

Queensland



Explanatory Notes for SL 2003 No. 229

Civil Liability Act 2003

CIVIL LIABILITY REGULATION 2003

GENERAL OUTLINE

Short title

Civil Liability Regulation 2003.

Authorising law

Sections 26, 27, 61 and 75 of the *Civil Liability Act 2003*.

Objectives of the Legislation

The objective of the regulation is to prescribe—

- the entities which a person must be acting for in performing duties to enhance public safety for that person to avoid the attachment of any civil liability for the duties performed in certain circumstances;
- the entities which, when providing services to enhance public safety, avoid the attachment of any civil liability for the duties performed in certain circumstances; and
- the ranges of injury scale values, for various injuries, a court is to consider when assessing an injury scale value for any particular injury if general damages are to be awarded by the court.

Reasons for the subordinate legislation

The *Civil Liability Act 2003* (the Act) introduced fundamental changes to the law of negligence and to the calculation of damages in personal injury matters. The Act was assented to on 9 April 2003. Some provisions commenced on 2 December 2002, while the majority commenced on assent. Chapter 2, part 2 was to commence on a date to be proclaimed.

Section 26 of the Act provides that where a person does or omits to do an act in the course of rendering first aid or other assistance to someone in distress, civil liability for the act or omission will not attach to the person so long as they are providing the aid or assistance while performing duties to enhance public safety for an entity that provides services that enhance public safety and named under a regulation.

This provision was originally contained in the *Personal Injuries Proceedings Act 2002* (PIPA), and a list of entities was provided under the *Personal Injuries Proceedings Regulation 2002* (the PIPReg). PIPA relates to the procedure that a personal injury action must proceed through before being able to commence legal proceedings, as opposed to the law that applies in deciding the action. Accordingly, the provision was transferred out of PIPA into the Act. Through the use of a transitional provision in the Act, the PIPReg continues to apply to the provision until a regulation is made under the Act.

Section 27 of the Act provides that civil liability will not attach to the entity which a person is acting for in the circumstances referred to above. This new provision also requires that the list of entities be prescribed by regulation. Through the use of a transitional provision in the Act, the entities referred to in the PIPReg for the purposes of removing liability from a person providing the services are taken to be entities for the purposes of the new provision until a regulation is made under the Act.

Sections 61 and 62 of the Act provide a new system for the assessment of any general damages component of an award of damages in a personal injury action. A court is to assess an injury scale value (ISV) on a scale running from 0 to 100 for any injury. The scale reflects 100 equal gradations from an injury not severe enough to justify any award of general damages to an injury of the gravest conceivable kind.

In assessing an ISV, a court is to have regard to any ISVs that have been assessed by courts in cases involving personal injury similar to that before it. Further, the Court is to have regard to the range of ISVs for similar injuries prescribed by regulation. This requirement upon the court relates to

all personal injuries covered by the Act that occurred on or after 2 December 2002.

Consistency with the authorising law

The declaration of the entities providing services that enhance public safety is required to be prescribed under both section 26 and 27 of the Act.

The ranges of ISV for various injuries are required to be prescribed by section 61 of the Act.

In order to ensure appropriate application of the ranges of ISV provided in the regulation, rules for application of the ranges are authorised to be prescribed under section 75 of the Act.

Administrative cost to Government of implementation

There is no cost to government in the implementation of the regulation. Upon implementation, it is expected there will be an overall reduction in legal costs spent in negotiating personal injury actions as a result of the rules provided by the regulation for assessing general damages for a personal injury.

Consistency with Fundamental Legislative Principles

The regulation is consistent with fundamental legislative principles.

CONSULTATION

Community

In relation to the entities named for the purposes of indemnity when providing emergency services, the Department of Emergency Services consulted with relevant community groups prior to the PIPReg. Subsequently consultation was undertaken with the Local Government Association of Queensland.

In relation to the ranges of ISV, consultation with community stakeholders was initially conducted by retired Supreme Court and Court of Appeal Justice the Honourable Mr James Thomas AM QC. The

Honourable Mr Thomas consulted with various medical specialists, in addition to representatives of the following stakeholder groups—

- Australian Medical Association (Queensland Branch)
- Australian Plaintiff Lawyers Association
- Bar Association of Queensland
- Insurance Council of Australia
- Queensland Law Society
- Suncorp Insurance Limited

A further round of consultation was engaged in with these stakeholders direct on the basis of the final recommendations made by the Honourable Mr Thomas.

Government

Consultation has been undertaken with the Department of Premier and Cabinet, the Motor Accident Insurance Commission, Queensland Health and the Business Regulation Reform Unit of the Department of State Development.

The Office of the Queensland Parliamentary Counsel has drafted the regulation based upon the recommendations of the Honourable Mr Thomas.

NOTES ON PROVISIONS

PART 1-PRELIMINARY

Section 1 provides the title of the regulation.

Section 2 provides that schedule 7 of the regulation defines certain words used within the regulation.

Section 3 provides that notes within the text of the regulation are part of the regulation.

Section 4 provides that the entities for the purposes of section 26 of the *Civil Liability Act 2003* (the Act) are prescribed in schedule 1 of the regulation.

Section 5 provides that the entities for the purposes of section 27 of the Act are prescribed in schedule 2 of the regulation.

Section 6 provides that the ranges of injury scale value (ISV) for the purposes of section 61(1)(c)(i) of the Act are set out in schedule 4. Further, the section provides that rules upon the application of schedule 4 are contained in schedule 3 to the regulation. Section 6 provides that, where schedule 4 does not list an injury for which a court is to assess an ISV, the court is to assess that ISV by comparing the injury with similar injuries that are mentioned in the schedule, and the ranges of ISV that are provided for those similar injuries. This process must have regard to the objective of schedule 4, as referred to in section 1 of 3 schedule. The section also provides a system in schedule 6, the Psychiatric Impairment Rating Scale (PIRS) for the assessment of the level of impairment resulting in mental disorder with provision for rules for making an assessment under PIRS to be contained in schedule 5. Finally, the section notes that certain parts of the section and also certain schedules are made in accordance with the transitional power provided in section 75 of the Act, and will therefore expire 1 year after commencement.

Schedule 1

Prescribed Entities Providing Services to Enhance Public Safety – Act, Section 26(1)

This schedule prescribes the list of entities that a person must be performing duties for, in the course of rendering first aid or other aid to a person in distress, if the person intends relying upon section 26 of the Act to say that civil liability does not attach to any act or omission of the person if done or omitted in good faith.

Schedule 2

Prescribed Entities Providing Services to Enhance Public Safety – Act, Section 27(1)

This schedule prescribes the list of entities that may rely upon section 27 of the Act to say that civil liability does not attach to the entity for any act or omission of a person performing duties for the entity, in the course of

rendering first aid or other aid to a person in distress, if the act or omission is done or omitted in good faith.

Schedule 3

Matters Relevant to Application of Schedule 4 (Ranges of Injury Scale Values)

Schedule 3 provides the rules necessary for schedule 4 to be used in accordance with its design. The rules apply a system of assessment focused upon the impact of a single injury or in the case of multiple injuries, a dominant injury. These rules apply whether the injury is actually mentioned within schedule 4 or assessed under section 3 of schedule 3. Use of schedule 4 without having regard to the rules will result in the assessment of an ISV that is not in accordance with the principles of the Act.

Section 1 of schedule 3 sets out the objectives of schedule 4. The objectives are a reflection of the purpose of the scale as proposed under section 61 of the Act. Part of section 61 is included as a note to the section for ease of reference in use of the document.

Section 2 of schedule 3 provides the basis for application of schedule 4. Certain injuries are mentioned in the injury column of schedule 4, which is in tabular form. The corresponding range of ISVs for that injury is contained in the corresponding Injury Scale Value column. The court is to consider this range as being the range of ISVs within which an ISV for the injury should be assessed, having regard to the particular level of adverse impact the injury has on the person.

The injuries referred to in schedule 4 are distinct injuries, as opposed to a combination of injuries. The ranges of ISV are a reflection of the level of impact that each injury will have upon a person, from the least possible effect for each possible injury to the worst possible effect. The differences in these levels of effect within a range will be assessed by a court by having regard to the factors that affect the level of seriousness of impact. These factors commonly include age, insight, life expectancy, pain, suffering, loss of amenities of life, and any difficulties in life likely to have emerged in any event. They are able to be considered by a court pursuant to the power provided in section 9.

It should be noted that the existence of any pre-existing impairment is to be considered in two ways. Firstly, the impact of any pre-existing injury may be relevant to the variation of ISV within the range of ISVs for an

injury within schedule 4. Secondly, if the pre-existing injury is exacerbated by the injury mentioned in schedule 4, the impact to be assessed is the change between the pre-existing injury and the later injury. This second point is dealt with in section 7 of schedule 3.

Section 3 of schedule 3 deals with the instance where there is not one distinct injury to be assessed by the court, but a number of injuries. This includes whether one, some or all of the injuries are identified in schedule 4. If there is more than one injury, the Court is to consider the range of ISVs provided in the scale for the dominant injury as being the range of ISVs for the entire impact of the multiple injuries. It is not the case that the court assesses an ISV for each of the multiple injuries. The term “dominant injury” is defined in schedule 7 and is generally the injury with the highest range of ISVs of all the multiple injuries.

Section 4 provides that, where a court considers the upper limit of the range of ISVs for a particular dominant injury is inadequate to reflect the impact of the multiple injuries in a particular case, the court may assess an ISV for the injury that exceeds the ISV at the top of the range. It will only be in exceptional circumstances that the ISV for the multiple injuries will be increased by more than an amount equal to 25% of the ISV at the top of the range for the dominant injury.

Further, the ability to increase the ISV does not mean that, if the Court is assessing an ISV for a multiple injury, it immediately increases the ISV to the maximum ISV available in the range. The Court must still have regard to the objectives of the regulation and the requirements of section 61 of the Act. The result can be no increase at all above the ISV assessable for the dominant injury only, or an increase only partially toward the maximum ISV that could be assessed for the dominant injury. In those uncommon cases where the impact of the injuries exceeds that reflected by the maximum ISV for the dominant injury, the court is required to give detailed reasons of the factors which support the court’s decision to exceed a 25% increase, and which mark the impact of the injuries as justifying such an increase.

Section 5 provides that an adverse psychological reaction to an incident or injury that is not diagnosable as a mental disorder, such as fear or apprehension, is to be treated merely as a factor that may be relevant in reflecting the seriousness of the impact of the injury, and not as a separate injury. Such a reflection may be relevant to the assessment of an ISV within the range of ISVs provided for the distinct injury. It does not as a matter of course increase the level of ISV that will be awarded for the injury.

Section 6 applies when a court is assessing an ISV for which a PIRS rating is relevant under schedule 4. PIRS ratings are referred to in schedule 4, part 2. A PIRS rating is capable of being accepted by a court only if it is assessed by a medical expert as required under schedules 5 and 6 and provided to the court in a PIRS report as required under schedule 5, part 4.

Section 7 provides that a court is to only have regard to the actual increase in any impairment caused by an injury. A Court is not to assess the ISV on the basis that the range of ISVs provided for an injury reflects the seriousness of the impact of that type of injury upon a person with a pre-existing impairment. The ranges of ISV for each injury in schedule 4 are provided on the basis of no pre-existing impairment.

Section 8 provides that, within schedule 4, further information relevant to an injury mentioned in that schedule may be stated. This further information provides—

- definitions of various types of injury
- examples of types of injury
- examples of the level of ISV which an example of the type of injury would be expected to receive within the range of ISVs for that type of injury.

The Court is to consider this information in assessing which type of injury either reflects or is similar to the injury for which the court is to assess an ISV. The information is not the only information the court may have regard to in assessing a level of ISV to reflect the impact of the injury, but is information the court must have regard to if relevant to the particular case.

Section 9 provides that a court may have regard to any factors it considers relevant in assessing the impact of an injury to justify a level of ISV within the range set for an injury or in moving outside that range, whether above or below it. In the assessment of general damages, the court will have regard to all the facts and circumstances relevant to the impact of the injury upon the person. Such facts and circumstances commonly include insight, age, life expectancy, pain, suffering, loss of amenities of life, the possible effects of any pre-existing impairment and the difficulties in life that are likely to have emerged in any event.

Section 10 provides that, while a medical assessment of the whole person impairment of a person is important, other factors are also relevant in assessing the impact of that impairment upon any particular person.

These factors are acknowledged by sections 8 and 9 of schedule 3. The whole person impairment, as defined by schedule 7, is a medical assessment expressed as a percentage of the impact of an injury upon a person's ability to perform activities of daily life. It is these other factors which distinguish between a mere assessment of impairment and an assessment of the impact of an injury upon a person.

Section 11 requires all medical reports that refer to a whole person impairment percentage to provide full details relevant to calculation of the percentage.

Section 12 provides that, for all injuries other than mental disorders or scarring, a court is to prefer evidence of a whole person impairment assessed pursuant to the 5th edition of the American Medical Association Guides to the Evaluation of Permanent Impairment (AMA5). This does not remove the ability for parties to obtain reports on the impairment suffered by a person based upon other criteria or experience. There is no preferred evidence rule for the impact of scarring that does not cause functional impairment or mental disorder.

Section 13 requires a court, in assessing an ISV, to give greater weight to a PIRS report provided under schedule 5 than to another medical assessment of the permanent impairment caused by a mental disorder.

Section 14 provides that a court is to assess a whole number only when assessing an ISV. Literal application of the multiple injury rules stated in section 5 can result in a fraction of a whole number being assessed. The Act makes provision for whole number values only, and accordingly any ISV assessed must be a whole number. A whole number can be zero.

Schedule 4

Ranges of Injury Scale Value

Schedule 4 provides ranges of injury scale value (ISV) for various injuries. Schedule 4 does not attempt to list every conceivable injury, or every conceivable combination of injuries, and is not a mirror of past awards of general damages. The injuries are separate and distinct, but in many instances are grouped so as to form a continuous range through various levels of injury to the same body part. Schedule 4 has been designed with a view to a court making an assessment of an ISV for a dominant injury. Schedule 3 provides rules for use of the schedule in assessment of multiple injuries. The range of ISVs for each numbered item is intended to cover the effects of an injury of the nature described in that

item, from the least serious to the most serious having regard to the common mitigating and aggravating factors relevant in assessing general damages.

Schedule 5

Matters Relevant to Application of Schedule 6 (Psychiatric Impairment Rating Scale)

Schedule 5 sets out the method by which the PIRS set out in schedule 6 is to be used. It involves 5 steps. The PIRS uses the assessment of six areas of a person's ability to function, three of which centre upon daily living, to assess the impairment caused by a mental disorder. The method is based upon the method and philosophy of assessment of mental disorders contained in AMA 5.

In order for a PIRS assessment to be made, a mental disorder must first be diagnosed in accordance with the text revision of the 4th edition of the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association. The method is to be used by an expert who has received appropriate training in assessment of impairment caused by mental disorder, in particular in relation to assessment using the PIRS.

Clinical judgment will be the most important tool in application of the PIRS. Any assessment will necessarily be consistent with a recognised psychiatric diagnosis and clinical experience. If the impairment is attributable to physical injury, an assessment under PIRS will not be appropriate. Where cognitive defects are suspected, the expert must take into account all information relevant to the impact of that defect on the mental disorder.

Finally, it is not the function of any person, other than a medical expert, to assess a person's impairment by way of reference to schedule 6. The term "medical expert" is defined in schedule 7. Also, it is not the function of the medical expert to assess the ISV for the mental disorder.

Schedule 6

Psychiatric Impairment Rating Scale

Schedule 6 provides the Psychiatric Impairment Rating Scale. It consists of 5 levels of impairment for each of six areas of function. The level of impairment is identified as a class, with 1 being the lowest and 5 being the highest. At the lowest level, whilst possibly not impacting upon the

functionality of a person, they will have a diagnosed mental disorder that can be stated as not being present prior to the incident claimed to have caused the injury.

Schedule 7

Definitions

Schedule 7 provides the definitions of terms used within the regulation for the purposes of the regulation.

ENDNOTES

1. Laid before the Legislative Assembly on . . .
2. The administering agency is the Department of Justice and Attorney-General.