

New South Wales Consolidated Acts

CIVIL LIABILITY ACT 2002

- As at 20 August 2013
- Act 22 of 2002

DIVISION 3 - Causation

Section 5D 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 ("factual 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 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.

(3) If it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent:

(a) the matter is to be determined subjectively in the light of all relevant circumstances, subject to paragraph (b), and

(b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.

(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.

Section 5E Onus of proof

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

DIVISION 4 - Assumption of risk

Section 5F Meaning of "obvious risk"

(1) For the purposes of this Division, 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.

Section 5G Injured persons presumed to be aware of obvious risks

(1) In proceedings relating to liability for negligence, a person who suffers harm is presumed to have been aware of the risk of harm if it was an obvious risk, unless the person proves on the balance of probabilities that he or she was not aware of the risk.

(2) For the purposes of this section, a person is aware of a risk if the person is aware of the type or kind of risk, even if the person is not aware of the precise nature, extent or manner of occurrence of the risk.

Section 5H No proactive duty to warn of obvious risk

(1) A person ("the defendant") does not owe a duty of care to another person ("the plaintiff") to warn of an obvious risk to the plaintiff.

(2) This section does not apply if:

(a) the plaintiff has requested advice or information about the risk from the defendant, or

(b) the defendant is required by a written law to warn the plaintiff of the risk, or

(c) the defendant is a professional and the risk is a risk of the death of or personal injury to the plaintiff from the provision of a professional service by the defendant.

(3) Subsection (2) does not give rise to a presumption of a duty to warn of a risk in the circumstances referred to in that subsection.

Section 5I 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 and skill.

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

DIVISION 5 - Recreational Activities

Section 5J Application of Division

(1) This Division applies only in respect of liability in negligence for harm to a person ("the plaintiff") resulting from a recreational activity engaged in by the plaintiff.

(2) This Division does not limit the operation of Division 4 in respect of a recreational activity.

Section 5K Definitions

In this Division:

"dangerous recreational activity" means a recreational activity that involves a significant risk of physical harm.

"obvious risk" has the same meaning as it has in Division 4.

"recreational activity" includes:

- (a) any sport (whether or not the sport is an organised activity), and
- (b) any pursuit or activity engaged in for enjoyment, relaxation or leisure, and
- (c) 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 in any pursuit or activity for enjoyment, relaxation or leisure.

Section 5L No liability for harm suffered from obvious risks of dangerous recreational activities

(1) A person ("the defendant") is not liable in negligence for harm suffered by another person ("the plaintiff") as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the plaintiff.

(2) This section applies whether or not the plaintiff was aware of the risk.

Section 5M No duty of care for recreational activity where risk warning

(1) A person ("the defendant") does not owe a duty of care to another person who engages in a recreational activity ("the plaintiff") to take care in respect of a risk of the activity if the risk was the subject of a risk warning to the plaintiff.

(2) If the person who suffers harm is an incapable person, the defendant may rely on a risk warning only if:

- (a) the incapable person was under the control of or accompanied by another person (who is not an incapable person and not the defendant) and the risk was the subject of a risk warning to that other person, or
- (b) the risk was the subject of a risk warning to a parent of the incapable person (whether or not the incapable person was under the control of or accompanied by the parent).

(3) For the purposes of subsections (1) and (2), a risk warning to a person in relation to a recreational activity is a warning that is given in a manner that is reasonably likely to result in people being warned of the risk before engaging in the recreational activity. The defendant is not required to establish that the person received or understood the warning or was capable of receiving or understanding the warning.

(4) A risk warning can be given orally or in writing (including by means of a sign or otherwise).

(5) A risk warning need not be specific to the particular risk and can be a general warning of risks that include the particular risk concerned (so long as the risk warning warns of the general nature of the particular risk).

(6) A defendant is not entitled to rely on a risk warning unless it is given by or on behalf of the defendant or by or on behalf of the occupier of the place where the recreational activity is engaged in.

(7) A defendant is not entitled to rely on a risk warning if it is established (on the balance of probabilities) that the harm concerned resulted from a contravention of a provision of a written law of the State or Commonwealth that establishes specific practices or procedures for the protection of personal safety.

(8) A defendant is not entitled to rely on a risk warning to a person to the extent that the warning was contradicted by any representation as to risk made by or on behalf of the defendant to the person.

(9) A defendant is not entitled to rely on a risk warning if the plaintiff was required to engage in the recreational activity by the defendant.

(10) The fact that a risk is the subject of a risk warning does not of itself mean:

(a) that the risk is not an obvious or inherent risk of an activity, or

(b) that a person who gives the risk warning owes a duty of care to a person who engages in an activity to take precautions to avoid the risk of harm from the activity.

(11) This section does not limit or otherwise affect the effect of a risk warning in respect of a risk of an activity that is not a recreational activity.

(12) In this section:

"incapable person" means a person who, because of the person's young age or a physical or mental disability, lacks the capacity to understand the risk warning.

"parent" of an incapable person means any person (not being an incapable person) having parental responsibility for the incapable person.

Section 5N Waiver of contractual duty of care for recreational activities

(1) Despite any other written or unwritten law, a term of a contract for the supply of recreation services may exclude, restrict or modify any liability to which this Division applies that results from breach of an express or implied warranty that the services will be rendered with reasonable care and skill.

(2) Nothing in the written law of New South Wales renders such a term of a contract void or unenforceable or authorises any court to refuse to enforce the term, to declare the term void or to vary the term.

(3) A term of a contract for the supply of recreation services that is to the effect that a person to whom recreation services are supplied under the contract engages in any recreational activity concerned at his or her own risk operates to exclude any liability to which this Division applies that results from breach of an express or implied warranty that the services will be rendered with reasonable care and skill.

(4) In this section, "recreation services" means services supplied to a person for the purposes of, in connection with or incidental to the pursuit by the person of any recreational activity.

(5) This section applies in respect of a contract for the supply of services entered into before or after the commencement of this section but does not apply in respect of a breach of warranty that occurred before that commencement.