



New South Wales

Law Reform (Miscellaneous Provisions) Amendment Bill 2000

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the *Law Reform (Miscellaneous Provisions) Act 1965* so as to provide that in certain circumstances the damages recoverable by a person who sues for breach of a contractual duty of care are to be reduced to the extent of any contributory negligence by the person.

Background

At common law, a defendant being sued for a tort could generally raise the contributory negligence of the plaintiff as a complete defence to the claim. That is, if the damage suffered by the plaintiff was partly due to the plaintiff's failure to take reasonable care, the plaintiff could not recover any damages at all from the defendant. (For example, a pedestrian injured by a speeding vehicle would not be able to claim damages if the pedestrian had contributed to the accident by failing to keep a proper lookout for vehicles.)

The *Law Reform (Miscellaneous Provisions) Act 1965 (the Act)* modified the common law by providing for apportionment of damages in cases of contributory negligence. Under the Act, if a plaintiff's damage is the result partly of the plaintiff's fault and partly of the fault of the defendant, the plaintiff can still recover damages from the defendant but the amount of damages is reduced to the extent that the court thinks just and equitable having regard to the plaintiff's share in the responsibility for the damage.

The apportionment provisions contained in the Act were based on United Kingdom legislation. There are similar provisions in the other Australian States and Territories. The apportionment provisions apply to claims of negligence and other claims in tort where contributory negligence could be a defence to the claim.

Some contracts contain an express or implied term that one of the parties has a duty to act with reasonable care. If that duty is breached, in some circumstances the other party may be able to sue for breach of duty of care both in tort and in contract. There was support in some Australian and United Kingdom cases for the view that the apportionment legislation extended to claims in contract for damages for breach of a contractual duty of care, where the duty of care owed by the defendant is the same in contract as in tort.

Recently the High Court of Australia decided in *Astley v Austrust Limited* (1999) 197 CLR 1 that the apportionment provisions contained in the *Wrongs Act 1936* of South Australia applied only to claims for damages in tort; they did not apply to claims of breach of contractual duty of care. As a result, if a plaintiff sues a defendant for breach of duty of care in both contract and in tort, the plaintiff's damages may be reduced for contributory negligence in the claim in tort, but not in the claim in contract.

The object of this Bill is to overcome the effect of the decision in *Astley*. The Bill amends the apportionment provisions in the Act so as to extend those provisions to claims for a breach of a contractual duty of care that is concurrent and co-extensive with a tortious duty of care.

The amendments have a retrospective effect (that is, they apply to acts or omissions that occurred before the amendments commence). However, the amendments will not apply to acts or omissions about which a court has given a judgment, or about which the parties have agreed to a settlement.

This Bill also rewrites the apportionment provisions in plainer language and removes an obsolete Schedule to the Act.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 is a formal provision giving effect to the amendments to the *Law Reform (Miscellaneous Provisions) Act 1965* set out in Schedule 1.

Clause 4 is a formal provision giving effect to consequential amendments to the Acts set out in Schedule 2.

Schedule 1 contains the amendments described in the Overview to this Bill.

Schedule 2 contains consequential amendments to the *Companion Animals Act 1998*, the *District Court Act 1973*, the *Motor Accidents Act 1988*, the *Motor Accidents Compensation Act 1999* and the *Workers Compensation Act 1987*.



New South Wales

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New South Wales

Law Reform (Miscellaneous Provisions) Amendment Bill 2000

No. , 2000

A Bill for

An Act to amend the *Law Reform (Miscellaneous Provisions) Act 1965* to make provision for the application of the common law doctrine of contributory negligence to contractual liability in certain circumstances; and for other purposes.

The Legislature of New South Wales enacts:	1
1 Name of Act	2
This Act is the <i>Law Reform (Miscellaneous Provisions) Amendment Act 2000</i> .	3 4
2 Commencement	5
This Act commences on a day or days to be appointed by proclamation.	6 7
3 Amendment of Law Reform (Miscellaneous Provisions) Act 1965 No 32	8
The <i>Law Reform (Miscellaneous Provisions) Act 1965</i> is amended as set out in Schedule 1.	9 10
4 Amendment of other Acts	11
The Acts specified in Schedule 2 are amended as set out in that Schedule.	12 13

Schedule 1	Amendment of Law Reform (Miscellaneous Provisions) Act 1965	1
		2
	(Section 3)	3
[1]	Section 1 Name of Act	4
	Omit section 1 (2).	5
[2]	Section 2A	6
	Insert after section 2:	7
	2A Notes	8
	Notes included in this Act are explanatory notes and do not form part of this Act.	9
		10
[3]	Part 3	11
	Omit the Part. Insert instead:	12
	Part 3 Amendment of doctrine of contributory negligence	13
		14
	7 Application of Part to breach of statutory duty	15
	(1) This Part does not apply to any action for damages founded on a breach of statutory duty imposed on a defendant.	16
		17
	(2) This Part does not affect the provisions and operation of the <i>Statutory Duties (Contributory Negligence) Act 1945</i> .	18
		19
	8 Definitions	20
	In this Part:	21
	<i>claimant</i> —see section 9 (1).	22
	<i>contributory negligence</i> —see section 9 (1).	23
	<i>court</i> , in relation to any claim, means the court by or before which the claim falls to be determined.	24
		25
	<i>damage</i> includes loss of life and personal injury.	26

	<i>wrong</i> means an act or omission that:	1
(a)	gives rise to a liability in tort in respect of which a defence of contributory negligence is available at common law, or	2 3 4
(b)	amounts to a breach of a contractual duty of care that is concurrent and co-extensive with a duty of care in tort.	5 6
9	Apportionment of liability in cases of contributory negligence	7
(1)	If a person (the <i>claimant</i>) suffers damage as the result partly of the claimant's failure to take reasonable care (<i>contributory negligence</i>) and partly of the wrong of any other person:	8 9 10
(a)	a claim in respect of the damage is not defeated by reason of the contributory negligence of the claimant, and	11 12 13
(b)	the damages recoverable in respect of the wrong are to 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.	14 15 16 17
(2)	Subsection (1) does not operate to defeat any defence arising under a contract.	18 19
(3)	If any contract or enactment providing for the limitation of liability is applicable to the claim, the amount of damages recoverable by the claimant by virtue of subsection (1) is not to exceed the maximum limit so applicable.	20 21 22 23
10	Workers compensation and contributory negligence	24
(1)	If any payments made to the claimant by way of compensation take effect under section 63 (5) of the <i>Workers' Compensation Act 1926</i> to any extent as a defence to the proceedings by the claimant against his or her employer, those payments are to be reduced to the same extent as the damages recoverable by the claimant are reduced under section 9, and are a defence to the reduced extent only.	25 26 27 28 29 30 31
(2)	If the claimant is liable to repay compensation to his or her employer under section 64 (1) (a) of the <i>Workers' Compensation Act 1926</i> or under section 151Z of the <i>Workers' Compensation Act 1987</i> , the amount of compensation so	32 33 34 35

repayable is to be reduced to the same extent as the damages recoverable by the claimant are reduced under section 9.	1 2
(3) If the cost of any medical or hospital treatment or ambulance service for which the claimant's employer incurs liability under section 10 of the <i>Workers' Compensation Act 1926</i> or under Division 3 of Part 3 of the <i>Workers Compensation Act 1987</i> remains unpaid at the time the claimant recovers damages:	3 4 5 6 7
(a) the claimant's liability in respect of that cost is, as between the claimant and the claimant's employer, to be reduced to the same extent as the claimant's damages are reduced under section 9, and	8 9 10 11
(b) the claimant's employer, despite the recovery of damages and the provisions of section 151Z of the <i>Workers Compensation Act 1987</i> , remains liable to pay to the claimant the balance of that cost under section 10 of the <i>Workers' Compensation Act 1926</i> or under Division 3 of Part 3 of the <i>Workers Compensation Act 1987</i> (whichever is applicable).	12 13 14 15 16 17 18
Note. The <i>Workers' Compensation Act 1926</i> has been repealed, but the Act is given ongoing effect by the transitional provisions contained in the <i>Workers Compensation Act 1987</i> .	19 20 21
11 Total damages to be recorded	22
If the damages recoverable by a claimant are subject to any reduction under this Part, the court is to find and record the total damages that would have been recoverable had there been no contributory negligence by the claimant.	23 24 25 26
12 Contribution between joint tortfeasors	27
Section 5 of the <i>Law Reform (Miscellaneous Provisions) Act 1946</i> applies in any proceedings where two or more persons are liable for damages in tort or would, if they had all been sued, be so liable by virtue of this Part in respect of the damage suffered by any person.	28 29 30 31 32
13 Compensation to relatives	33
(1) No action for damages for the benefit of dependants of a deceased person under the <i>Compensation to Relatives Act 1897</i> is defeated by the contributory negligence or breach of statutory duty of the deceased person.	34 35 36 37

(2)	The damages recoverable in such an action are not reduced by reason of the contributory negligence or of the breach of statutory duty of the deceased person.	1 2 3
14	Application of limitations periods	4
(1)	This section applies to proceedings to which section 9 applies if:	5 6
(a)	the claimant suffered damage as the result partly of the wrong of two or more persons, and	7 8
(b)	one of those persons avoids liability to another of those persons (or his or her personal representative) by pleading the <i>Limitation Act 1969</i> or any other enactment limiting the time within which proceedings may be taken.	9 10 11 12 13
(2)	The person who avoids liability is not entitled to recover damages or contribution from the other person or his or her personal representative by virtue of section 9.	14 15 16
15	Apportionment by judge or jury	17
(1)	If proceedings to which section 9 applies are tried by a judge sitting without a jury, the judge is to make the apportionment under section 9.	18 19 20
(2)	If proceedings to which section 9 applies are tried by a judge sitting with a jury, the jury is to determine the total damages that would have been recoverable had there been no contributory negligence by the claimant, and the extent to which those damages are to be reduced.	21 22 23 24 25
16	Savings and transitional provisions	26
	Schedule 1 has effect.	27

[4] Schedule	1
Omit the Schedule. Insert instead:	2
Schedule 1 Savings and transitional provisions	3
(Section 16)	4
Part 1 Preliminary	5
1 Regulations	6
(1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:	7
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<i>Law Reform (Miscellaneous Provisions) Amendment Act 2000</i>	10
(2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.	11
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(3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:	14
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(a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or	17
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(b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.	20
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Part 2 Provisions consequent on the Law Reform (Miscellaneous Provisions) Amendment Act 2000	23
	24
	25
2 Definitions	26
In this Part:	27
<i>the amending Act</i> means the <i>Law Reform (Miscellaneous Provisions) Amendment Act 2000</i> .	28
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- 3 Amendments concerning contributory negligence to have retrospective application** 1
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- (1) Subject to subclause (2), the amendments to this Act made by the amending Act are taken to apply to wrongs that occurred before the commencement of those amendments as if those amendments had been in force when the wrong occurred. 3
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- (2) This Act, as in force immediately before the commencement of the amendments made by the amending Act, continues to apply to a wrong about which: 7
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- (a) a court has, before that commencement, given judgment or made a decision (including a judgment or decision about liability only), whether or not an appeal has been made against that judgment or decision, or 10
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- (b) the persons responsible for the damage have, before that commencement, entered into an agreement to settle claims arising from the wrong (including an agreement about liability only). 14
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Schedule 2	Amendment of other Acts	1
	(Section 4)	2
2.1	Companion Animals Act 1998 No 87	3
	Section 28 Contributory negligence	4
	Omit “taken to have been suffered as the result partly of the fault of the owner of the dog and partly of the fault of the person suffering the damage” from section 28 (1).	5 6 7
	Insert instead “taken to have been suffered as the result partly of a wrong by the owner of the dog and partly of the contributory negligence of the person who suffered the damage”.	8 9 10
2.2	District Court Act 1973 No 9	11
[1]	Section 76 Amount recoverable	12
	Omit “section 10” wherever occurring. Insert instead “Part 3”.	13
[2]	Section 76	14
	Omit “if the successful party had not been at fault” wherever occurring.	15
	Insert instead “if there had been no contributory negligence by the successful party”.	16 17
2.3	Motor Accidents Act 1988 No 102	18
	Section 75 Contributory negligence—claims under the Compensation to Relatives Act 1897	19 20
	Omit “Section 10 (4)”. Insert instead “Section 13”.	21

2.4	Motor Accidents Compensation Act 1999 No 41	1
	Section 139 Contributory negligence—claims under the Compensation to Relatives Act 1897	2 3
	Omit “Section 10 (4)”. Insert instead “Section 13”.	4
2.5	Workers Compensation Act 1987 No 70	5
	Section 151N Contributory negligence—generally	6
	Omit “section 10 (4)” from section 151N (5). Insert instead “section 13”.	7