

South Australia



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ELIZABETHAE II REGINAE
A.D. 2002

**WRONGS (LIABILITY AND DAMAGES FOR PERSONAL INJURY)
AMENDMENT ACT 2002**

No. 21 of 2002

[Assented to 12 September 2002]

An Act to amend the Wrongs Act 1936.

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The Parliament of South Australia enacts as follows:

Short title

1. (1) This Act may be cited as the *Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002*.

(2) The *Wrongs Act 1936* is referred to in this Act as "the principal Act".

Commencement

2. This Act will come into operation on a day to be fixed by proclamation.

Insertion of new Part 2A

3. The following new Part is inserted in the principal Act after section 23C:

**PART 2A
DAMAGES FOR PERSONAL INJURY**

DIVISION 1—PRELIMINARY

Interpretation

24. In this Part—

"**accident**" means an incident out of which personal injury arises and includes a motor accident;

"**Consumer Price Index**" means the Consumer Price Index (all groups index for Adelaide) published by the Australian Statistician under the *Census and Statistics Act 1905* (Cwth);

"**drive**" includes ride, and "**driver**" and "**rider**" have corresponding meanings;

"**intoxicated**"—a person is intoxicated if under the influence of alcohol or a drug to the extent that the person's capacity to exercise due care and skill is impaired;

"**medical expenses**" includes—

- (a) the fees of medical practitioners and other professional medical advisers and therapists; and
- (b) the cost of hospitalisation; and
- (c) the cost of medicines and therapeutic appliances;

"**motor accident**" means an incident in which personal injury arises out of the use of a motor vehicle;

"**motor vehicle**" means—

- (a) a motor vehicle as defined in the *Motor Vehicles Act 1959*; or

- (b) a vehicle operated on a railway, tramway or other fixed track or path by—
 - (i) a person who holds a contract, licence or authority under the *Passenger Transport Act 1994*; or
 - (ii) a person who holds an accreditation under the *Rail Safety Act 1996*;

"non-economic loss" means—

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

"passenger compartment" of a motor vehicle means a part of the vehicle designed for the carriage of passengers;

"personal injury" or "injury" means bodily injury and includes—

- (a) mental and nervous shock; and
- (b) death,

and **"injured"** has a corresponding meaning;

"prescribed discount rate" means—

- (a) if no percentage is fixed by regulation for the purposes of this definition—5 per cent; or
- (b) if such a percentage is fixed by regulation—the percentage so fixed;

"prescribed maximum" means—

- (a) in relation to an injury arising from an accident that occurred during 2002—\$2.2 million; or
- (b) in relation to an injury arising from an accident that occurred in a subsequent calendar year—a sum (calculated to the nearest multiple of \$10) that bears to \$2.2 million the same proportion as the Consumer Price Index for the September quarter of the preceding year bears to the Consumer Price Index for the September quarter 2001;

"prescribed minimum" means—

- (a) in relation to an injury arising from an accident that occurred during 2002—\$2 750; or

- (b) in relation to an injury arising from an accident that occurred in a subsequent calendar year—a sum (calculated to the nearest multiple of \$10) that bears to \$2 750 the same proportion as the Consumer Price Index for the September quarter of the preceding year bears to the Consumer Price Index for the September quarter 2001;

"State average weekly earnings" means the amount determined in accordance with the regulations by reference to publications of the Australian Statistician.

Application of this Part

24A. This Part applies where damages are claimed for personal injury—

- (a) arising from a motor accident (whether caused intentionally or unintentionally); or
- (b) arising from an accident caused wholly or in part—
 - (i) by negligence; or
 - (ii) by some other unintentional tort on the part of a person other than the injured person; or
 - (iii) by a breach of a contractual duty of care.

DIVISION 2—ASSESSMENT OF DAMAGES

Damages for non-economic loss

24B. (1) Damages may only be awarded for non-economic loss if—

- (a) the injured person's ability to lead a normal life was significantly impaired by the injury for a period of at least 7 days; or
- (b) medical expenses of at least the prescribed minimum have been reasonably incurred in connection with the injury.

(2) If damages are to be awarded for non-economic loss, they must be assessed as follows:

- (a) the injured person's total non-economic loss is to be assigned a numerical value (the **scale value**) on a scale running from 0 to 60 (the scale reflecting 60 equal gradations of non-economic loss, from a case in which the non-economic loss is not severe enough to justify any award of damages to a case in which the injured person suffers non-economic loss of the gravest conceivable kind);
- (b) the damages for non-economic loss are to be calculated in relation to an injury arising from an accident that occurred during 2002 by multiplying the scale value by \$1 710;

- (c) the damages for non-economic loss are to be calculated in relation to an injury arising from an accident that occurred during 2003 as follows:
- (i) if the scale value is 10 or less—by multiplying the scale value by \$1 150;
 - (ii) if the scale value is 20 or less but more than 10—by adding to \$11 500 an amount calculated by multiplying the number by which the scale value exceeds 10 by \$2 300;
 - (iii) if the scale value is 30 or less but more than 20—by adding to \$34 500 an amount calculated by multiplying the number by which the scale value exceeds 20 by \$3 450;
 - (iv) if the scale value is 40 or less but more than 30—by adding to \$69 000 an amount calculated by multiplying the number by which the scale value exceeds 30 by \$4 600;
 - (v) if the scale value is 50 or less but more than 40—by adding to \$115 000 an amount calculated by multiplying the number by which the scale value exceeds 40 by \$5 750;
 - (vi) if the scale value is 60 or less but more than 50—by adding to \$172 500 an amount calculated by multiplying the number by which the scale value exceeds 50 by \$6 900;
- (d) the damages for non-economic loss in relation to an injury arising from an accident that occurred in a subsequent calendar year are to be calculated in accordance with paragraph (c) but the amount arrived at is to be adjusted (to the nearest multiple of \$10) by multiplying it by a proportion obtained by dividing the Consumer Price Index for the September quarter of the previous calendar year by the Consumer Price Index for the September quarter 2002.

Example—

Suppose that A is injured in an accident that occurred in 2003 and claims damages for personal injury. The case is one in which the criteria under which damages for non-economic loss may be awarded are satisfied. In assessing those damages, A's total non-economic loss is assigned by the court a scale value of 23. The damages for non-economic loss will, therefore, be \$44 850, calculated as follows:

$$\$34\,500 + (3 \times \$3\,450) = \$44\,850.$$

Damages for mental or nervous shock

24C. Damages may only be awarded for mental or nervous shock if the injured person—

- (a) was physically injured in the accident or was present at the scene of the accident when the accident occurred; or
- (b) is a parent, spouse or child of a person killed, injured or endangered in the accident.

Damages for loss of earning capacity

24D. (1) If the injured person was incapacitated for work, damages for loss of earning capacity are not to be awarded in respect of the first week of the incapacity.

(2) Total damages for loss of earning capacity (excluding interest awarded on damages for any past loss) are not to exceed the prescribed maximum.

Lump sum compensation for future losses

24E. If—

- (a) an injured person is to be compensated by way of lump sum for loss of future earnings or other future losses; and
- (b) an actuarial multiplier is used for the purpose of calculating the present value of the future losses,

then, in determining the actuarial multiplier, a prescribed discount rate is to be applied.

Exclusion of interest on damages compensating non-economic or future loss

24F. Interest is not to be awarded on damages compensating non-economic or future loss.

Exclusion of damages for cost of management or investment

24G. Damages are not to be awarded to compensate for the cost of the investment or management of the amount awarded.

Damages in respect of gratuitous services

24H. (1) Damages are not to be awarded—

- (a) to allow for the recompense of gratuitous services except services of a parent, spouse or child of the injured person; or
- (b) to allow for the reimbursement of expenses, other than reasonable out-of-pocket expenses, voluntarily incurred, or to be voluntarily incurred, by a person rendering gratuitous services to the injured person.

(2) Damages awarded to allow for the recompense of gratuitous services of a parent, spouse or child are not to exceed an amount equivalent to 4 times State average weekly earnings.

(3) However, the court may make an award in excess of the limit prescribed by subsection (2) if satisfied that—

- (a) the gratuitous services are reasonably required by the injured person; and
- (b) it would be necessary, if the services were not provided gratuitously by a parent, spouse or child of the injured person to engage another person to provide the services for remuneration,

but, in that event, the damages awarded are not to reflect a rate of remuneration for the person providing the services in excess of State average weekly earnings.

DIVISION 3—SPECIAL PROVISIONS IN REGARD TO LIABILITY

Exclusion of liability in certain cases

24I. (1) Liability for damages is excluded if the court—

- (a) is satisfied beyond reasonable doubt that the accident occurred while the injured person was engaged in conduct constituting an indictable offence; and
- (b) is satisfied on the balance of probabilities that the injured person's conduct contributed materially to the risk of injury.

(2) However, the court may award damages despite this exclusionary principle if satisfied that—

- (a) the circumstances of the particular case are exceptional; and
- (b) the principle would, in the circumstances of the particular case, operate harshly and unjustly.

(3) For the purposes of subsection (1)(a), a relevant conviction or acquittal is to be accepted as conclusive evidence of guilt or innocence of the offence to which it relates.

(4) This section does not affect the operation of a rule of law relating to joint illegal enterprises.

Presumption of contributory negligence where injured person intoxicated

24J. (1) If the injured person was intoxicated at the time of the accident, and contributory negligence is alleged by the defendant, contributory negligence will, subject to this section, be presumed.

(2) The injured person may, however, rebut the presumption by establishing on the balance of probabilities—

- (a) that the intoxication did not contribute to the accident; or
- (b) that the intoxication was not self-induced.

(3) Unless the presumption of contributory negligence is rebutted, the court must assess damages on the basis that the damages to which the injured person would be entitled in the absence of contributory negligence are to be reduced, on account of contributory negligence, by 25 per cent or a greater percentage determined by the court to be appropriate in the circumstances of the case.

(4) If, in the case of a motor accident, the injured person was the driver of a motor vehicle involved in the accident and the evidence establishes—

- (a) that the concentration of alcohol in the injured person's blood was .15 grams or more in 100 millilitres of blood; or
- (b) that the driver was so much under the influence of intoxicating liquor or a drug as to be incapable of exercising effective control of the vehicle,

the minimum reduction prescribed by subsection (3) is to be increased to 50 per cent.

Presumption of contributory negligence where injured person relies on care and skill of person known to be intoxicated**24K. (1) If—**

- (a) the injured person—
 - (i) was of or above the age of 16 years at the time of the accident; and
 - (ii) relied on the care and skill of a person who was intoxicated at the time of the accident; and
 - (iii) was aware, or ought to have been aware, that the other person was intoxicated; and
- (b) the accident was caused through the negligence of the other person; and
- (c) the defendant alleges contributory negligence on the part of the injured person,

contributory negligence will, subject to this section, be presumed.

(2) Subject to the following exception, the presumption is irrebutable.

Exception—

The injured person may rebut the presumption by establishing, on the balance of probabilities, that—

- (a) the intoxication did not contribute to the accident; or
- (b) the injured person could not reasonably be expected to have avoided the risk.

(3) In a case in which contributory negligence is to be presumed under this section, the court must apply a fixed statutory reduction of 25 per cent in the assessment of damages.

(4) A passenger in a motor vehicle is taken, for the purposes of this section, to rely on the care and skill of the driver.

(5) If, in the case of a motor accident, the evidence establishes—

- (a) that the concentration of alcohol in the driver's blood was .15 grams or more in 100 millilitres of blood; or
- (b) that the driver was so much under the influence of intoxicating liquor or a drug as to be incapable of exercising effective control of the vehicle,

the fixed statutory reduction prescribed by subsection (3) is increased to 50 per cent.

(6) This section operates to the exclusion of the defence of *volenti non fit injuria* insofar as it relates to the voluntary assumption of a risk arising from the intoxication of another.

Evidentiary provision relating to intoxication

24L. (1) A finding by a court that there was present in the blood of a person, at or about the time of an accident, a concentration of alcohol of .08 or more grams in 100 millilitres of blood is to be accepted, for the purposes of this Part, as conclusive evidence of the facts so found and that the person was intoxicated at the time of the accident.

(2) A finding by a court that a person was at or about the time of an accident so much under the influence of alcohol or a drug as to be unable to exercise effective control of a motor vehicle is to be accepted, for the purposes of this Part, as conclusive evidence that the person was, at the time of the accident, so much under the influence of alcohol or a drug as to be unable to exercise effective control of the motor vehicle.

Non-wearing of seatbelt, etc.

24M. (1) If the injured person was injured in a motor accident, was of or above the age of 16 years at the time of the accident and—

- (a) the injured person was not, at the time of the accident, wearing a seatbelt as required under the *Road Traffic Act 1961*; or
- (b) one of the following factors contributed to the accident or the extent of the injury:
 - (i) the injured person was not wearing a safety helmet as required under the *Road Traffic Act 1961*;
 - (ii) the injured person was a passenger in or on a motor vehicle with a passenger compartment but was not in the passenger compartment at the time of the accident,

contributory negligence will, subject to this section, be presumed.

(2) Subject to the following exception, the presumption is irrebutable.

Exception—

In the case mentioned in subsection (1)(b)(ii)—the injured person may rebut the presumption by establishing, on the balance of probabilities, that the injured person could not reasonably be expected to have avoided the risk.

(3) In a case in which contributory negligence is to be presumed under this section, the court must apply a fixed statutory reduction of 25 per cent in the assessment of damages.

How case is dealt with where damages are liable to reduction on account of contributory negligence

24N. (1) If damages are liable to reduction on account of actual or presumed contributory negligence, the court is to proceed in accordance with this section.

(2) First, the court is to assess the damages to which the injured person would be entitled if there were no reduction for contributory negligence.

(3) Secondly, the court is to—

- (a) determine the extent of the injured person's contributory negligence, leaving out of the account factors for which a fixed statutory reduction is prescribed by this Part but taking into account the injured person's intoxication (if relevant) and factors that would, apart from this Part, amount to contributory negligence; and
- (b) determine a percentage reduction to be made on account of these forms of contributory negligence (which cannot be less in a case involving intoxication than the relevant minimum prescribed by this Part); and
- (c) then reduce the amount assessed under subsection (2) by the percentage determined under this subsection.

(4) Thirdly, the court is to apply any applicable fixed statutory reduction to the amount assessed under subsection (2) and reduced, if required, under subsection (3), and, if 2 or more fixed statutory reductions are required, the court is to make them in series.

Example—

Suppose that an amount of \$100 000 is subject to 2 fixed statutory reductions of 25 per cent. In this case, the amount is first reduced to \$75 000 and then reduced to \$56 250.

(5) There is no necessary correlation between a finding of contributory negligence in relation to a cause of action under this Part and an apportionment of liability in relation to a different cause of action arising from the same facts.

Example—

Suppose that A and B are both drivers of motor vehicles that come into collision as a result of the negligence of both with resultant personal injuries to each other and also to C, a passenger in B's vehicle. Suppose that B's damages are reduced by 60 per cent under this Part as a result of actual or presumptive contributory negligence causally related to the occurrence of the accident. This is not to imply that, in A's action against B, no reduction beyond 40 per cent can be made on a similar basis. In C's action against A and B, responsibility will be apportioned between A and B without regard to the provisions of this Part.

DIVISION 4—TERRITORIAL APPLICATION

Territorial application

24O. This Part is intended to apply to the exclusion of inconsistent laws of any other place to the determination of liability and the assessment of damages for personal injury arising from an accident occurring in this State.

Repeal of Division 10 of Part 3

4. Division 10 of Part 3 of the principal Act (comprising section 35A) is repealed.

Insertion of Divisions 13 and 14 of Part 3

5. The following Divisions are inserted in the principal Act after section 37:

DIVISION 13—GOOD SAMARITANS

Good samaritans

38. (1) In this section—

"emergency assistance" means—

- (a) emergency medical assistance; or**
- (b) any other form of assistance to a person whose life or safety is endangered in a situation of emergency;**

"good samaritan" means—

- (a) a person who, acting without expectation of payment or other consideration, comes to the aid of a person who is apparently in need of emergency assistance; or**
- (b) a medically qualified person who, acting without expectation of payment or other consideration, gives advice by telephone or some other form of telecommunication about the treatment of a person who is apparently in need of emergency medical assistance;**

"medically qualified"—a person is to be regarded as medically qualified if the person—

- (a) is a registered medical practitioner; or**
- (b) has professional qualifications in some field of health care that are statutorily recognised; or**
- (c) works or has worked as an ambulance officer or in some other recognised paramedical capacity.**

(2) A good samaritan incurs no personal civil liability for an act or omission done or made in good faith and without recklessness in assisting a person in apparent need of emergency assistance.

(3) A medically qualified good samaritan incurs no personal civil liability for advice given about the assistance to be given to a person in apparent need of emergency medical assistance.

(4) However—

- (a) the immunity does not extend to a liability that falls within the ambit of a scheme of compulsory third party motor vehicle insurance; and**
- (b) the immunity does not operate if the good samaritan's capacity to exercise due care and skill was, at the relevant time, significantly impaired by alcohol or another recreational drug.**

DIVISION 14—EXPRESSIONS OF REGRET

Expressions of regret

39. In proceedings in which damages are claimed for a tort, no admission of liability or fault is to be inferred from the fact that the defendant or a person for whose tort the defendant is liable expressed regret for the incident out of which the cause of action arose.

Transitional provision

6. (1) The amendments made by sections 3 and 4 of this Act are applicable to an action in which damages are claimed for personal injury if the accident out of which the action arises occurs on or after the commencement of those sections.

(2) If the accident out of which the action arises occurred before the commencement of sections 3 and 4 of this Act, the principal Act (if relevant to the action) applies as if the amendments made by those sections had not been made.

Example—

Suppose that A was exposed to asbestos in 1986 but is not diagnosed with asbestosis until 2004. The assessment of A's damages for personal injury would be determined in accordance with the law that applied before the commencement of sections 3 and 4 of the *Wrongs Act (Liability and Assessment of Damages for Personal Injury) Amendment Act 2002*.

Report on implications of these amendments

7. As soon as practicable after the expiration of 2 years from the commencement of this Act, the Economic and Finance Committee must investigate and report to the Parliament on the effect of the amendments on the availability and cost of public liability insurance.