

Civil Liability Act 2002 (NSW)

A user's guide



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CBP's expertise

CBP has extensive experience in both personal injury and professional indemnity claims which fall within the *Civil Liability Act 2002* (NSW). The breadth of our personal injury experience includes acting:

- For owners, tenants, managers and cleaners of commercial, shopping and residential complexes involving personal injury and liability disputes, and issues involving labour hire disputes and workers' compensation recoveries. CBP currently act for a chain of supermarkets with 80 stores across New South Wales in respect of their public liability matters.
- In matters involving hoteliers and other licensed premises in claims concerning personal injury and assault. CBP successfully defended the South Tweed Heads Rugby Club in a claim brought by Ms Cole at first instance and in successive appeals culminating in the High Court.
- For Key Pharmaceuticals in a 300 member class action. In the context of a "strict liability" exposure, a strategy was implemented under which legal costs were agreed thus enabling the swift and cost effective resolution of individual claims.
- In claims involving labour hire workers who are injured in the course of the employment.
- In numerous large multi party construction claims involving personal injury and/or property damage.
- In catastrophic injury claims including paraplegia and quadriplegia involving the complex assessment of damages and liability.

In the area of professional indemnity, CBP has extensive experience in acting for a vast array of professionals and their insurers in relation to professional indemnity risk. Without being exhaustive, CBP has extensive experience in acting for financial advisers, lawyers, construction professionals, insurance professionals and health professionals.

Civil Liability Act 2002 (NSW)

In New South Wales the common law of negligence has been modified by statute. The *Civil Liability Act* was enacted in 2002 to address perceived problems with the application of tort law and resulting increases in insurance premiums.

The *Civil Liability Act* applies in most circumstances where negligence is alleged against a defendant. Section 3B of the Act, however, excludes:

- intentional conduct
- dust diseases claims
- tobacco related claims
- motor accidents
- public transport accidents
- workers compensation
- victims of crime
- sporting injuries compensation
- compensation under the *Anti Discrimination Act*.

As with common law negligence, in order to establish negligence under the *Civil Liability Act*, a plaintiff must prove that the defendant:

- owed the plaintiff a duty of care (Division 2)
- breached that duty
- caused the damage alleged (Division 3).

Negligence - the elements of a claim

Section 5B under the Act codifies the common law principles which enliven a duty of care. In considering whether a defendant owes a duty to a plaintiff, section 5B requires a Court to determine whether:

- the risk was foreseeable
- the risk was not insignificant
- a reasonable person, in the person's position would have taken those precautions.

Section 50 of the Act defines the standard of care in circumstances where the defendant is a professional acting in his or her professional capacity.

A professional is not liable in negligence if it is established that the professional acted in a manner that was widely accepted in Australia by peer professional opinion as competent professional practice. A Court, however, is not bound by the peer professional opinion if the Court considers the opinion to be irrational.

Causation has been the subject of careful analysis by Australian appellate Courts in recent times (see *Amaca & Ors v Ellis* [2010] HCA 5 and *Woolworths v Strong* [2010] NSWCA 282). The common law question of causation involves two questions. The first being the application of the "but for" test and the second being whether a defendant is, in law, responsible for the damage which his or her negligence has played some part in producing.

The common law position is modified by the Act into a two stage test. Section 5D provides:

"(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 (factual causation), and
- (b) that it is appropriate for the scope for the negligent person's liability to extend to the harm so caused (scope of liability)."

In rare cases the evidence is not sufficient to establish that the alleged conduct was a "material" cause of the damage to the plaintiff - typically because of uncertainties surrounding the aetiology of injury. In such cases, the Court may apply section 5D(2) of the act:

"(2) In determining in an exceptional case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing 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."

Adeels Palace v Moubarak [2009] HCA 48 is the leading case which discussed the application of section 5D(2). In finding that section 5D(2) did not apply to Adeels, the High Court did not go so far as to define in what circumstances a matter would be considered "exceptional". Australian courts are yet to establish an "exceptional" case for section 5D(2) to apply.

No wrong is done to one who is willing

Division 4 of the Act provides a defence to a claim by codifying a form of *volenti non fit injuria* (no wrong is done to one who is willing).

Under Section 5F it is a defence to a claim if the risk to the plaintiff was an "obvious risk". Perhaps self-evidently obvious risk is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person. A defendant has no duty to warn of an obvious risk unless:

- the plaintiff has requested advice or information from the defendant
- there is a requirement for the defendant to warn the plaintiff
- the defendant is a professional.

In the event that the obvious risk materialises, the defendant will not have a liability to the plaintiff (section 5H).

Risk can be assumed with regard to "recreational activities" (section 5J). "Recreational activities" are very broadly defined to include:

- "any sport (whether or not the sport is an organised activity)
- any pursuit of activity engaged in for enjoyment, relaxation or leisure
- any pursuit or activity engaged in at a place (such as a beach, park or other public open space) where people ordinarily engage in sport or activity for enjoyment, relaxation or leisure."

Despite this, courts are increasingly taking a restrictive approach as to what is considered a "recreational activity". The cases suggest that a recreational activity needs to be one which is purely for recreational purposes (bungee jumping) as opposed to an activity which could be seen as, say, exercise and well being (exercising at a gym).

Section 5L provides that a defendant will not be liable for harm suffered from obvious risks of "dangerous recreational activities". The definition of "dangerous recreational activities" is recreational activity as previously defined that involves "a significant risk of physical harm".

In addition, section 5M also provides that there is no duty of care owed to a plaintiff for a recreational activity where there is a risk warning provided.

Mental Harm

Although a person is able to recover for pure mental harm (ie where there are no physical disabilities), this is only available in certain circumstances. Under section 30, the plaintiff must first establish that:

- "they witnessed, at the scene, the victim being killed, injured or put in peril, or
- they are a close member of the family of the victim."

For a plaintiff to be considered a "close member of the family" they must be:

- "a parent of the victim or other person with parental responsibility for the victim, or
- the spouse or partner of the victim, or
- a child or stepchild of the victim or any other person for whom the victim has parental responsibility, or
- a brother, sister, half brother or half sister, or stepbrother or stepsister of the victim"

The requirement that the plaintiff "witness, at the scene" is now somewhat blurred given the varying forms of media. At the scene would imply that the person is physically present at the time. The question then arises whether a plaintiff would be able to claim if they were, for example, watching live footage of the victim "being killed, injured or put in peril" on the internet.

Witnessing the aftermath of an accident is in most circumstances insufficient for a plaintiff to recover for pure mental harm. In 2010, however, the High Court of Australia found in *Wicks v State Rail Authority of New South Wales*; *Sheehan v State Rail Authority of New South Wales* (2010) 241 CLR 60 that "there are cases where death, or injury, or being put in peril takes place over an extended period, and this was such a case."

Section 31 provides that a defendant is only liable for a "recognised" psychiatric illness. Further, section 32 requires that the foreseeability test be satisfied for a duty of care to exist. Specifically, section 32 states that a person does not owe a duty to another person to not cause that person mental harm unless "the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken" (*Tame v New South Wales* (2002) 211 CLR 317; *Annetts v Australian Stations Pty Ltd* (2000) 23 WAR 35).

Contributory negligence and proportionate liability

The *Civil Liability Act* also provides for circumstances where the plaintiff, or another wrongdoer, has contributed to the harm suffered by the plaintiff.

Section 5S provides that in determining the extent of a reduction in damages by reason of contributory negligence (ie negligence by the person who suffered the harm), a court is entitled to determine that the defendant be allowed a 100% reduction if the court thinks that it is just and equitable to do so. This will result in the claim being

defeated. Although often relied upon by defendants, courts are generally reluctant to allow a high percentage for contributory negligence.

A plaintiff's loss will frequently be the result of wrongdoing by more than one person, ie a concurrent wrongdoer. A concurrent wrongdoer is a person who is one of two or more persons whose acts or omissions causes, independently of each other or jointly, the damage or loss that is the subject of this claim.

In such cases, the legislature considered it appropriate that there be means to allocate responsibility as between the various wrongdoers (Part 4). Section 34 allows the court to consider the role and responsibility of concurrent wrongdoers without those wrongdoers being joined to the proceedings. Section 34 applies to the following claims:

- "(a) a claim for economic loss or damage to property in an action for damages arising from a failure to take reasonable care but not including any claim arising out of personal injury.
- (b) a claim for economic loss or damage to property in an action under the Fair Trading Act 1987."

For claims arising out of personal injury, a cross claim must be filed as Part 4 of the *Civil Liability Act* is not applicable.

If a claim is apportionable, a defendant is only liable for the loss or damage suffered by the plaintiff for which that defendant is responsible. A court may not give judgment against the defendant for any more than that amount irrespective of whether the other wrongdoer is a party to the proceedings.

Intoxication

Generally speaking, intoxication of a person is irrelevant to either the existence of the duty of care, or the standard of care, owed to that person (section 49). The leading case in Australia which discussed the duty of care owed to intoxicated persons was in *Cole v South Tweed Heads Rugby League Football Club Ltd (2004) 217 CLR 469* in which CBP successfully acted for the Club. In that case, the High Court held that in ordinary circumstances, no duty of care is owed by the licensee of premises to a person who is served alcohol where that person becomes intoxicated and, as a result, is injured.

Good Samaritans and volunteers

Section 57 provides an immunity from civil liability for people who render assistance in an emergency to persons who are injured or at risk of injury. The immunity only applies, however, where there is an emergency. The legislation is unclear, however, whether the immunity is available for acts or omissions which are not for the benefit of the injured person but for the benefit of others, for example bystanders within a zone of danger.

Similarly, Part 9 of the Act provides protection for volunteers. A volunteer does not incur any personal civil liability when undertaking community work organised by a community organisation in good faith. A "community organisation" is a body corporate, a religious or charitable organisation or an authority of the State that organises the doing of community work by volunteers and that is capable of being sued. "Community work" is defined to mean work that is not for private financial gain and is done for a charitable, benevolent, philanthropic, sporting, education or cultural purpose.

Quantum of Damages

Non economic loss

Non economic loss or general damages is discussed in section 16 of the Act. Non economic loss is defined to mean one or more of pain and suffering, loss of amenities of life, loss of expectation of life and disfigurement.

Damages may not be awarded for non economic loss unless the severity of the non economic loss is at least 15% of a most extreme case. In practice this is not a difficult threshold to satisfy.

The maximum that can be awarded (for a most extreme or serious case) is \$500,500. What is a most extreme case is difficult to assess, however, it has been suggested that a quadriplegic with full brain function or a person who suffers both deafness and blindness would reach, or come very close to reaching, a most extreme case.

Each October, the maximum amount is reassessed. Section 16 of the *Civil Liability Act* provides a scaled amount for each percentage of economic loss. We **attach** the section 16 scaled amounts for your reference.

Out of pocket expenses

Out of pocket expenses (generally medical expenses) incurred in order to treat the injuries and disabilities suffered as a result of the negligence of the defendant are claimable as damages. Past out of pocket expenses can generally be easily quantified by reference to government notices and with receipts from pharmacies and other medical service providers.

Economic loss (section 12 and 13)

In personal injury proceedings, damages are commonly awarded for loss of earning capacity or economic loss. Economic loss represents the income that a plaintiff would have earned but is now incapable of earning as a result of injuries and disabilities arising from the negligent act or omission.

Past economic loss due to loss of earnings or the deprivation or impairment of earning capacity is available pursuant to section 12 of the *Civil Liability Act*. Under section 12, a plaintiff can also recover for future economic loss as a result of having been deprived from earning in the future. A plaintiff can also claim for the loss of expectation of financial support.

In calculating future economic loss, the court must determine what the plaintiff's most likely future circumstances would have been but for the injury. Economic loss must be assessed by reference to those circumstances.

The maximum that can be awarded is in circumstances where the plaintiff earns more than three times the average weekly earnings (at the time of this publication, the average was approximately \$1,300 per week).

Although calculation for future economic loss has traditionally been awarded (for permanent injuries) to the retirement age of 65, frequently evidence is led as to the plaintiff's intention to work past the age of 65. Such submissions are assisted by the recent increase in age for retirement to 67.

A plaintiff is also entitled to loss of employer superannuation contributions based on the income assessed in accordance with sections 12 and 13.

In calculating damages for future economic loss (and for all future heads of damage), a discount rate of 5% is to be applied.

Domestic assistance (section 15)

In circumstances where a person requires personal care or domestic services as a result of the negligently inflicted injury, an amount can be awarded to compensate the plaintiff for the care that was provided (*Woolworths Ltd v Lawlor* [2004] NSWCA 209). Domestic assistance is split into two categories namely, assistance which is "gratuitous" and "commercial". Gratuitous attendance care services means attendant care services:

- that have been or are to be provided by another person to a claim, and
- for which the claimant has not paid or is not liable to pay.

Commercial assistance, as the phrase suggests, is when attendant care services have been provided and the services provider has received consideration for the provision of those services.

Section 15 of the *Civil Liability Act* restricts the circumstances where a claimant can be awarded gratuitous domestic assistance. No damages may be awarded to a claimant for gratuitous attendant care services if the services are provided or are to be provided:

- "for less than 6 hours per week, and
- for less than 6 months."

The use of the word "and" was specifically included in the Act following the case of *Harrison v Melhem* [2008] NSWCA 67. Commercial assistance is not limited by the section 15 provisos.

As with future economic loss and future out of pocket expenses, the amount for future domestic assistance is to be calculated by reference to the table of multipliers (**attached** for your reference). In calculating future loss, the amount of the loss per week is first determined and, multiplied using the table of multipliers depending on the number of years that the loss will continue. For example, for a 40 year old plaintiff, their economic loss is likely (depending on the circumstances of the claim) to be limited to 27 years. Using the table of multipliers, the loss per week (say \$1000) is multiplied by the 5% multiplier for 27 years (783) to calculate a future loss of \$783,000).

All future heads of damage are also reduced (after assessing loss using the table of multipliers) by reducing each head of damage for the vicissitudes of life. The percentage of reduction is dependant upon the facts of the case, however, a percentage of 15% is considered reasonable in most circumstances.

TABLE OF MULTIPLIERS - \$1 PER WEEK

Present Lump Sum Equivalent in Value to a Sum of \$1 Per Week
for Periods from 1 to 90 Years Calculated at Discount Rates of 3% and
5%

Years	3 %	5%	Years	3%	5%	Years	3%	5%
1	51.4	50.9	31	1,059.2	833.8	61	1,474.4	1,014.9
2	101.3	99.4	32	1,079.8	845.0	62	1,482.9	1,017.5
3	149.8	145.6	33	1,099.8	855.7	63	1,491.1	1,020.0
4	196.9	189.6	34	1,119.2	865.9	64	1,499.1	1,022.3
5	242.6	231.5	35	1,138.0	875.6	65	1,506.8	1,024.6
6	286.9	271.4	36	1,156.2	884.8	66	1,514.4	1,026.7
7	330.0	309.4	37	1,174.0	893.6	67	1,521.7	1,028.8
8	371.8	345.6	38	1,191.2	902.0	68	1,528.8	1,030.7
9	412.4	380.1	39	1,207.9	909.9	69	1,535.6	1,032.5
10	451.8	412.9	40	1,224.2	917.5	70	1,542.3	1,034.3
11	490.0	444.1	41	1,239.9	924.8	71	1,548.8	1,036.0
12	527.2	473.9	42	1,255.2	931.6	72	1,555.1	1,037.6
13	563.3	502.3	43	1,270.1	938.2	73	1,561.2	1,039.1
14	598.3	529.3	44	1,284.5	944.5	74	1,567.2	1,040.5
15	632.3	555.0	45	1,298.5	950.4	75	1,573.0	1,041.9
16	665.3	579.5	46	1,312.1	956.1	76	1,578.6	1,043.2
17	697.3	602.8	47	1,325.3	961.5	77	1,584.0	1,044.5
18	728.4	625.0	48	1,338.1	966.6	78	1,589.3	1,045.7
19	758.6	646.2	49	1,350.6	971.5	79	1,594.4	1,046.8
20	787.9	666.4	50	1,362.6	976.2	80	1,599.4	1,047.9
21	816.4	685.6	51	1,374.4	980.6	81	1,604.2	1,048.9
22	844.0	703.8	52	1,385.7	984.9	82	1,608.9	1,049.9
23	870.9	721.2	53	1,396.8	988.9	83	1,613.4	1,050.8
24	896.9	737.8	54	1,407.5	992.7	84	1,617.9	1,051.7
25	922.2	753.6	55	1,418.0	996.4	85	1,622.2	1,052.5
26	946.8	768.7	56	1,428.1	999.8	86	1,626.3	1,053.3
27	970.6	783.0	57	1,437.9	1,003.2	87	1,630.4	1,054.1
28	993.8	796.6	58	1,447.4	1,006.3	88	1,634.3	1,054.8
29	1,016.2	809.6	59	1,456.7	1,009.3	89	1,638.1	1,055.5
30	1,038.1	822.0	60	1,465.7	1,012.2	90	1,641.8	1,056.2

DETERMINATION OF DAMAGES FOR NON ECONOMIC LOSS					
Section 16 of the Civil Liability Act 2002 No 22					
% of MEC	% of Max Amount	Award (Rounded)	%	Amount Awarded	Net Amount
100%	100%	500,500	50%	50%	250,500
99%	99%	495,500	49%	49%	245,000
98%	98%	490,500	48%	48%	240,000
97%	97%	485,500	47%	47%	235,000
96%	96%	480,500	46%	46%	230,000
95%	95%	475,500	45%	45%	225,000
94%	94%	470,500	44%	44%	220,000
93%	93%	465,500	43%	43%	215,000
92%	92%	460,500	42%	42%	210,000
91%	91%	455,500	41%	41%	205,000
90%	90%	450,500	40%	40%	200,000
89%	89%	445,500	39%	39%	195,000
88%	88%	440,500	38%	38%	190,000
87%	87%	435,500	37%	37%	185,000
86%	86%	430,500	36%	36%	180,000
85%	85%	425,500	35%	35%	175,000
84%	84%	420,500	34%	34%	170,000
83%	83%	415,500	33%	33%	165,000
82%	82%	410,500	32%	30.0%	150,000
81%	81%	405,500	31%	26.0%	130,000
80%	80%	400,500	30%	23.0%	115,000
79%	79%	395,500	29%	18.0%	90,000
78%	78%	390,500	28%	14.0%	70,000
77%	77%	385,500	27%	10.0%	50,000
76%	76%	380,500	26%	8.0%	40,000
75%	75%	375,500	25%	6.5%	32,500
74%	74%	370,500	24%	5.5%	27,500
73%	73%	365,500	23%	5.0%	25,000
72%	72%	360,500	22%	4.5%	22,500
71%	71%	355,500	21%	4.0%	20,000
70%	70%	350,500	20%	3.5%	17,500
69%	69%	345,500	19%	3.0%	15,000
68%	68%	340,500	18%	2.5%	12,500
67%	67%	335,500	17%	2.0%	10,000
66%	66%	330,500	16%	1.5%	7,500
65%	65%	325,500	15%	1.0%	5,000
64%	64%	320,500	14%	NO DAMAGES TO BE AWARDED	
63%	63%	315,500	13%		
62%	62%	310,500	12%		
61%	61%	305,500	11%		
60%	60%	300,500	10%		
59%	59%	295,500	9%		
58%	58%	290,500	8%		
57%	57%	285,500	7%		
56%	56%	280,500	6%		
55%	55%	275,500	5%		
54%	54%	270,500	4%		
53%	53%	265,500	3%		
52%	52%	260,500	2%		
51%	51%	255,500	1%		

NOTES:

1. Maximum Amount \$500,500
2. "MEC" denotes Most Extreme Case
3. "Max Amount" denotes the maximum amount to be awarded for non economic loss damages per Section 16 (2)
4. Award amounts have been rounded to the nearest 8500 per Section 16 (4)
5. The Civil Liability At 2002 No 22 replaces the Non Economic Loss Damages of the Health Care Liability Act 2001