

South Australia

WRONGS ACT 1936

An Act to consolidate certain Acts relating to wrongs.

*This Act is published under the Legislation Revision and Publication Act 2002 and incorporates all amendments in force as at **10 March 2003**.*

Please note—References in the legislation to other legislation or instruments or to titles of bodies or offices are not automatically updated as part of the program for the revision and publication of legislation and therefore may be obsolete.

WRONGS ACT 1936

being

Wrongs Act 1936 No. 2267 of 1936 [Assented to 13 August 1936]

as amended by

Wrongs Act Amendment Act 1939 No. 18 of 1939 [Assented to 22 November 1939]
Wrongs Act Amendment Act 1940 No. 48 of 1940 [Assented to 28 November 1940]
Wrongs Act Amendment Act 1944 No. 14 of 1944 [Assented to 23 November 1944]
Wrongs Act Amendment Act 1951 No. 50 of 1951 [Assented to 13 December 1951]
Statute Law Revision Act 1952 No. 42 of 1952 [Assented to 4 December 1952]
Limitation of Actions and Wrongs Acts Amendment Act 1956 No. 17 of 1956 [Assented to 8 November 1956]
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Wrongs Act Amendment Act 1959 No. 38 of 1959 [Assented to 10 December 1959]
Statutes Amendment (Law of Property and Wrongs) Act 1972 No. 19 of 1972 [Assented to 30 March 1972]¹
Statutes Amendment (Miscellaneous Provisions) Act 1972 No. 58 of 1972 [Assented to 27 April 1972]¹
Wrongs Act Amendment Act 1974 No. 70 of 1974 [Assented to 17 October 1974]²
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Wrongs Act Amendment Act 1975 No. 119 of 1975 [Assented to 4 December 1975]³
Wrongs Act Amendment Act 1983 No. 87 of 1983 [Assented to 1 December 1983]
Wrongs Act Amendment Act (No. 2) 1983 No. 116 of 1983 [Assented to 22 December 1983]
Wrongs Act Amendment Act 1986 No. 126 of 1986 [Assented to 24 December 1986]⁴
Wrongs Act Amendment Act 1987 No. 45 of 1987 [Assented to 30 April 1987]⁵
Wrongs Act Amendment Act 1988 No. 41 of 1988 [Assented to 5 May 1988]⁶
Wrongs Amendment Act 1991 No. 38 of 1991 [Assented to 31 October 1991]
Statutes Amendment (Motor Vehicles and Wrongs) Act 1993 No. 5 of 1993 [Assented to 4 March 1993]⁷
Statutes Amendment (Courts) Act 1993 No. 62 of 1993 [Assented to 27 May 1993]⁸
Statutes Amendment (Attorney-General's Portfolio) Act No. 21 of 1994 [Assented to 26 May 1994]⁹
Passenger Transport Act 1994 No. 30 of 1994 [Assented to 26 May 1994]¹⁰
Criminal Law Consolidation (Felonies and Misdemeanours) Amendment Act 1994 No. 59 of 1994 [Assented to 27 October 1994]¹¹
Racial Vilification Act 1996 No. 92 of 1996 [Assented to 12 December 1996]¹²
Statutes Amendment (References to Banks) Act 1997 No. 30 of 1997 [Assented to 12 June 1997]¹³
Non-Metropolitan Railways (Transfer) Act 1997 No. 53 of 1997 [Assented to 31 July 1997]¹⁴
Statutes Amendment (Motor Accidents) Act 1998 No. 67 of 1998 [Assented to 17 September 1998]¹⁵
Financial Sector Reform (South Australia) Act 1999 No. 33 of 1999 [Assented to 17 June 1999]¹⁶
Wrongs (Damage by Aircraft) Amendment Act 2000 No. 8 of 2000 [Assented to 20 April 2000]¹⁷
Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 No. 41 of 2001 [Assented to 3 August 2001]¹⁸
Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002 No. 21 of 2002 [Assented to 12 September 2002]¹⁹
Law Reform (Delay in Resolution of Personal Injury Claims) Act 2002 No. 38 of 2002 [Assented to 28 November 2002]²⁰

NOTE:

- Asterisks indicate repeal or deletion of text.
- Entries appearing in bold type indicate the amendments incorporated since the last reprint.
- For the legislative history of the Act see Appendix.

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- ¹ Came into operation 18 May 1972: *Gaz.* 18 May 1972, p. 1926.
- ² Came into operation 28 November 1974: *Gaz.* 28 November 1974, p. 3373.
- ³ Came into operation 29 January 1976: *Gaz.* 29 January 1976, p. 356.
- ⁴ Came into operation 8 February 1987: *Gaz.* 5 February 1987, p. 250.
- ⁵ Came into operation 5 July 1987: *Gaz.* 28 May 1987, p. 1384.
- ⁶ Came into operation 8 February 1987: s. 2.
- ⁷ Came into operation 3 May 1993: *Gaz.* 29 April 1993, p. 1476.
- ⁸ Came into operation 28 October 1993: *Gaz.* 27 October 1993, p. 1892.
- ⁹ Came into operation 7 July 1994: *Gaz.* 7 July 1994, p. 4.
- ¹⁰ Came into operation 1 July 1994: *Gaz.* 30 June 1994, p. 1843.
- ¹¹ Came into operation 1 January 1995: *Gaz.* 8 December 1994, p. 1942.
- ¹² Came into operation 6 July 1998: *Gaz.* 2 July 1998, p. 9.
- ¹³ Part 13 (s. 19) came into operation 3 July 1997: *Gaz.* 3 July 1997, p. 4.
- ¹⁴ Came into operation 11 September 1997: *Gaz.* 11 September 1997, p. 703.
- ¹⁵ Part 3 (s. 13) and Part 4 (s. 14) came into operation 29 October 1998: *Gaz.* 17 September 1998, p. 902.
- ¹⁶ Schedule (item 64) came into operation 1 July 1999: being the date specified under section 3(16) of the *Financial Sector Reform (Amendments and Transitional Provisions) Act (No. 1) 1999* of the Commonwealth as the transfer date for the purposes of that Act.
- ¹⁷ Came into operation 9 November 2000: *Gaz.* 9 November 2000, p. 3004.
- ¹⁸ Section 9(1) came into operation 16 August 2001: *Gaz.* 16 August 2001, p. 3046.
- ¹⁹ Came into operation 1 December 2002: *Gaz.* 28 November 2002, p. 4293.
- ²⁰ **Section 4 came into operation 10 March 2003: *Gaz.* 13 February 2003, p. 581.**

SUMMARY OF PROVISIONS

1. Short title
2. Repeal
3. Act to bind the Crown
- 3A. Interpretation

Part 1—Defamation

5. Words imputing want of chastity to a woman
6. Privilege of newspaper, radio or television reports of legal proceedings
7. Privilege of newspaper, radio or television reports of proceedings of public meetings and of certain bodies and persons
8. Penalties on unfair and inaccurate reports
9. Offer of an apology
10. Defence in action against a newspaper or radio or television station for libel
11. Evidence in mitigation of damages
12. Publishing parliamentary reports
13. Consolidation of actions
14. Evidence as to publication, matters charged etc
15. Obscene matter
16. Proof of publication of newspaper, book or periodical
17. Proof of copies of newspaper

Part 1A—Liability for animals

- 17A. Liability for animals

Part 1B—Occupiers liability

- 17B. Interpretation
- 17C. Occupier's duty of care
- 17D. Landlord's liability limited to breach of duty to repair
- 17E. Exclusion of conflicting common law principles

Part 2—Wrongful acts or neglect causing death

19. Liability for death caused wrongfully
20. Effect and mode of bringing action, awarding of damages for funeral expenses etc
21. Restriction of actions and time of commencement
22. Particulars of the person for whom damages claimed
23. Provision where no executor or administrator or action not commenced within six months
- 23A. Liability to parents of person wrongfully killed
- 23B. Liability to surviving spouse of person wrongfully killed
- 23C. Further provisions as to *solatium* etc

Part 2A—Damages for personal injury

Division 1—Preliminary

24. Interpretation
- 24A. Application of this Part

Division 2—Assessment of damages

- 24B. Damages for non-economic loss
- 24C. Damages for mental or nervous shock
- 24D. Damages for loss of earning capacity
- 24E. Lump sum compensation for future losses
- 24F. Exclusion of interest on damages compensating non-economic or future loss
- 24G. Exclusion of damages for cost of management or investment
- 24H. Damages in respect of gratuitous services

Division 3—Special provisions in regard to liability

- 24I. Exclusion of liability in certain cases
- 24J. Presumption of contributory negligence where injured person intoxicated
- 24K. Presumption of contributory negligence where injured person relies on care and skill of person known to be intoxicated
- 24L. Evidentiary provision relating to intoxication
- 24M. Non-wearing of seatbelt etc
- 24N. How case is dealt with where damages are liable to reduction on account of contributory negligence

Division 4—Territorial application

- 24O. Territorial application

Part 3—General provisions

Division 3—Rights as between employer and employee in cases of vicarious liability

- 27C. Rights as between employer and employee

Division 4—Mental or nervous shock

- 28. Personal injury caused by mental or nervous shock

Division 5—Remedies against certain shipowners

- 29. Remedy against shipowners and others for injuries

Division 6—Damage by aircraft

- 29A. Damage by aircraft
- 29B. Exclusion of liability for trespass or nuisance

Division 7—Abolition of rule of common employment

- 30. Abolition of rule of common employment

Division 8—Actions in tort relating to husband and wife

- 32. Abolition of rule as to unity of spouses
- 33. Wife may claim for loss or impairment of consortium
- 34. Damages where injured spouse participated in a business

Division 9—Abolition of actions of seduction, enticement and harbouring

35. Abolition of actions for enticement, seduction and harbouring

Division 10A—Unreasonable delay in resolution of claim

- 35B. Definitions
35C. Damages for unreasonable delay in resolution of a claim
35D. Regulations

Division 11—Liability for perjury in civil actions

36. Liability for perjury in civil actions

Division 12—Racial victimisation

37. Racial victimisation

Division 13—Good samaritans

38. Good samaritans

Division 14—Expressions of regret

39. Expressions of regret

**APPENDIX
LEGISLATIVE HISTORY**

The Parliament of South Australia enacts as follows:**Short title**

1. This Act may be cited as the *Wrongs Act 1936*.

Repeal

2. The following enactments are repealed, namely:

U.K. 6 and 7 Vict., c. 96 (adopted in South Australia by 17, 1846)—An Act of the Parliament of the United Kingdom, entitled "An Act to amend the Law respecting defamatory words and libel". (Sections 1, 2, 9, and 10.)

No. 1 of 1865-6—An Act for compensating the Families of Persons killed by Accident. (The whole.)

No. 7 of 1865—An Act to amend the Law of Slander. (The whole.)

No. 17 of 1874—An Act to provide for the recovery of damages caused by negligence on the part of persons employed by the Government of South Australia in certain cases. (Section 3.)

No. 646 of 1895—The Law of Libel Amendment Act 1895. (The whole.)

Act to bind the Crown

3. This Act binds the Crown.

Interpretation

3A. In this Act, unless the contrary intention appears—

"**brother**" includes half-brother and step-brother;

"**child**" includes son, daughter, grandson, granddaughter, step-son and step-daughter;

"**the judgment first given**" means—

(a) where a judgment is set aside on appeal, a subsequent judgment that is not set aside; and

(b) where a judgment is varied on appeal, the judgment as varied;

"**newspaper**" means any newspaper or journal printed for sale and published in the State periodically at intervals not exceeding thirty-one days;

"**parent**" includes father, mother, grandfather, grandmother, step-father and step-mother;

"**putative spouse**" in relation to any cause of action arising under this Act means a person adjudged under the *Family Relationships Act 1975* to have been a putative spouse on the day on which the cause of action arose;

"**sister**" includes half-sister and step-sister;

"**spouse**" in relation to any cause of action arising under this Act means a person—

- (a) who was a lawful spouse on the day on which the cause of action arose; or
- (b) who is adjudged to have been a putative spouse on the day on which the cause of action arose,

and "**husband**" and "**wife**" are to be construed accordingly.

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Wrongs Act 1936

Part 1—Defamation

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Words imputing want of chastity to a woman

5. Words spoken and published of any woman imputing to her a want of chastity, shall be and shall be deemed to be slander, and an action shall be sustainable for such words in the same manner and to the same extent as for words charging an indictable offence.

Privilege of newspaper, radio or television reports of legal proceedings

6. A fair and accurate report published by newspaper, radio or television of proceedings publicly heard before any court exercising judicial authority shall, if published contemporaneously with such proceedings, be privileged: Provided that nothing in this section shall authorise the publication of any blasphemous or indecent matter.

Privilege of newspaper, radio or television reports of proceedings of public meetings and of certain bodies and persons

7. (1) A fair and accurate report published by newspaper, radio or television of the proceedings of—

- (a) a public meeting; or
- (ab) either House of Parliament; or
- (b) (except where neither the public nor any reporter is admitted) of any meeting of a municipal or district council, school board of advice, board of health, board or local authority formed or constituted under the provisions of any Act of Parliament, or of any committee appointed by any of the abovementioned bodies; or
- (c) a meeting of any royal commission, select committee of either House of Parliament; or
- (d) a meeting of shareholders in any incorporated company,

and the publication by newspaper, radio or television at the request of any Government office or department, Minister of the Crown, or Commissioner of Police, of any notice or report issued by it or him for the information of the public, shall be privileged unless it is proved that the report or publication was published or made maliciously:

Provided that—

- (a) nothing in this section shall authorise the publication of any blasphemous or indecent matter:
- (b) the protection intended to be afforded by this section shall not be available as a defence in any proceedings if it is proved that the defendant has been requested to publish by the same newspaper or radio or television station, as the case may be, a reasonable letter or statement by way of contradiction or explanation of such report or other publication and has refused or neglected to do so:

- (c) nothing in this section shall be deemed or construed to limit or abridge any privilege now by law existing, or to protect the publication of any matter not of public concern and the publication of which is not for the public benefit.

(2) For the purposes of this section, "**public meeting**" means any meeting *bona fide* and lawfully held for a lawful purpose, and for the furtherance or discussion of any matter of public concern, whether the admission thereto be general or restricted.

Penalties on unfair and inaccurate reports

8. If any unfair and inaccurate report of any matter mentioned in either of the last two preceding sections is published by newspaper, radio or television, every person responsible for the publication shall be guilty of an offence against this Act, punishable on complaint of any person aggrieved, and on summary conviction, by a fine not exceeding two thousand dollars, or by imprisonment not exceeding three calendar months:

Provided that—

- (a) the punishment shall be by fine only if it is proved that the defendant, as soon as practicable after being informed of the unfairness and inaccuracy of the report, published by the newspaper or radio or television station, as the case may be, a correction thereof, giving to the correction at least equal prominence to that which was given to the original report:
- (b) any person laying a complaint under this section shall be deemed to have waived all other remedies, both civil and criminal, against the same defendant in respect of the same report.

Offer of an apology

9. In any action for defamation, the defendant may, after notice in writing of his intention so to do, duly given to the plaintiff at the time of filing or delivering the defence in the action, give in evidence in mitigation of damages, that he made or offered an apology to the plaintiff for the defamation before the commencement of the action, or if the action was commenced before there was an opportunity of making or offering such an apology, as soon afterwards as he had an opportunity of doing so.

Defence in action against a newspaper or radio or television station for libel

10. (1) In an action for a libel contained in any public newspaper or other periodical publication or in a radio or television broadcast, the defendant may plead that the libel was inserted in the newspaper or other periodical publication or included in the broadcast without actual malice and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, he inserted in the newspaper or other periodical publication or broadcast on the same radio or television station, a full apology for the libel, or if the newspaper or periodical publication in which the libel appeared was ordinarily published at intervals exceeding one week, offered to publish such an apology in any newspaper or periodical publication to be selected by the plaintiff in the action.

(2) The defendant upon filing such defence may pay into Court a sum of money by way of amends for the injury sustained by the publication of the libel.

(3) To such a defence the plaintiff may reply generally denying the whole of such defence.

Evidence in mitigation of damages

11. At the trial of an action for a libel, the defendant may give in evidence in mitigation of damages that the plaintiff has already recovered or has brought action for damages, or has received or agreed to receive compensation in respect of a libel or libels to the same purport or effect as the libel for which such action has been brought.

Publishing parliamentary reports

12. (1) It shall be lawful for any defendant in any civil or criminal proceeding in respect of the publication of any report, paper, votes, or proceedings of Parliament, which either House of Parliament deems fit and necessary and has authorised to be published, to bring before the Court, after giving twenty-four hours notice to the plaintiff or prosecutor of his intention so to do, a certificate under the hand of the President or Clerk of the Legislative Council, or the Speaker or Clerk of the House of Assembly, stating that the matter in question was published by order or under the authority of the Legislative Council or House of Assembly, as the case may be, together with an affidavit verifying the said certificate, and the court shall thereupon stay the said proceeding, and the same and every writ and process therein shall thereupon be put an end to and superseded, by virtue of this Act.

(2) It shall be lawful for the defendant in any civil or criminal proceeding in respect of the publication of any copy of any such report, paper, votes, or proceedings, to lay before the court, at any stage of the proceeding, the said report, paper, votes, or proceedings, and the said copy together with an affidavit verifying the same and the correctness of the said copy, and the court shall thereupon stay the said proceeding, and the same and every writ and process therein shall thereupon be put an end to and superseded by virtue of this Act.

(3) It shall be a good defence to any civil or criminal proceeding in respect of the printing of any extract from or abstract of such report, paper, votes, or proceedings if the defendant proves that the said extract or abstract was published in good faith and without malice.

(4) The following persons, namely, the Government Printer and those members of the public service who are employed in the making of official reports of the debates and proceedings of Parliament are hereby authorised by each House of Parliament to publish reports of the debates and proceedings of that House:

Provided that this subsection shall not absolve any such person from the duty to conform to any instructions lawfully given to him by any person in authority.

(5) For the purposes of this section the papers which set out the daily business of each House of Parliament and are commonly called "Notices and Orders of the Day" shall be papers of Parliament the publication of which has been authorised by the House concerned.

Consolidation of actions

13. (1) A judge or the court, upon an application by or on behalf of two or more defendants in actions to the same, or substantially the same libel, brought by the same person, may make an order for the consolidation of those actions, so that they shall be tried together.

(2) After such an order has been made, and before the trial of the actions, the defendants in any new actions instituted in respect to the same or substantially the same libel, shall also be entitled to be joined in a common action, upon a joint application being made by those new defendants and the defendants in the actions already consolidated.

Evidence as to publication, matters charged etc

14. A court of summary jurisdiction, upon the hearing of a charge against a person responsible for the publication of a libel by newspaper, radio or television, may receive evidence as to the publication being for the public benefit, and as to the matters charged in the libel being true, and as to the report being fair and accurate and published without malice, and as to any matter which under this or any other Act or otherwise might be given in evidence by way of defence by the person charged on his trial on indictment; and the Court, if of opinion after hearing such evidence that there is a strong or probable presumption that the jury at the trial would acquit the person charged, may dismiss the case.

Obscene matter

15. It shall not be necessary to set out in any indictment or other judicial proceeding instituted against the publisher of any obscene libel the obscene passage, but it shall be sufficient to deposit the book, newspaper, or other documents containing the alleged libel with the indictment or other judicial proceeding, together with particulars showing precisely by reference to pages, columns, and lines, in what part of the book, newspaper, or other document the alleged libel is to be found, and such particulars shall be deemed to form part of the record, and all proceedings may be taken thereon as though the passages complained of had been set out in the indictment or judicial proceeding.

Proof of publication of newspaper, book or periodical

16. Upon the trial of an action or prosecution in respect of a libel contained in a newspaper or book, the production of such newspaper or book containing a printed statement that it is printed or published by or for the defendant shall be *prima facie* evidence of the publication of the said newspaper or book by the defendant.

Proof of copies of newspaper

17. Upon the trial of an action or prosecution in respect of a libel contained in a newspaper, after evidence sufficient in the opinion of the court has been given of the publication by the defendant of the newspaper containing the libel, other prints purporting to be other numbers or parts of the same newspaper formerly or subsequently published, and containing a printed statement that they were published by or for the defendant, shall be admissible in evidence on either side without further proof of publication of them.

Part 1A—Liability for animals

Liability for animals

17A. (1) Subject to this section, liability for injury, damage or loss caused by an animal shall be determined in accordance with the principles of the law of negligence.

(2) In determining the standard of care to be exercised in relation to the keeping, management and control of an animal, a court shall take into account—

- (a) the nature and disposition of the animal (which shall be determined according to the facts of the particular case and not according to any legal categorisation); and
- (b) any other relevant matters.

(3) It is not necessary for a person seeking damages for injury, damage or loss caused by an animal to establish prior knowledge on the part of any other person of a vicious, dangerous or mischievous propensity of the animal.

(4) In any proceedings relating to injury, damage or loss caused by an animal, it shall not be a circumstance of excuse, mitigation or justification that the injury, damage or loss was caused by reason of the animal straying onto a public street or road.

(5) In an action arising from injury, damage or loss caused by an animal to an employee, it shall not be presumed that the employee voluntarily assumed risks attendant upon his employment that may have arisen from working in proximity to animals.

(6) A court in determining whether a reasonable standard of care was exercised in a particular case shall take into account measures taken—

- (a) for the custody and control of the animal; and
- (b) to warn against any vicious, dangerous or mischievous propensity that it might exhibit.

(7) Notwithstanding subsection (6), the fact that in a particular case no measures were taken for the custody and control of an animal, or to warn against any vicious, dangerous or mischievous propensity that it might exhibit, does not necessarily show that a reasonable standard of care was not exercised.

(8) Where a person incites, or knowingly permits, an animal to cause injury, damage or loss to another, he shall be liable in trespass for that injury, damage or loss.

(9) Subject to subsection (10), this section operates to the exclusion of any other principles upon which liability for injury, damage or loss caused by an animal would, but for this subsection, be determined in tort.

(10) This section—

- (a) does not affect an action in nuisance where an animal is the cause of, or involved in, the nuisance; and
- (b) does not derogate from any other statutory right or remedy; and

- (c) does not affect any cause of action that arose before the commencement of the *Wrongs Act Amendment Act 1983*.

Part 1B—Occupiers liability

Interpretation

17B. In this Part, unless the contrary intention appears—

"**dangerous**" includes unsafe;

"**landlord**" includes a landlord under a statutory tenancy;

"**occupier**" of premises means a person in occupation or control of the premises, and includes a landlord;

"**premises**" means—

- (a) land; or
- (b) a building or structure (including a moveable building or structure); or
- (c) a vehicle (including an aircraft or a ship, boat or vessel).

Occupier's duty of care

17C. (1) Subject to this Part, the liability of the occupier of premises for injury, damage or loss attributable to the dangerous state or condition of the premises shall be determined in accordance with the principles of the law of negligence.

(2) In determining the standard of care to be exercised by the occupier of premises, a court shall take into account—

- (a) the nature and extent of the premises; and
- (b) the nature and extent of the danger arising from the state or condition of the premises; and
- (c) the circumstances in which the person alleged to have suffered injury, damage or loss, or the property of that person, became exposed to that danger; and
- (d) the age of the person alleged to have suffered injury, damage or loss, and the ability of that person to appreciate the danger; and
- (e) the extent (if at all) to which the occupier was aware, or ought to have been aware, of—
 - (i) the danger; and
 - (ii) the entry of persons onto the premises; and
- (f) the measures (if any) taken to eliminate, reduce or warn against the danger; and
- (g) the extent (if at all) to which it would have been reasonable and practicable for the occupier to take measures to eliminate, reduce or warn against the danger; and
- (h) any other matter that the court thinks relevant.

(3) The fact that an occupier has not taken any measures to eliminate, reduce or warn against a danger arising from the state or condition of premises does not necessarily show that the occupier has failed to exercise a reasonable standard of care.

(4) Subject to any Act or law to the contrary, an occupier's duty of care may be reduced or excluded by contract but no contractual reduction or exclusion of the duty affects the rights of any person who is a stranger to the contract.

(5) Where an occupier is, by contract or by reason of some other Act or law, subject to a higher standard of care than would be applicable apart from this subsection, the question of whether the occupier is liable for injury, damage or loss shall be determined by reference to that higher standard of care.

(6) An occupier owes no duty of care to a trespasser unless—

- (a) the presence of trespassers on the premises, and their consequent exposure to danger, were reasonably foreseeable; and
- (b) the nature or extent of the danger was such that measures which were not in fact taken should have been taken for their protection.

Landlord's liability limited to breach of duty to repair

17D. The liability under this Part of a landlord who is not in occupation of premises is limited to injury, damage or loss arising from—

- (a) an act or omission on the part of the landlord in carrying out an obligation to maintain or repair the premises; or
- (b) a failure on the part of the landlord to carry out an obligation to maintain or repair the premises.

Exclusion of conflicting common law principles

17E. (1) Subject to subsection (2), this Part operates to the exclusion of any other principles on which liability for injury, damage or loss attributable to the state or condition of premises would, but for this Part, be determined in tort.

(2) This Part does not apply to a case where an occupier causes a dangerous state or condition of premises, or allows premises to fall into a dangerous state or condition, intending to cause injury, damage or loss to another.

Part 2—Wrongful acts or neglect causing death

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Liability for death caused wrongfully

19. Whenever the death of a person is caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death was caused under such circumstances as amount in law to an indictable offence.

Effect and mode of bringing action, awarding of damages for funeral expenses etc

20. (1) Every such action shall be for the benefit of the wife, husband, parent, brother, sister and child of the person whose death has been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased.

(2) In every such action the court may give such damages as it thinks proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit the action is brought.

(2a) In any such action in respect of the death of any person after the passing of the *Wrongs Act Amendment Act 1939* damages may be awarded in respect of any medical expenses incurred as a result of the injury causing the death and the funeral expenses of the deceased person if such expenses have been incurred by the parties for whose benefit the action is brought.

(2aa) In assessing damages under this section in any action based on a death occurring after the passing of the *Wrongs Act Amendment Act 1956* there shall not be taken into account—

- (i) any sum paid or payable on the death of the deceased under any contract of assurance or insurance, whether made before or after the passing of the said Act:
- (ii) any sum paid or payable consequent on the death of the deceased person as a gratuity to any person for whose benefit the action is brought:
- (iii) any superannuation payments or benefits consequent upon the death of the deceased person:
- (iv) any sum paid or payable consequent upon the death of the deceased person under any contributory medical hospital death or funeral benefit scheme:
- (v) any sum paid or payable as a social service benefit or pension by the Governments of the Commonwealth of Australia, or the United Kingdom, or the State of South Australia to or in respect of any person for whose benefit the action is brought.

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(3) The amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the court finds and directs.

(4) Where a deceased person is survived by a legal spouse and a putative spouse, the action shall, subject to this section, be brought for the benefit of both.

(5) An action need not be brought under this section for the benefit of a person who has, by notice in writing served upon the executor or administrator of the deceased, renounced the benefit of this section.

(6) Where the court considers it appropriate that any person for whose benefit an action lies under this section should present an independent claim for the benefit of an action under this section, it may permit or require that person to appear or be represented in the proceedings in all respects as if he were a separate party to the proceedings.

(7) No action lies against the executor or administrator for failing to bring an action for the benefit of a putative spouse if he brings the action without notice of the claim of the putative spouse under this section, but the interest of any such spouse in the action shall be recognised by the court if application for recognition is made to the court before the proceedings are finally determined.

Restriction of actions and time of commencement

21. Not more than one action shall lie under this Part for and in respect of the same subject matter of complaint; and every such action shall be commenced within three years after the death of the deceased person.

Particulars of the person for whom damages claimed

22. In every such action the plaintiff shall be required to deliver to the defendant or his solicitor, full particulars of the person or persons for whom and on whose behalf the action is brought, and of the nature of the claim in respect of which damages are sought to be recovered.

Provision where no executor or administrator or action not commenced within six months

23. (1) In any case falling under section 19 of this Act, if there is no executor or administrator of the deceased person or, there being such an executor or administrator, no action is commenced under this Part within six months after the death of the deceased person, then an action may be brought by and in the name or names of the person or all or any of the persons for whose benefit an action could have been brought under this Part by an executor or administrator of the deceased person.

(2) Every action brought under this section shall be for the benefit of the same persons and shall be subject to the same regulations and procedure as nearly as may be as if brought by or in the name of an executor or administrator of the deceased person.

Liability to parents of person wrongfully killed

23A. (1) Whenever the death of an infant is caused by a wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the infant to maintain an action to recover damages, the person who would have been liable if death had not ensued shall be liable to pay to the surviving parents or parent of the child such sum—

- (a) where the death occurred before the commencement of the *Wrongs Act Amendment Act 1974*—not exceeding one thousand dollars; or
- (b) where the death occurred after the commencement of the *Wrongs Act Amendment Act 1974*—not exceeding three thousand dollars,

as the court thinks just by way of *solatium* for the suffering caused to the parents or parent by the death of the child.

Wrongs Act 1936

(2) Where both parents bring an action to recover any sum of money payable under this section, the amount recovered after deducting the costs not recovered from the defendant, shall be divided between the parents in such shares as the court directs.

(3) Where both parents survive the child and either of them does not join in bringing an action under this section, the other may bring an action for such amount as he claims to be due to him or her.

(4) In this section—

"parent" means the father or mother of a child.

Liability to surviving spouse of person wrongfully killed

23B. (1) Whenever the death of a person is caused by a wrongful act, neglect or default and the act, neglect or default is such as would, if death had not ensued, have entitled that person to maintain an action to recover damages, the person who would have been liable if death had not ensued shall be liable to pay to the surviving spouse of the deceased person such sum—

(a) where the death occurred before the commencement of the *Wrongs Act Amendment Act 1974*—not exceeding one thousand four hundred dollars; or

(b) where the death occurred after the commencement of the *Wrongs Act Amendment Act 1974*—not exceeding four thousand two hundred dollars,

as the court thinks just by way of *solatium* for the suffering caused to the spouse by that death.

(2) Where the deceased person is survived by a lawful spouse and a putative spouse, they may both claim *solatium* under this section, but the total amount awarded by way of *solatium* in any such case shall not exceed the amount that could have been awarded if the deceased had been survived by a single spouse.

(3) Where, in any proceedings under this section, a lawful spouse and a putative spouse both claim *solatium* under this section, any *solatium* awarded by the court shall be apportioned between the claimants in such manner as the court thinks just.

(4) In any proceeding by a lawful spouse for *solatium* it is not necessary for the court to inquire if the deceased was also survived by a putative spouse, but any such spouse may, at any time before the proceedings are finally determined, apply to the court to be joined as a party to the proceedings.

Further provisions as to *solatium* etc

23C. (1) The rights conferred by sections 23A and 23B shall be in addition to and not in derogation of any rights conferred on the parent, husband or wife by any other provision of this Act.

(2) In an action brought to enforce any right given under section 23A or 23B of this Act the court may in its discretion refuse to order the payment of any sum by way of *solatium* if, having regard to the conduct of the plaintiff in relation to the deceased person, or to the relations which existed between the plaintiff and the deceased person, or for any other sufficient reason, it considers that no such payment should be made.

(3) Any cause of action conferred on any person by section 23A or 23B of this Act shall not, on the death of that person, survive for the benefit of his estate.

(4) A cause of action conferred on a person by section 23A or section 23B of this Act is exercisable notwithstanding that the death of the person injured by the wrongful act, neglect or default was caused in circumstances which in law amount to an indictable offence.

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

Wrongs Act 1936

- (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.

Wrongs Act 1936

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.

Wrongs Act 1936

(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.

Wrongs Act 1936

Division 4—Territorial application

Territorial application

240. 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.

Part 3—General provisions

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Division 3—Rights as between employer and employee in cases of vicarious liability

Rights as between employer and employee

27C. (1) Notwithstanding any Act or law, or the provisions express or implied of any contract or agreement, where an employee commits a tort for which his employer is vicariously liable—

- (a) the employee shall not be liable to indemnify the employer in respect of the vicarious liability incurred by the employer; and
- (b) unless the employee is otherwise entitled to indemnity in respect of his liability, the employer shall be liable to indemnify the employee in respect of liability incurred by the employee in respect of the tort.

(2) Where an employer is proceeded against for the tort of his employee, and the employee is entitled pursuant to a policy of insurance or contract of indemnity to be indemnified in respect of liability that he may incur in respect of the tort, the employer shall be subrogated to the rights of the employee under that policy or contract in respect of the liability incurred by him (the employer), arising from the commission of the tort.

(3) Where a person commits serious and wilful misconduct in the course of his employment and that misconduct constitutes a tort, the provisions of this section shall not apply in respect of that tort.

Division 4—Mental or nervous shock

Personal injury caused by mental or nervous shock

28. (1) In any action for injury to the person caused after the passing of the *Wrongs Act Amendment Act 1939* the plaintiff shall not be debarred from recovering damages merely because the injury complained of arose wholly or in part from mental or nervous shock.

(2) In determining any question of liability for injury to the person caused before the passing of the *Wrongs Act Amendment Act 1939* no regard shall be paid to the fact that this section has been enacted, or to the provisions hereof.

Division 5—Remedies against certain shipowners

Remedy against shipowners and others for injuries

29. (1) If it is alleged that the owners of any ship are liable to pay damages in respect of personal injuries, including fatal injuries, caused by the ship or sustained on, in, or about the ship, in any port or harbour in the State, in consequence of the wrongful act, neglect, or default of the owners of the ship, or the master or officers or crew thereof, or any other person in the employment of the owners of the ship, or of any defect in the ship or its apparel or equipment, and at any time that ship is found in any port or river in the State or in any water within three miles of the coast of the State, the Supreme Court or the local court of full jurisdiction nearest to the ship may, upon its being shown to the court by any person applying in accordance with rules of court that the owners are probably liable to pay damages in respect of such injuries and that none of the

Wrongs Act 1936

owners resides in the State, issue an order directed to any officer of the Supreme Court or of the said local court, or of the Minister of Marine, or of any authority exercising the powers vested in the said Minister named in the order, requiring such officer to detain the ship until such time as the owners, agent, master, or consignee thereof have paid such compensation, or have given security, to be approved by a Judge of the Supreme Court, or as the case may be, by a judge or magistrate of the said local court, to abide the event of any proceedings that may be instituted in respect of the injuries, and to pay all costs and damages that may be awarded thereon.

(2) The officer to whom the order is directed may detain the ship in accordance with the order.

(3) In any legal proceedings in relation to such injuries as aforesaid, the person giving security may be made the defendant, and shall be stated to be the owner of the ship which has caused the injuries, and the production of the order of the judge or magistrate made in relation to the security shall in the said proceedings be conclusive evidence that the defendant is the owner of the ship.

(4) If the owner of a ship is a corporation, such corporation shall, for the purpose of this section, be deemed to reside in the State if it has an office in the State at which service of process can be effected.

(5) If a ship after detention in pursuance of this section or after service on the master of any notice of an order for detention under this section, proceeds to sea before the ship is released by the officer detaining it, the master of the ship, and also the owner, and any person who sends the ship to sea, if that owner or person is party or privy to the offence, shall be guilty of an offence and liable on summary conviction to a penalty not exceeding four hundred dollars.

(6) If the master proceeds to sea with the ship in contravention of subsection (5) of this section, and takes to sea any person authorised to detain the ship or any person assisting any person so authorised, the owner and master of the ship shall each be liable to pay all expenses of and incidental to the taking to sea of any such person, in addition to any penalty imposable under subsection (5).

(7) The words "person applying" in this section shall include an employer who has paid compensation, or against whom a claim for compensation has been made, under the *Workmen's Compensation Act 1932* or under any corresponding subsequent enactment, if he shows the court that he probably is or will become entitled to be indemnified under that Act or enactment, and in such case this section shall apply as if the employer were a person claiming damages in respect of personal injuries.

(8) The jurisdiction of the Supreme Court under this section may be exercised by a single judge of that court sitting in chambers.

Division 6—Damage by aircraft

Damage by aircraft

29A. (1) In this section—

"**aircraft damage**" means personal injury, loss of life, material loss, damage or destruction in South Australia that is not covered by the Commonwealth Act but would, assuming the aircraft had been engaged in trade and commerce among the States, have been covered by the Commonwealth Act;

"**Commonwealth Act**" means the *Damage by Aircraft Act 1999* (Cwth).

(2) Words and expressions used in this section that are defined in the Commonwealth Act have the same respective meanings as in the Commonwealth Act.

(3) Subject to the following qualifications, liability for aircraft damage is to be determined on the same principles as under the Commonwealth Act.

(4) The following qualifications apply:

- (a) a person who uses an aircraft as a passenger or for the transportation of passengers or goods is not to be regarded as an operator of the aircraft if the person reasonably relies on the skill of another (not being an employee) to operate the aircraft;
- (b) if aircraft damage results from the unauthorised use of an aircraft, a person (other than the unauthorised user) who is liable for damage as owner or operator of the aircraft is entitled to be indemnified against that liability by the person (not being an employee) who used the aircraft without proper authority;
- (c) if aircraft damage results from an impact between an aircraft or part of an aircraft and a person or object (other than a person or object in the aircraft), liability is to be determined according to principles of negligence unless—
 - (i) the impact occurs while the aircraft is in flight; or
 - (ii) the impact is caused by the aircraft or part of the aircraft crashing or falling to the ground;
- (d) exemplary damages are not to be awarded for aircraft damage unless the defendant is shown to have caused the damage intentionally or recklessly.

(5) This section does not apply to damage arising from operations of any of the following kinds carried out from an aircraft:

- (a) seeding;
- (b) the spreading of fertiliser, weedicide, pesticide or other agricultural chemicals;
- (c) firefighting;
- (d) the dispersal of pollutants;
- (e) any similar operations,

unless the damage is caused by an impact between the aircraft or part of the aircraft and the ground or an impact between a substantial thing dropping or falling from the aircraft and the ground.

Exclusion of liability for trespass or nuisance

29B. (1) In this section—

"**Commonwealth Acts**" means the *Air Navigation Act 1920* (Cwth) and the *Civil Aviation Act 1988* (Cwth);

Wrongs Act 1936

"land" includes a building, structure or other property on land (whether affixed to the land or not);

"relevant air navigation regulations" means the regulations governing air navigation under the Commonwealth Acts including those regulations as they apply to air navigation in South Australia under the *Air Navigation Act 1937*.

(2) No action for trespass or nuisance arises by reason only of the flight of an aircraft over land, or the ordinary incidents of such a flight, if—

- (a) the aircraft flies at a height that is reasonable having regard to prevailing weather conditions and other relevant circumstances; and
- (b) the aircraft is operated in accordance with the relevant air navigation regulations.

Division 7—Abolition of rule of common employment

Abolition of rule of common employment

30. (1) Where any injury or damage is suffered by a servant by reason of the wrongful act, neglect or default of a fellow servant, the employer of those servants shall be liable in damages in respect of that injury or damage in the same manner and in the same cases as if those servants had not been engaged in a common employment.

(2) This section applies to any injury or damage arising from a wrongful act, neglect or default committed after the enactment of this section, whether the contract of employment was made before or is made after the enactment of this section.

(3) "Employer" in this section includes the Crown and instrumentalities of the Crown.

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Division 8—Actions in tort relating to husband and wife

Abolition of rule as to unity of spouses

32. (1) Subject to this section, where any injury or damage is suffered by any person by reason of the wrongful act, neglect or default of his spouse, the spouse shall be liable in respect of that injury or damage in all respects as if the injured person and the person by reason of whose wrongful act neglect or default the injury or damage is suffered were not married.

(2) This section shall not be construed as entitling any person to maintain an action in trespass or ejectment against his spouse in respect of a matrimonial home.

(3) Where proceedings are brought pursuant to this section, the court may dismiss the proceedings if it appears to the court—

- (a) that no substantial benefit would accrue to either party from the continuation of the proceedings; or
- (b) that the question or questions in issue could be more conveniently disposed of on an application under section 105 of the *Law of Property Act*.

Wife may claim for loss or impairment of consortium

33. (1) Where a person causes injury to another by wrongful act, neglect or default, he shall (whether or not the injury results in death) be liable in damages to the wife of the injured person for loss or injury suffered by her as a result of the loss or impairment of the consortium of husband and wife.

(2) The damages shall be assessed in the same manner as upon a claim by a husband for damages in tort in respect of loss or impairment of consortium.

Damages where injured spouse participated in a business

34. (1) Where a husband and wife are engaged in the conduct of a business, and either of them suffers an injury as a result of which his or her participation in the conduct of the business ceases or is impaired, the other spouse shall be entitled to recover from a person whose wrongful act, neglect or default caused the injury compensation for loss that he or she has suffered or continues to suffer by reason of the fact that the participation of his or her spouse in the conduct of the business has ceased or has been impaired.

(2) In this section—

"**business**" includes any professional or commercial undertaking;

"**injury**" includes an injury that results in the death of a spouse.

Division 9—Abolition of actions of seduction, enticement and harbouring

Abolition of actions for enticement, seduction and harbouring

35. The following actions at common law are abolished—

(a) the action for seduction; and

(b) the action for enticement; and

(c) the action for harbouring.

* * * * *

Division 10A—Unreasonable delay in resolution of claim

Definitions

35B. In this Division—

"**dependant**" of a deceased person means any person on whose behalf an action could (assuming that he or she had been financially dependent on the deceased person) be brought under Part 2;

"**personal injury**" includes—

(a) a disease;

(b) any impairment of a physical or mental condition.

Wrongs Act 1936

Damages for unreasonable delay in resolution of a claim

35C. (1) Damages in the nature of exemplary damages may be awarded, on a claim by the personal representative of a deceased person, against another person (the person in default) if the conditions prescribed by subsection (2) are satisfied.

(2) The conditions for an award of damages under this section are as follows:

- (a) the deceased person suffered personal injury giving rise to a right to compensation or damages; and
- (b) the deceased person made a claim in writing (giving a reasonable indication of the grounds of the claim) for compensation or damages for the personal injury; and
- (c) a person (the **person in default**) unreasonably delayed the resolution of the claim knowing, or in circumstances in which he or she ought to have known, that the deceased person was, because of advanced age, illness or injury, at risk of dying before the resolution of the claim; and
- (d) the person in default is—
 - (i) the person against whom the deceased person's claim lay; or
 - (ii) some other person who controlled or had an interest in the defence of the claim; and
- (e) the deceased person died before compensation or damages for non-economic loss were finally determined by agreement between the parties or by judgment or decision of a court or tribunal; and
- (f) damages have not been recovered and are not recoverable under section 3(2) of the *Survival of Causes of Action Act 1940*.

(3) For the purposes of subsection (2)—

- (a) the question whether a person has unreasonably delayed resolution of a claim is to be determined in the context of the proceedings as a whole (including negotiations and other non-curial proceedings) and the conduct of the deceased person and any other parties to the proceedings;
- (b) a lawful fee agreement between a legal practitioner and client does not give the legal practitioner an interest in the defence of the claim;
- (c) if a judgment or decision of a court or tribunal is liable to appeal, then—
 - (i) if there is no appeal—the judgment or decision finally determines compensation or damages on the date it is given; but
 - (ii) if there is an appeal—there is no final determination of compensation or damages until the appeal is determined.

(4) A court or tribunal that has, or would have had, jurisdiction in an action for damages, workers compensation or other monetary compensation for the personal injury has jurisdiction to award damages on a claim under this section but such a claim must be brought before the court or tribunal within 3 years after the deceased person's death (either as a separate proceeding or by introducing it as an additional claim in existing proceedings for damages or compensation for the personal injury).

(5) In determining the amount of the damages to be awarded under this section, the court or tribunal is to have regard to—

- (a) the need to ensure that the person in default does not benefit from the unreasonable delay in the resolution of the deceased person's claim; and
- (b) the need to punish the person in default for the unreasonable delay; and
- (c) any other relevant factor.

(6) Damages may be awarded under this section despite any statutory restriction on the award of exemplary or punitive damages but, if the deceased person's claim was for worker's compensation, the damages cannot exceed the total amount of the compensation for non-economic loss to which the deceased person would have been entitled if the claim had been resolved immediately before his or her death.

(7) Damages awarded under this section are to be paid, at the direction of the court or tribunal—

- (a) to the dependants of the deceased person in proportions determined by the court or tribunal; or
- (b) to the estate of the deceased person.

(8) In exercising its discretion under subsection (7), the court or tribunal—

- (a) is to make an award to dependants rather than to the estate unless there are no dependants or there is some other good reason to the contrary; and
- (b) in apportioning between dependants is to have regard to other relevant statutory entitlements (if any) that arise on the death of the deceased person.

(9) This section applies if the deceased person died on or after the commencement of this section (whether the circumstances out of which the personal injury claim arose occurred before or after that date).

Regulations

35D. (1) The Governor may make regulations for the purposes of this Division.

(2) The regulations may (for example) deal with any aspect of the procedure to be followed in proceedings under this Division.

Division 11—Liability for perjury in civil actions

Liability for perjury in civil actions

36. (1) Subject to this section, a person who gives perjured evidence in civil proceedings is liable for damage suffered by any other person in consequence of the perjury.

(2) In proceedings under this section, the plaintiff must establish—

(a) that the defendant—

(i) has been convicted of perjury; or

(ii) has been found guilty of contempt of court on the ground of having committed perjury; or

(iii) has been committed for trial on a charge of perjury but by reason of the fact that no indictment has been preferred, or a *nolle prosequi* has been entered, has not been tried on that charge; and

(b) that the perjured evidence was material to the outcome of the proceedings in which it was given.

(3) Where the defendant has not been convicted of perjury, or been found guilty of contempt of court on the ground of having committed perjury, the evidence upon which a liability is alleged to arise under this section must be corroborated in a material particular.

(4) It is no defence to an action under this section that the perjured evidence was accepted as true by the court before which it was given.

(5) In proceedings under this section, an apparently genuine document that appears to be a transcript of evidence given in the proceedings in which the perjured evidence is alleged to have been given shall be accepted as evidence—

(a) of the evidence given in those proceedings; and

(b) where evidence appears from the transcript to have been given by a particular person—that it was in fact given by that person.

Division 12—Racial victimisation

Racial victimisation

37. (1) In this section—

"**act of racial victimisation**" means a public act inciting hatred, serious contempt or severe ridicule of a person or group of persons on the ground of their race but does not include—

(a) publication of a fair report of the act of another person; or

(b) publication of material in circumstances in which the publication would be subject to a defence of absolute privilege in proceedings for defamation; or

- (c) a reasonable act, done in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest (including reasonable public discussion, debate or expositions);

"**detriment**" means—

- (a) injury, damage or loss; or
- (b) distress in the nature of intimidation, harassment or humiliation;

"**public act**" means—

- (a) any form of communication with the public; or
- (b) conduct in a public place;

"**race**" of a person means the nationality, country of origin, colour or ethnic origin of the person or of another person with whom the person resides or associates.

(2) An act of racial victimisation that results in detriment is actionable as a tort by the person who suffers the detriment.

(3) In an action for damages for racial victimisation, damages may be awarded to compensate any form of detriment.

(4) The total amount of the damages that may be awarded for the same act or series of acts cannot exceed \$40 000.

(5) In applying the limit fixed by subsection (4), the court must take into account damages awarded by a court in criminal proceedings on convicting the defendant, in respect of the same act or series of acts, of the offence or a series of offences of racial vilification¹.

(6) Before a court awards damages for an act of racial victimisation, the court must—

- (a) take reasonable steps to ensure that all persons who may have been harmed by the act are given a reasonable opportunity to claim damages in the proceedings; or
- (b) take other action that appears reasonable and necessary in the circumstances to protect the interests of possible claimants who are not before the court.

¹ See section 6 of the *Racial Vilification Act 1996*.

Division 13—Good samaritans

Good samaritans

38. (1) In this section—

"**emergency assistance**" means—

- (a) emergency medical assistance; or

Wrongs Act 1936

- (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.

APPENDIX

LEGISLATIVE HISTORY

Transitional Provisions

(Transitional provision from Wrongs Act Amendment Act 1986, s. 4)

4. The amendments made by this Act do not affect a cause of action that arose before the commencement of this Act.

(Transitional provision from Wrongs Act Amendment Act 1987, s. 4)

4. This Act does not affect a cause of action that arose before its commencement and does not give rise to a cause of action in relation to an event that occurred before its commencement.

(Transitional provision from Statutes Amendment (Motor Vehicles and Wrongs) Act 1993, s. 19)

19. The amendments made by this Act do not affect a cause of action, right or liability that arose before the commencement of this Act.

(Transitional provision from Statutes Amendment (Motor Accidents) Act 1998, s. 14)

14. (1) An amendment made by this Act does not affect a cause of action, right or liability that arose before the commencement of the amendment.

(2) However, subsection (1) does not derogate from the operation of section 105 of the *Motor Vehicles Act 1959*.

(Transitional provisions from Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002, ss. 6 and 7)

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.

Legislative History

Legislative history prior to 3 February 1976 appears in marginal notes and footnotes included in the consolidation of this Act contained in Volume 11 of *The Public General Acts of South Australia 1837-1975* at page 642.

Wrongs Act 1936

	Legislative history since 3 February 1976 (entries in bold type indicate amendments incorporated since the last reprint) is as follows:
Section 3:	substituted by 116, 1983, s. 2
Section 3B:	inserted by 116, 1983, s. 3; omitted under <i>Legislation Revision and Publication Act 2002</i> 10.3.03
Section 6:	amended by 116, 1983, s. 4
Section 7(1):	amended by 116, 1983, s. 5; 30, 1997, s. 19; 33, 1999, Sched. (item 64)
Section 8:	amended by 116, 1983, s. 6
Section 10(1):	amended by 116, 1983, s. 7
Section 11:	amended by 116, 1983, s. 8
Section 14:	amended by 116, 1983, s. 9
	Part 1A comprising s. 17A and heading inserted by 116, 1983, s. 10
	Part 1B comprising ss. 17B - 17E and heading inserted by 45, 1987, s. 3
Section 19:	amended by 59, 1994, Sched. 2
Section 23C(4):	amended by 59, 1994, Sched. 2
	Part 2A comprising ss. 24 - 24O and headings inserted by 21, 2002, s. 3
Heading preceding section 24:	repealed and Part 3 Division 1 heading inserted in its place by 8, 2000, s. 4 (Sched.); repealed by 41, 2001, s. 9(1)
Section 24:	amended by 8, 2000, s. 4 (Sched.); repealed by 41, 2001, s. 9(1)
Sections 25 - 27:	repealed by 41, 2001, s. 9(1)
Heading preceding section 27A:	repealed and Part 3 Division 2 heading inserted in its place by 8, 2000, s. 4 (Sched.); repealed by 41, 2001, s. 9(1)
Section 27A:	amended by 8, 2000, s. 4 (Sched.); repealed by 41, 2001, s. 9(1)
Section 27B:	repealed by 41, 2001, s. 9(1)
Heading preceding section 27C:	repealed and Part 3 Division 3 heading inserted in its place by 8, 2000, s. 4 (Sched.)
Heading preceding section 28:	repealed and Part 3 Division 4 heading inserted in its place by 8, 2000, s. 4 (Sched.)
Heading preceding section 29:	repealed and Part 3 Division 5 heading inserted in its place by 8, 2000, s. 4 (Sched.)
	Division 6 of Part 3 comprising ss. 29A and 29B and heading inserted by 8, 2000, s. 3
Heading preceding section 30:	repealed and Part 3 Division 7 heading inserted in its place by 8, 2000, s. 4 (Sched.)
Section 31 and heading:	repealed by 116, 1983, s. 11
Heading preceding section 32:	repealed and Part 3 Division 8 heading inserted in its place by 8, 2000, s. 4 (Sched.)
Heading preceding section 35:	repealed and Part 3 Division 9 heading inserted in its place by 8, 2000, s. 4 (Sched.)
	Division 10 of Part 3 comprising s. 35A and heading inserted by 126, 1986, s. 3; amended by 41, 1988, s. 3; 38, 1991, s. 2; 5, 1993, s. 18; 62, 1993, s. 42; 21, 1994, s. 31; 30, 1994, Sched. 4 cl. 2(e); 53, 1997, s. 12; 67, 1998, s. 13; 8, 2000, s. 4 (Sched.); repealed by 21, 2002, s. 4

Division 10A of Part 3 comprising ss. 35B - 35D and heading inserted by 38, 2002, s. 4

Heading preceding section 36: inserted by 87, 1983, s. 2; repealed and Part 3 Division 11 heading inserted in its place by 8, 2000, s. 4 (Sched.)

Section 36: inserted by 87, 1983, s. 2

Heading preceding section 37: inserted by 92, 1996, s. 7: repealed and Part 3 Division 12 heading inserted in its place by 8, 2000, s. 4 (Sched.)

Section 37: inserted by 92, 1996, s. 7

Division 13 of Part 3 comprising s. 38 and heading inserted by 21, 2002, s. 5

Division 14 of Part 3 comprising s. 39 and heading inserted by