the injury; or
 - (ii) the assessment of damages before any reduction in respect of the person’s responsibility for the injury is more than \$500,000, in which case the amount that can be recovered is \$500,000 as reduced in respect of the person’s responsibility for the injury;
- (b) for non-economic loss but only if—
 - (i) the assessment of damages before any reduction in respect of the person’s responsibility for the injury is more than \$5,000 but less than \$350,000, in which case the amount that can be recovered is that amount so assessed as reduced in respect of the person’s responsibility for the injury; or
 - (ii) the assessment of damages before any reduction in respect of the person’s responsibility for the injury is more than \$350,000, in which

case the amount that can be recovered is \$350,000 as reduced in respect of the person's responsibility for the injury.

53. 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 award to which this section applies, the court is to disregard the amount (if any) by which the claimant's gross weekly earnings would (but for the death or injury) 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 Part, the amount of **average weekly earnings** at the date of the award is—
- (a) the amount per week comprising the amount estimated by the Statistician under the *Census and Statistics Act 1961* as the average weekly total earnings of all employees in Norfolk Island for the most recent quarter occurring before the date of the award for which such an amount has been estimated by the Statistician and that is, at that date, available to the court making the award; or
 - (b) if the 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.

54. Fixing damages for death

The maximum amount of damages that may be awarded to a claimant in respect of the death of a person is \$500,000.

55. Indexation of maximum amount for non-economic loss

(1) The amount that is to apply for the purposes of paragraph 52(1)(b) may be varied, in respect of the financial year beginning on 1 July 2009 and each subsequent financial year by such amount not exceeding the increase in the retail price index calculated under section 2 of the *Retail Price Index Act 1983* over the previous 12 months as determined by the Minister by notice in the Gazette.

(2) If it is necessary for the purposes of this section to calculate an amount that consists of or includes a fraction of a whole number, the amount is deemed to have been calculated in accordance with this section if the calculation is made—

- (a) if the amount is less than \$1000, to the nearest whole \$1; or
- (b) if the amount is \$1000 or more, to the nearest whole \$10.

(3) If an amount is varied in accordance with this section, section 52 and this section have effect as if a reference to the amount were a reference to the amount as so varied.

56. 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 determined by the Minister by notice in the Gazette; or
- (b) if no percentage is so prescribed—a discount rate of 6%.

(3) Except as provided by this section, nothing in this section affects any other law relating to the discounting of sums awarded as damages.

57. Limitation on damages for loss of gratuitous care

In an action under this Part, no damages may be awarded for a loss of gratuitous care provided or to be provided by the deceased to the deceased's dependants unless the court is satisfied that—

- (a) the care—
 - (i) was provided to the dependants; and
 - (ii) was being provided for at least 6 hours per week; and
 - (iii) had been provided for at least 6 consecutive months before the death, or the injury that caused the death, to which the damages relate; or
- (b) there is a reasonable expectation that, but for the death, or the injury that caused the death, of the deceased, the gratuitous care would have been provided to the dependants—
 - (i) for at least 6 hours per week; and
 - (ii) for a period of at least 6 consecutive months.

58. Calculation of damages for gratuitous care

(1) If, in an action under this Act, the court is satisfied that the deceased would (if death, or the injury that caused the death, had not ensued) have provided gratuitous care to his or her dependants for not less than 40 hours per week, the amount of damages that may be awarded for the loss of that care must not exceed the **average weekly earnings** for that quarter.

(2) If, in an action under this Part, the court is satisfied that the deceased would have provided gratuitous care to his or her dependants for less than 40 hours per week, the amount of damages that may be awarded for the loss of that care must not exceed the amount calculated at an hourly rate of one-fortieth of the amount determined in accordance with subsection (1) as the case requires.

59. Application of sections 57 and 58

Except as provided by sections 57 and 58, nothing in those sections affects any other law relating to damages arising from loss of gratuitous care.

60. Tariffs for damages for non-economic loss

(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 for damages for non-economic loss in those earlier proceedings.

(3) This section does not alter the rules for the determination of other damages.

61. Transport accidents

(1) In this section, “**transport accident**” means an incident directly caused by the driving of a motor car or other motor vehicle.

(2) Despite anything to the contrary in any other Act, a party may in proceedings under this Part when adducing evidence on the question of whether any person was at the time of the transport accident under the influence of intoxicating liquor or any other drug, use the analysis or the results of the analysis of a blood sample or, breath analysis, lawfully taken under the *Road Traffic Act 1982* at or after the time of the transport accident.

(3) A party must not adduce material referred to in subsection (2) in evidence in proceedings under this Part unless—

- (a) the party provides to all other parties in the proceedings, copies of the document or documents which form the evidence at least 6 weeks before the commencement of the trial of the proceedings; and
- (b) if notice is given to that party by another party at least 2 weeks before the commencement of the trial of the proceedings, the party causes the person who supplied the information contained in the document or documents to attend the trial of the proceedings for the purpose of cross-examination.

(4) Notwithstanding anything to the contrary in this Act, for the purposes of any law relating to the time within which an action for damages must be commenced, the cause of action in respect of an injury suffered in a transport accident arises on the day of the transport accident or on the day on which the injury first manifests itself.

PART 6 — FATAL INJURIES

62. Definitions for Part 6

- (1) In this Part, unless the contrary intention appears—
- “**child**”, in relation to a deceased person, includes a grand-child and a stepchild of the deceased person;
- “**parent**”, in relation to a deceased person, includes a grand-parent and a step-parent of the deceased person;
- “**personal representative**”, in relation to a deceased person, means the person or persons to whom any grant of probate of the will or administration of the estate of the deceased person has been made in Norfolk Island or in a State or Territory of Australia, and includes an executor by representation of the deceased person, and the

Curator of Deceased Persons' Estates if the Curator is administering the estate of the deceased person.

(2) Each of the following persons is, for the purpose of this Part, a member of a deceased person's family—

- (a) the widow or widower of the deceased person;
- (b) a child of the deceased person;
- (c) a person to whom the deceased person stood, immediately before his death, in loco parentis;
- (d) a parent of the deceased person;
- (e) a person who stood, immediately before the death of the deceased person, in loco parentis to the deceased person;
- (f) a brother, a sister, a half-brother and a half-sister of the deceased person;
- (g) a former wife or former husband of the deceased person; and
- (h) a person who, was, immediately before the death of the deceased person, a de facto partner of the deceased.

(3) For the purposes of this Act—

- (a) an illegitimate person shall be treated as being, or as having been, the legitimate child of his mother and reputed father;
- (b) a child of the deceased person born alive after the death of that person shall be treated as having been born before the death of the deceased person;
- (c) a child includes a child as defined in the *De Facto Relationships Act 2005*.

63. Liability in respect of the death of a person

Where the death of a person is caused by a wrongful act, neglect or default and the act, neglect or default is such that it would, if death had not ensued, have entitled the person injured to maintain an action and recover damages in respect of the injury, the person who would have been liable if the death had not ensued is liable to an action for damages notwithstanding the death of the person injured and irrespective of whether the death of that person was caused by circumstances that amount in law to a crime.

64. One action for the benefit of members of deceased person's family

(1) Not more than one action under this Part shall be brought against a person in respect of a death.

(2) Subject to section 68, any such action shall be brought by and in the name of the personal representative of the deceased person for the benefit of those members of the deceased person's family who sustained damage by reason of his death.

65. Damages

(1) In an action under this Part, the court may award to the parties respectively for whose benefit the action is brought such damages as it may think proportioned to the injury resulting from the death of the person injured but such damages must not exceed the amount provided by section 54.

(2) The amount of damages recovered under this section shall, after deducting the costs not recovered from the defendant, be divided amongst the persons for whose benefit the action is brought in such shares as the court determines.

(3) Damages in an action under this Part may include—

- (a) the reasonable expenses of burial or cremation of the deceased person; and
- (b) the reasonable medical and hospital expenses of the deceased person in relation to the injury that resulted in the death of the deceased person,

that are incurred by a person for whose benefit the action is brought.

(4) In assessing damages in respect of liability under this Part, there shall not be taken into account by way of reduction of damages —

- (a) a sum paid or payable on the death of, or personal injury to, the deceased person under a contract of insurance;
- (b) a sum paid or payable out of a superannuation, provident or like fund, or by way of benefit from a friendly society, benefit society, lodge or trade union;
- (c) a sum paid or payable by any government or person consequent upon the death of, or personal injury to, the deceased person and being—
 - (i) a payment in lieu of furlough or long service leave; or
 - (ii) a payment by way of pension, social service benefit or repatriation benefit;
- (d) a sum paid or payable as a gratuity consequent upon the death of the deceased person;
- (e) any sum in respect of the acquisition by a member of the deceased person's family, consequent upon the death of the deceased person, of, or of an interest in, a dwelling used at any time as the home of the member, or of, or of an interest in, the household contents of any such dwelling; or
- (f) a premium that would have become payable under a contract of insurance in respect of the life of the deceased person if he had lived beyond the time at which he died.

66. Contributory negligence

(1) Where a person dies as the result partly of his own fault and partly of the fault of another person or other persons, and accordingly, if an action were brought for the benefit of the estate of the deceased person under section 92, the damages recoverable would be reduced under section 102, any damages recoverable in an action under this Part shall be reduced to the same extent as if they were damages in an action so brought for the benefit of the estate of the deceased person.

(2) In this section, “**fault**” has the same meaning as in section 101.

67. Payment into court

(1) Where an action is brought under this Part, the defendant may pay an amount of money into court as compensation for the benefit of the persons for whose benefit the action is brought and who are entitled to compensation under this Part without specifying the shares into which that amount is to be divided by the court.

(2) Where an amount of money is paid into court by way of compensation, no portion of that amount shall be paid out of court except in pursuance of an order of the court.

68. Alternative action by person or persons other than personal representative

(1) Where an action under this Part has not been commenced by and in the name of the personal representative of a deceased person within six months after the death of the deceased person, any one or more of the persons for whose benefit an action under this Part may be brought may bring an action under this Part.

(2) An action brought under this Part by a person other than the personal representative of the deceased person shall be for the benefit of the same persons and subject to the same provisions and procedures, mutatis mutandis, as if it were brought by the personal representative of the deceased person.

69. Special endorsement on writ of summons

The writ of summons or other process by which an action under this Part is commenced shall, in addition to any other endorsements required or permitted to be made, be endorsed with a statement specifying the names of each of the persons for whose benefit the action is brought and the relationship of each of those persons to the deceased person.

70. Powers of the court to make orders in relation to actions

(1) Where—

- (a) an action under this Part has been commenced; and
- (b) the court is satisfied that a person whose name is not included in the names of the persons for whose benefit the action is stated to have been brought is a person whose name should have been so included,

the court may, on application made by or on behalf of that person, or of its own motion, order that the action shall proceed as if the name of that person had been so included.

(2) In proceedings under this Part, the court may order that any one or more of the persons for whose benefit the action has been brought be separately represented by counsel or solicitor, or both.

(3) Where the court makes an order under this section, the court may, at the same or a subsequent time, make such orders in relation to procedure in the action as it thinks fit.

(4) The powers of the court under this section are in addition to, and not in derogation of, any other powers of the court.

71. Provisions applicable where action tried before court with a jury

If an action under this Part or the assessment of damages in such an action is tried before the court with a jury, the references in section 64 to the court shall be read as references to the jury before which the action is tried.

PART 7 – APOLOGIES

72. Definitions

In sections 73 and 74 –

“**apology**” means an expression of sorrow, regret or sympathy but does not include a clear acknowledgment of fault;

“**civil proceeding**” includes—

- (a) a proceeding before a tribunal; and
- (b) a proceeding under an Act regulating the practice or conduct of a profession or occupation;

“**injury**” means personal or bodily injury and includes—

- (a) pre-natal injury; and
- (b) psychological or psychiatric injury; and
- (c) disease; and
- (d) aggravation, acceleration or recurrence of an injury or disease.

73. Apology not admission of liability

(1) In a civil proceeding where the death or injury of a person is in issue or is relevant to an issue of fact or law, an apology does not constitute—

- (a) an admission of liability for the death or injury; or
- (b) an admission of unprofessional conduct, carelessness, incompetence or unsatisfactory professional performance, however expressed, for the purposes of any Act regulating the practice or conduct of a profession or occupation.

(2) Subsection (1) applies whether the apology—

- (a) is made orally or in writing; or
- (b) is made before or after the civil proceeding was in contemplation or commenced.

(3) Nothing in this section affects the admissibility of a statement with respect to a fact in issue or tending to establish a fact in issue.

74. Reduction or waiver of fees

(1) In a civil proceeding where the death or injury of a person is in issue or is relevant to an issue of fact or law and it is alleged that the death or injury occurred as a consequence of the provision of a service, a reduction or waiver of the fees payable for the service or a related service does not constitute—

- (a) an admission of liability for the death or injury; or
- (b) an admission of unprofessional conduct, carelessness, incompetence or unsatisfactory professional performance, however expressed, for the purposes of any Act regulating the practice or conduct of a profession or occupation.

(2) Subsection (1) applies whether the reduction or waiver of fees—

- (a) is made orally or in writing; or
- (b) is made before or after the civil proceeding was in contemplation or commenced.

(3) Nothing in this section affects the admissibility of a statement with respect to a fact in issue or tending to establish a fact in issue.

75. Coroners Act 1993 - apology or reduction or waiver of fees

(1) In this section, “**apology**” means an expression of sorrow, regret or sympathy but does not include a clear acknowledgment of fault.

(2) In an investigation of a death—

(a) an apology; or

(b) a reduction or waiver of fees payable for a service provided to the person who died—

does not constitute an admission as to how death occurred or the cause of death, for the purposes of findings under the *Coroners Act 1993* nor does it constitute an answer that may criminate or tend to criminate the person making the apology or giving the reduction or waiver.

(3) Subsection (2) applies whether the apology or the reduction or waiver of fees—

(a) is made orally or in writing; or

(b) is made before or after the investigation commenced.

(4) Nothing in this section affects the admissibility of a statement with respect to a fact in issue or tending to establish a fact in issue.

(5) This section applies to an apology or reduction or waiver of fees made on or after the commencement of this Part.

76. Transitional

This Part extends to proceedings that relate to an injury received, or to a death resulting from an injury received, whether before, on or after the commencement day.

PART 8 – STRUCTURED SETTLEMENTS**77. Definitions**

In this Part—

“**court**”, in relation to a claim, means—

(a) if a proceeding based on the claim has been commenced in the Supreme Court or the Court of Petty Sessions—the court hearing the proceeding; or

(b) if no proceeding based on the claim has been commenced—the Supreme Court or the Court of Petty Sessions;

“**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; and

(d) aggravation, acceleration or recurrence of an injury or disease;

“**structured settlement**” means 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.

78. Court may make order for structured settlement

(1) If the parties to a claim for damages that relate to injury to a person caused by the fault of another person agree to settle the claim by making a structured

settlement, one or more parties may 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.

PART 9 – GOOD SAMARITAN PROTECTION

79. Definition

In this Part, “**injury**” means personal or bodily injury and includes—

- (a) pre-natal injury; and
- (b) psychological or psychiatric injury; and
- (c) disease; and
- (d) aggravation, acceleration or recurrence of an injury or disease.

80. Protection of good samaritans

(1) A good samaritan is an individual who provides assistance, advice or care to another person in relation to an emergency or accident in circumstances in which—

- (a) he or she expects no money or other financial reward for providing the assistance, advice or care; and
- (b) as a result of the emergency or accident the person to whom, or in relation to whom, the assistance, advice or care is provided is at risk of death or injury, is injured, is apparently at risk of death or injury, or is apparently injured.

(2) A good samaritan is not liable in any civil proceeding for anything done, or not done, by him or her in good faith—

- (a) in providing assistance, advice or care at the scene of the emergency or accident; or
- (b) in providing advice by telephone or by another means of communication to a person at the scene of the emergency or accident.

(3) Subsection (2) applies even if the emergency or accident was caused by an act or omission of the good samaritan.

(4) Subsection (2) does not apply to any act or omission of a good samaritan that occurs before the assistance, advice or care is provided by the good samaritan.

81. Application of section 80

Section 80 applies in relation to assistance, advice or care provided on or after the commencement of this Part.

PART 10 – VOLUNTEER PROTECTION

82. Definitions

In this Part—

“**community organisation**” means—

- (a) an incorporated association under the *Associations Incorporation Act 2005*;
- (b) any other body corporate;

- (c) any public sector agency within the meaning of the *Public Sector Management Act 2000* or other person or body acting on behalf of the Administration —

that organises the doing of community work by volunteers;

“**community work**” has the meaning set out in section 84;

“**organise**” includes to direct and to supervise;

“**volunteer**” has the meaning set out in section 83.

83. Meaning of “volunteer”

(1) A volunteer is an individual who provides a service in relation to community work on a voluntary basis.

(2) A person is still a volunteer even if, in providing a service, he or she receives—

- (a) remuneration that he or she would receive whether or not he or she provided that service; or
- (b) out-of-pocket expenses incurred in relation to providing that service; or
- (c) remuneration that is not more than the amount (if any) specified in the regulations for the purposes of this section.

(3) For the purposes of this Part the following are not volunteers—

- (a) any person who would otherwise be a volunteer under this Part while he or she is engaged in any activity in respect of which an Act absolves him or her from civil liability for anything done, or not done, while he or she is so engaged;
- (b) a person who does community work under an order imposed by a court.

84. Meaning of “community work”

(1) Community work is any work that is done, or to be done—

- (a) for a religious, educational, charitable or benevolent purpose;
- (b) for the purpose of promoting or encouraging literature, science or the arts;
- (c) for the purpose of sport, recreation, tourism or amusement;
- (d) for the purpose of conserving or protecting the environment;
- (e) for the purpose of establishing, carrying on or improving a community, social or cultural centre;
- (f) for a political purpose;
- (g) for the purpose of promoting the common interests of the community generally or of a particular section of the community;
- (h) for an emergency service provided by the Administration for the benefit of the community;
- (j) for any other purpose specified in the regulations for the purposes of this section.

(2) For the purposes of this Part, community work does not include any work of a kind that is specified in the regulations as work that is not community work for the purposes of this Part.

85. Protection of volunteers from liability

(1) A volunteer is not liable in any civil proceeding for anything done, or not done, in good faith by him or her in providing a service in relation to community work organised by a community organisation.

(2) Any liability resulting from an act or omission that would but for subsection (1) attach to the volunteer attaches instead to the community organisation.

86. Exceptions to subsection 85(1)

(1) Section 85(1) does not apply to a volunteer—

(a) who knew, or who 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 any instructions given by the community organisation in relation to the providing of the service; or

(b) whose ability to provide the service in a proper manner was, at the relevant time, significantly impaired by alcohol or drugs.

(2) Section 85(1) also does not apply to a volunteer in respect of any claim to recover damages in respect of defamation.

(3) A reference to drugs in subsection (1)(b) does not include a reference to drugs that were taken for a therapeutic purpose or that were not taken voluntarily.

(4) A reference to alcohol in subsection (1)(b) does not include a reference to alcohol that was not consumed voluntarily.

87. Provisions concerning the liability of community organisations

(1) Section 85(2) does not override any protection from liability that would have applied to a community organisation if the thing done, or not done, by the volunteer had been done, or not done, by the community organisation.

(2) If more than one community organisation is involved in organising particular community work, section 85(2) applies to the community organisation or organisations that principally organised that work.

(3) In the case of a community organisation that is a public sector agency within the meaning of the *Public Sector Management Act 2000* or another person or body acting on behalf of the Administration, any liability incurred by the community organisation under section 85(2) is incurred by the Administration.

88. Certain indemnities, etc have no effect

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 liability—

(a) that the volunteer would incur but for the operation of section 85(1); and

(b) that the community organisation incurs under section 85(2).

89. Application of section 85

Section 85 applies in relation to a service provided on or after the commencement of this Part.

90. Regulations

(1) The Administrator may make regulations generally prescribing any matter or thing required or permitted by this Part to be prescribed, or necessary or convenient to be prescribed to give effect to this Part.

(2) The regulations—

- (a) may be of general or limited application; and
- (b) may differ according to differences in time, place or circumstance; and
- (c) may apply, adopt or incorporate any matter contained in any document as in force at a particular time either wholly, or partially, or as amended by the regulations.

PART 11 – MISCELLANEOUS PROVISIONS*Division 1 – Ante-nuptial obligations of spouses***91. Torts and ante-nuptial obligations of spouses**

(1) The spouse of a man or woman is not, by reason only of his or her being such spouse, in a claim for damages resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise, liable—

- (a) in respect of negligence committed by him or her, whether before or after the marriage; or
- (b) to be sued, or made a party to a legal proceeding brought, in respect thereof.

(2) The last preceding sub-section does not affect a legal proceeding in respect of a claim for damages resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise, if proceedings had been instituted in respect thereof before the commencement of this Act.

*Division 2 – Survival of causes of action***92. Survival of causes of action**

Subject to this Division, on the death of a person all causes of action for damages resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise, subsisting against or vested in the person survive against the person's estate or, as the case may be, for the benefit of the person's estate.

93. Damages recoverable for benefit of an estate

Where a cause of action survives under this Division for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person—

- (a) do not include exemplary damages; and
- (b) where the death of that person has been caused by the act or omission that gives rise to the cause of action —
 - (i) shall be calculated without reference to any loss or gain to the estate of the person consequent upon the person's death, except that the reasonable expenses of burial or cremation may be included;
 - (ii) do not include damages for the pain or suffering of that person or for any bodily or mental harm suffered by him or for the curtailment of the person's expectation of life; and

- (iii) do not include damages for the loss of the capacity for that person to earn, or for the loss of future probable earnings of that person, had the person survived.

94. Limitation on proceedings

(1) No proceedings are maintainable in respect of a cause of action for damages resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise, which, by virtue of this Part, has survived against the estate of the deceased person unless —

- (a) proceedings against him in respect of that cause of action were pending on the date of his death;
- (b) proceedings are taken in respect of the cause of action not later than twelve months after his executor or administrator was granted probate or letters of administration or within such further period as the Supreme Court, on an application made, either before or after the expiration of that period, allows; or
- (c) in the case of a cause of action referred to in the next succeeding section, the proceedings are commenced within the period of twelve months after the date upon which the damage was suffered or after the date on which the executor or administrator of the deceased person was granted probate or letters of administration, whichever is the later.

(2) The last preceding subsection does not operate so as to permit the commencement of proceedings against the estate of a deceased person at any time after his death if the proceedings could not, by reason of any law relating to the limitation of actions, have been commenced against the deceased person at the time of his death.

(3) For the purposes of paragraph (c) of subsection (1) of this section, the damage to which an action in respect of the death of a person under the Part 6 relates shall be deemed to have been suffered on the day of the death of that person.

95. Damage suffered after or at the time of death

Where damage has been suffered by reason of an act or omission in respect of which a cause of action for damages resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise, would have subsisted against a person if that person had not died before or at the same time as the damage was suffered, there shall be deemed, for the purposes of this Division, to have been subsisting against him before his death such cause of action in respect of that act or omission as would have subsisted if he had died after the damage was suffered.

96. Rights in addition to Part 6

The rights conferred by this Part for the benefit of the estates of deceased persons are in addition to, and not in derogation of, any rights conferred by Part 6, and so much of this Division as relates to causes of action against the estates of deceased persons applies in relation to causes of action under that Part as it applies in relation to other causes of action not expressly excepted from the operation of section 91.

*Division 3—Proceedings against and contributions between tortfeasors***97. Definition**

In this Part, the reference to “**the judgment first given**” shall, in a case where that judgment is reversed on appeal, be construed as a reference to the judgment first given that is not so reversed, and, in a case where a judgment is varied on appeal, be construed as a reference to that judgment as so varied.

98. Proceedings against and contribution between joint and several tortfeasors

(1) This section applies where damage is suffered by a person as a result of negligence, regardless of whether the claim is brought in tort (whether crime or not), in contract, under statute or otherwise.

(2) Judgment recovered against a tortfeasor liable in respect of the damage is not a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage.

(3) If more than one action is brought in respect of the damage by or on behalf of the person by whom it was suffered, or for the benefit of the estate of that person, or for the benefit of the person or persons for whose benefit an action may be brought under Part 6 in respect of the death of that person, against tortfeasors liable in respect of the damage (whether as joint tortfeasors or otherwise)—

- (a) the sums recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given ; and
- (b) in any of those actions other than that in which judgment is first given, the plaintiff is not entitled to costs unless the court is of the opinion that there was reasonable ground for bringing the action.

(4) A tortfeasor liable in respect of the damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, but no person is entitled to recover contribution under this section from a person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

(5) Where the tort causing the damage was, or the torts causing the damage were, committed by the spouse of the person suffering the damage and some other person, that other person may recover contribution as mentioned in the last preceding subsection from the spouse, as if the spouse had been liable to the person suffering the damage.

99. Amount of contribution

In proceedings for contribution under the last preceding section the amount of the contribution recoverable from a person is such as is found by the court to be just and equitable, having regard to the extent of that person’s responsibility for the damage, and the court has power to exempt a person from liability to make contribution, or to direct that the contribution to be recovered from a person shall amount to a complete indemnity.

100. Effect of this Division

Nothing in this Division

- (a) affects any criminal proceedings against a person in respect of a wrongful act; or
- (b) renders enforceable an agreement for indemnity that would not have been enforceable if this Part had not been enacted.

Division 4 – Contributory negligence

101. Definitions for this Division

(1) In this Division—

“**court**”, in relation to a claim, means the court or arbitrator by or before whom the claim falls to be determined;

“**damage**” includes loss of life and personal injury;

“**fault**” means negligence, breach of statutory duty or other act or omission that gives rise to a liability in tort or would, apart from this Part, give rise to the defence of contributory negligence.

(2) A reference in this Division to the fault of a person shall be deemed to include a reference to a fault for which that person is vicariously responsible.

102. Contributory negligence

(1) Subject to this section, where a person suffers damage as the result partly of his own fault and partly of the fault of another person or other persons, a claim in respect of that damage is not liable to be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect of the damage shall be reduced to such extent as the court thinks just and equitable having regard to the claimant’s share in the responsibility for the damage.

(2) This section does not operate to defeat any defence arising under a contract.

(3) Where damages are recoverable by a person by virtue of subsection (1) subject to the reduction specified in that subsection, the court shall find and record the total damages which, apart from any limitation of liability provided by contract or enactment or any limitation of the jurisdiction of the court, would have been recoverable if the claimant had not been at fault.

(4) Where damages are recoverable by virtue of subsection (1) subject to the reduction specified in that subsection, and a contract or enactment providing for a limitation of liability is applicable to the claim or the jurisdiction of the court is limited—

- (a) the total damages found in accordance with the last preceding subsection shall be reduced to such extent as the court thinks just and equitable having regard to the claimant’s share in responsibility for the damage, and the reduced amount is, except as provided by the next succeeding paragraph, the amount recoverable; and
- (b) if the amount of damages as reduced under the last preceding paragraph exceeds the limit provided for in the contract or enactment or the limit of the jurisdiction of the court, the court shall award the maximum amount of damages permitted by the contract or enactment, or by the limit of the court’s jurisdiction.

103. Application of Division 3

The provisions of Division 3 apply in any case where two or more persons are liable, or would, if they had all been sued, be liable, by virtue of the last preceding section in respect of the damage suffered by a person.

104. Claims by third parties

Where—

- (a) a person (in this section called “**the injured person**”) suffers damage as a result partly of his own fault and partly of the fault of another person or other persons; and
- (b) by reason of the damage to the injured person a third person suffers damage (whether by way of the loss of the society or services of the injured person or otherwise),

the fault of the injured person shall, in a claim by the third person for the damage so suffered by him, be taken into account under section 102 for the purpose of reducing the damages recoverable by the third person as if the fault of the injured person were the fault of the third person.

105. Pleading of statute of limitations

Where, in a case to which section 102 applies, one of the persons at fault avoids liability to another such person or his personal representative by pleading an enactment limiting the time within which proceedings may be taken, he is not entitled to recover damages or contribution from that other person or representative by virtue of that section.

106. Where case is tried with jury

Where a case to which section 102 is tried with a jury, the jury shall determine the total damages which, apart from any limitation of liability provided by contract or enactment or any limitation of the jurisdiction of the court, would have been recoverable if the claimant had not been at fault, and the extent to which those damages are to be reduced.

107. Section not to apply to Navigation Act

Section 102 does not apply to a claim to which section 259 of the *Navigation Act 1912* (Clth) applies.

Division 5 – Insurance moneys

108. Amount of liability to be charge on insurance moneys payable against that liability

(1) If a person (in this Division referred to as “**the insured**”) has, whether before or after the commencement of this Act, entered into a contract of insurance by which the insured is indemnified against liability to pay any damages or compensation, the amount of the insured’s liability is, on the happening of the event giving rise to the claim for damages or compensation and notwithstanding that the amount of the liability may not then have been determined, a charge on all insurance moneys that are or may become payable in respect of that liability.

(2) If, on the happening of the event giving rise to the claim for damages or compensation, the insured (being a corporation) is being wound up, or if any subsequent winding-up of the insured (being a corporation) is deemed to have been commenced not later than the happening of that event, the provisions of subsection (1) of this section apply notwithstanding the winding-up.

(3) Every charge created by this section has priority over all other charges affecting the insurance moneys, and, where the same insurance moneys are subject to two or more charges by virtue of this section, those charges have priority between themselves in the order of the dates of the events out of which the liability arose, or, if the charges arise out of events happening on the same date, they rank equally between themselves.

109. Enforcement of charge

(1) Subject to subsection (2), a charge created by this Division is enforceable by way of an action against the insurer in the same way and in the same court as if the action were an action to recover damages or compensation from the insured.

(2) In respect of any such action and of the judgment given in any such action the parties have, to the extent of the charge, the same rights and liabilities, and the court has the same powers, as if the action were against the insured.

(3) Except where the provisions of subsection (2) applies, no such action shall be commenced in any court except with the leave of that court, and leave shall not be granted where the court is satisfied that the insurer is entitled under the terms of the contract of insurance to disclaim liability, and that any proceedings, including arbitration proceedings necessary to establish that the insurer is so entitled to disclaim have been taken.

(4) Such an action may be brought although judgment has been already recovered against the insured for damages or compensation in respect of the same matter.

110. Protection of insurer

(1) Notwithstanding anything in this Division, a payment made by an insurer under the contract of insurance without actual notice of the existence of a charge under this Division is, to the extent of that payment, a valid discharge to the insurer.

(2) An insurer is not liable under this Division for any greater sum than that fixed by the contract of insurance between himself and the insured.

Division 6 – Payment of benefits provided to claimants

111. Notice and reimbursement of benefits

(1) When any award for damages is made or settlement reached in respect of a claim arising from negligence any monies otherwise received or paid by way of benefit to or for the complainant as a result of the alleged negligence must be repaid in accordance with this section.

(2) In any claim for damages resulting from negligence, a defendant or the legal practitioner representing a defendant must not make any payment in respect of or from an award for damages or settlement of the claim, before receiving notice of any moneys owing to—

- (a) the Healthcare Fund;
- (b) the Medical Evacuation Fund;
- (c) the Norfolk Island Social Services Board; or

(d) an employer or the Administration under the *Employment Act 1988* and the defendant remains liable for such payment to the full extent of the settlement or award until all such moneys have been paid.

(3) In any claim for damages resulting from negligence, a claimant, or if the claimant is represented by a legal practitioner, the practitioner on behalf of the claimant, must, before the claim is set down for trial, file with the court a statement of the benefits (and if none that there have been none) that the claimant has received in respect of an injury suffered as a result of the alleged negligence and which may become payable under subsection (1), including, if known, the monetary value of those benefits.

(4) A copy of the statement referred to in subsection (1) must be served upon such of the Norfolk Island Healthcare Management, the Minister or members responsible for administration of the *Social Services Act 1980* and the *Employment Act 1988* and the employer as may have paid or provided a benefit.

(5) In this section—
“benefit” includes—

- (a) payments by way of Workers Compensation; and
- (b) where a claim is brought under Part 6 or otherwise for the benefit of the estate of a deceased, a benefit received by the deceased.

112. Application of section 111

(1) Section 111 applies to any claim for damages resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise, where the act or omission alleged to have resulted in the death or personal injury with which the action is concerned occurs before on or after the commencement date.

(2) Subsection (1) applies to a claim for which proceedings were commenced in a court before on or after the commencement date.

Division 7 — Repeal and savings

113. Repeal of old causes of action

(1) The following causes of action in tort and contract are abolished—

- (a) seduction;
- (b) inducement of a spouse to leave or remain apart from the other;
- (c) adultery; and
- (d) breach of promise to marry.

(2) No proceedings are maintainable after the commencement date in respect of any cause of action described in subsection (1).

114. Enactment ceasing to apply and repealed

(1) On and after the commencement date, the *Law Reform (Miscellaneous Provisions) Act 1971* ceases to have any application to causes of action for damages resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise, and to causes of action repealed by section 113.

(2) On the commencement date the *Compensation (Fatal Injuries) Act 1971* is repealed.

NOTES

The *Law of negligence and limitation of liability Act 2008* as shown in this consolidation comprises Act No. 18 of 2008 and amendments as indicated in the Tables below.

Enactment	Number and year	Date of commencement	Application saving or transitional provision
<i>Law of negligence and limitation of liability Act 2008</i>	18, 2008	31.12.2008	
<i>Interpretation (Amendment) Act 2012 [to substitute throughout — Commonwealth Minister for Minister; and to substitute Minister for executive member]</i>	14, 2012	28.12.2012	

Table of Amendments

ad = added or
inserted

am = amended

rep = repealed

rs = repealed and
substituted

Provisions affected	How affected	
39	am	14, 2012
55	am	14, 2012
56	am	14, 2012
111	am	14, 2012

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