

Civil Liability Amendment Bill 2004

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Western Australia

LEGISLATIVE ASSEMBLY

(As amended in Committee)

Civil Liability Amendment Bill 2004

A Bill for

An Act to amend the *Civil Liability Act 2002* —

- **to make provision in relation to the standard of care applicable to certain health professionals; and**
- **to make further provision in relation to proportionate liability.**

The Parliament of Western Australia enacts as follows:

Part 1 — Preliminary

1. Short title

This Act may be cited as the *Civil Liability Amendment Act 2004*.

5 **2. Commencement**

(1) Subject to subsection (2), this Act comes into operation on the day on which it receives the Royal Assent.

(2) Part 3 comes into operation immediately after the *Civil Liability Amendment Act 2003* section 9 comes into operation.

10 **3. The Act amended**

The amendments in this Act are to the *Civil Liability Act 2002**.

[* *Act No. 35 of 2002*.

For subsequent amendments see Western Australian Legislation Information Tables for 2003, Table 1, p. 56.]

Part 2 — Standard of care for health professionals

4. Section 5A amended

- (1) Section 5A(3) is repealed and the following subsections are inserted instead —

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- (3) Divisions 2, 3, 4, 5 and 6 do not apply unless the harm giving rise to the claim for damages arises out of an incident happening on or after 1 December 2003 (being the day on which the *Civil Liability Amendment Act 2003* section 8, which inserted those Divisions, came into operation).

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- (3a) Division 7 does not apply unless the harm giving rise to the claim for damages arises out of an incident happening on or after the day on which the *Civil Liability Amendment Act 2004* section 5 comes into operation.

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- (2) Section 5A(5) is repealed and the following subsection is inserted instead —

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- (5) In subsection (4) —
“**commencement day**” means the day referred to in subsection (3) or (3a), as is relevant to the case.

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5. Division 7 inserted in Part 1A

After section 5P the following Division is inserted in Part 1A —

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Division 7 — Professional negligence

5 **5PA. Interpretation**

In this Division —

“**health professional**” includes any of the following —

- (a) a chiropractor as defined in the *Chiropractors Act 1964* section 4;
- 10 (b) a dentist, dental therapist or dental hygienist, as those terms are defined in the *Dental Act 1939* section 4;
- (c) a dental prosthetist as defined in the *Dental Prosthetists Act 1985* section 3(1);
- 15 (d) a medical practitioner as defined in the *Medical Act 1894* section 3(1);
- (e) a nurse as defined in the *Nurses Act 1992* section 4;
- 20 (f) an occupational therapist as defined in the *Occupational Therapists Registration Act 1980* section 3;
- (g) a registered optometrist as defined in the *Optometrists Act 1940* section 3;
- 25 (h) an osteopath as defined in the *Osteopaths Act 1997* section 3;
- (i) a pharmaceutical chemist as defined in the *Pharmacy Act 1964* section 5(1);
- (j) a physiotherapist as defined in the *Physiotherapists Act 1950* section 2;
- 30 (k) a podiatrist as defined in the *Podiatrists Registration Act 1984* section 3;

- (l) a registered psychologist as defined in the *Psychologists Registration Act 1976* section 3.
- 5 (m) any other discipline or profession practising in the health area which applies a body of learning.

5PB. Standard of care for health professionals

- 10 (1) An act or omission of a health professional is not a negligent act or omission if it is in accordance with a practice that, at the time of the act or omission, is widely accepted by the health professional's peers as competent professional practice.
- 15 (2) Subsection (1) does not apply to an act or omission of a health professional in relation to informing a person of a risk of injury or death associated with —
 - (a) the treatment proposed for a patient or a foetus being carried by a pregnant patient; or
 - 20 (b) a procedure proposed to be conducted for the purpose of diagnosing a condition of a patient or a foetus being carried by a pregnant patient.
- 25 (3) Subsection (1) applies even if another practice that is widely accepted by the health professional's peers as competent professional practice differs from or conflicts with the practice in accordance with which the health professional acted or omitted to do something.
- 30 (4) Nothing in subsection (1) prevents a health professional from being liable for negligence if the practice in accordance with which the health professional acted or omitted to do something is, in the circumstances of the particular case, so unreasonable that no reasonable health professional in the health

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professional's position could have acted or omitted to do something in accordance with that practice.

5 (5) A practice does not have to be universally accepted as competent professional practice to be considered widely accepted as competent professional practice.

10 (6) In determining liability for damages for harm caused by the fault of a health professional, the plaintiff always bears the onus of proving, on the balance of probabilities, that the applicable standard of care (whether under this section or any other law) was breached by the defendant.

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Part 3 — Proportionate liability

6. Section 5AI amended

- (1) Section 5AI(1) is amended by deleting the definition of “apportionable claim” and inserting instead —

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“

“apportionable claim” means —

- (a) a claim for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from a failure to take reasonable care (but not including any claim arising out of personal injury); or
- (b) a claim for economic loss or damage to property in an action for damages under the *Fair Trading Act 1987* for a contravention of section 10 of that Act;

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- (2) Section 5AI(1) is amended in the definition of “concurrent wrongdoer” by deleting “acts or omissions” and inserting instead —

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“ act or omission ”.

7. Section 5AJ amended

After section 5AJ(3) the following subsection is inserted —

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- (4) For the purposes of this Part, there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action (whether or not of the same or a different kind).

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8. Section 5AJA inserted

After section 5AJ the following section is inserted —

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**5AJA. Certain concurrent wrongdoers not to have benefit
of apportionment**

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(1) Nothing in this Part operates to limit the liability of a
concurrent wrongdoer (an “**excluded concurrent
wrongdoer**”) in proceedings involving an
apportionable claim if —

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(a) the concurrent wrongdoer intended to cause the
economic loss or damage to property that is the
subject of the claim;

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(b) the concurrent wrongdoer fraudulently caused
the economic loss or damage to property that is
the subject of the claim; or

(c) the civil liability of the concurrent wrongdoer
was otherwise of a kind excluded from the
operation of this Part by section 3A.

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(2) The liability of an excluded concurrent wrongdoer is to
be determined in accordance with the legal rules, if
any, that (apart from this Part) are relevant.

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(3) The liability of any other concurrent wrongdoer who is
not an excluded concurrent wrongdoer is to be
determined in accordance with the provisions of this
Part.

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9. Section 5AKA inserted

After section 5AK the following section is inserted —

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5AKA. Duty of defendant to inform plaintiff about
concurrent wrongdoers

(1) If —

(a) a defendant in proceedings involving an apportionable claim has reasonable grounds to believe that a particular person (the “**other person**”) may be a concurrent wrongdoer in relation to the claim;

(b) the defendant fails to give the plaintiff, as soon as practicable, written notice of the information that the defendant has about —

(i) the identity of the other person; and

(ii) the circumstances that may make the other person a concurrent wrongdoer in relation to the claim;

and

(c) the plaintiff unnecessarily incurs costs in the proceedings because the plaintiff was not aware that the other person may be a concurrent wrongdoer in relation to the claim,

the court hearing the proceedings may order that the defendant pay all or any of those costs to the plaintiff.

(2) The court may order that the costs to be paid by the defendant be assessed on an indemnity basis or otherwise.

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10. Section 5AL amended

Section 5AL(1)(a) is amended as follows:

- (a) by deleting “recovered)” and inserting instead —
“ recovered ”;
- 5 (b) by deleting “defendant;” and inserting instead —
“ defendant); ”.

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