

South Australia

Civil Liability Act 1936

An Act to consolidate certain Acts relating to wrongs.

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Legislative history

The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Civil Liability Act 1936*.

2—Act to bind the Crown

This Act binds the Crown in right of South Australia and, so far as the legislative power of the Parliament of South Australia permits, the Crown in all its other capacities.

3—Interpretation

In this Act, unless the contrary intention appears—

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

brother includes half-brother and step-brother;

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

consequential mental harm means mental harm that is a consequence of bodily injury to the person suffering the mental harm;

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);

contributory negligence means a failure by a person who suffers harm to exercise reasonable care and skill for his or her own protection or for the protection of his or her own interests;

damages means compensation or damages for harm and includes solatium but does not include—

- (a) workers compensation; or
- (b) compensation under a statutory scheme for compensating victims of crime;

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

duty of care means a duty to take reasonable care or to exercise reasonable skill (or both);

harm includes loss of life, personal injury, damage to property, economic loss and loss of any other kind;

health care service includes—

- (a) a diagnostic service;
- (b) a therapeutic service;
- (c) any other service directed at maintaining or restoring health;

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;

mental harm means impairment of a person's mental condition;

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*;

negligence means failure to exercise reasonable care and skill, and includes a breach of a tortious, contractual or statutory duty of care;

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;

obvious risk—see section 36;

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

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 harm;
- (b) death;

precaution includes any action to avoid or reduce the risk of harm;

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;

pure mental harm means mental harm other than consequential mental harm;

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;

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

4—Application of this Act

- (1) This Act 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 harm arising from an accident occurring in this State.
- (2) Subsection (1) is intended to extend, and not to limit in any way, the application of this Act in accordance with its terms.
- (3) This Act does not derogate from the *Recreational Services (Limitation of Liability) Act 2002*.
- (4) This Act does not affect a right to compensation under the *Workers Rehabilitation and Compensation Act 1986*.

Part 3—Liability for animals

18—Liability for animals

- (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 4—Occupiers liability

19—Interpretation

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).

20—Occupier's duty of care

- (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.

21—Landlord's liability limited to breach of duty to repair

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.

22—Exclusion of conflicting common law principles

- (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 5—Wrongful acts or neglect causing death

23—Liability for death caused wrongfully

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.

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

- (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, subject to this Act, give such damages as it thinks proportioned to the harm resulting from the 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—
 - (a) 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;

- (b) 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;
 - (c) any superannuation payments or benefits consequent upon the death of the deceased person;
 - (d) any sum paid or payable consequent upon the death of the deceased person under any contributory medical hospital death or funeral benefit scheme;
 - (e) 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.
- (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.

25—Restriction of actions and time of commencement

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.

26—Particulars of person for whom damages claimed

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.

27—Provision where no executor or administrator or action not commenced within 6 months

- (1) In any case falling under section 23, 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.

28—Liability to parents of person wrongfully killed

- (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.
- (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.

29—Liability to surviving spouse of person wrongfully killed

- (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.

30—Further provisions as to *solatium* etc

- (1) The rights conferred by sections 28 and 29 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 28 or 29 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 28 or 29 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 28 or 29 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 6—Negligence

Division 1—Duty of care

31—Standard of care

- (1) For determining whether a person (the *defendant*) was negligent, the standard of care required of the defendant is that of a reasonable person in the defendant's position who was in possession of all information that the defendant either had, or ought reasonably to have had, at the time of the incident out of which the harm arose.
- (2) The reasonable person in the defendant's position will be taken to be sober unless—
 - (a) the defendant was intoxicated; and
 - (b) the intoxication was wholly attributable to the use of drugs in accordance with the prescription or instructions of a medical practitioner; and
 - (c) the defendant was complying with the instructions and recommendations of the medical practitioner and the manufacturer of the drugs as to what he or she should do, or avoid doing, while under the influence of the drugs,

and, in that event, the reasonable person will be taken to be intoxicated to the same extent as the defendant.

32—Precautions against risk

- (1) A person is not negligent in failing to take precautions against a risk of harm unless—
 - (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known); and
 - (b) the risk was not insignificant; and
 - (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.
- (2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things):
 - (a) the probability that the harm would occur if precautions were not taken;
 - (b) the likely seriousness of the harm;
 - (c) the burden of taking precautions to avoid the risk of harm;
 - (d) the social utility of the activity that creates the risk of harm.

33—Mental harm—duty of care

- (1) A person (the *defendant*) does not owe a duty to another person (the *plaintiff*) to take care not to cause the plaintiff mental harm unless a reasonable person in the defendant's position would have foreseen that a person of normal fortitude in the plaintiff's position might, in the circumstances of the case, suffer a psychiatric illness.
- (2) For the purposes of this section—
 - (a) in a case of pure mental harm, the circumstances of the case to which the court is to have regard include the following:
 - (i) whether or not the mental harm was suffered as the result of a sudden shock;
 - (ii) whether the plaintiff witnessed, at the scene, a person being killed, injured or put in peril;
 - (iii) the nature of the relationship between the plaintiff and any person killed, injured or put in peril;
 - (iv) whether or not there was a pre-existing relationship between the plaintiff and the defendant;
 - (b) in a case of consequential mental harm, the circumstances of the case include the nature of the bodily injury out of which the mental harm arose.
- (3) This section does not affect the duty of care of a person (the *defendant*) to another (the *plaintiff*) if the defendant knows, or ought reasonably to know, that the plaintiff is a person of less than normal fortitude.

Division 2—Causation

34—General principles

- (1) A determination that negligence caused particular harm comprises the following elements:
 - (a) that the negligence was a necessary condition of the occurrence of the harm (*factual causation*); and
 - (b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (*scope of liability*).
- (2) Where, however, a person (the *plaintiff*) has been negligently exposed to a similar risk of harm by a number of different persons (the *defendants*) and it is not possible to assign responsibility for causing the harm to any one or more of them—
 - (a) the court may continue to apply the principle under which responsibility may be assigned to the defendants for causing the harm¹; but
 - (b) the court should consider the position of each defendant individually and state the reasons for bringing the defendant within the scope of liability.
- (3) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

Note—

- ¹ See *Fairchild v Glenhaven Funeral Services Ltd* [2002] 3 WLR 89.

35—Burden of proof

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

Division 3—Assumption of risk

36—Meaning of obvious risk

- (1) For the purposes of this Division, an *obvious risk* to a person who suffers harm is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person.
- (2) Obvious risks include risks that are patent or matters of common knowledge.
- (3) A risk may be obvious even though it is of low probability.

37—Injured persons presumed to be aware of obvious risks

- (1) If, in an action for damages for negligence, a defence of voluntary assumption of risk (*volenti non fit injuria*) is raised by the defendant and the risk is an obvious risk, the plaintiff is taken to have been aware of the risk unless the plaintiff proves, on the balance of probabilities, that he or she was not actually aware of the risk.
- (2) For the purposes of this section, a person is aware of a risk if the person is aware of the type or kind of risk, even if the person is not aware of the precise nature, extent or manner of occurrence of the risk.

- (3) However, in order to establish a defence of voluntary assumption of risk, it is necessary to establish that the risk was such that a reasonable person in the plaintiff's position would have taken steps (which the plaintiff did not in fact take) to avoid it.

38—No duty to warn of obvious risk

- (1) A person (the *defendant*) does not owe a duty of care to another person (the *plaintiff*) to warn of an obvious risk to the plaintiff.
- (2) Subsection (1) does not apply if—
- (a) the plaintiff has requested advice or information about the risk from the defendant; or
 - (b) the defendant is required to warn the plaintiff of the risk—
 - (i) by a written law; or
 - (ii) by an applicable code of practice in force under the *Recreational Services (Limitation of Liability) Act 2002*; or
 - (c) the risk is a risk of death or of personal injury to the plaintiff from the provision of a health care service by the defendant.
- (3) Subsection (2) does not give rise to a presumption of a duty to warn of a risk in the circumstances referred to in that subsection.

39—No liability for materialisation of inherent risk

- (1) A person is not liable in negligence for harm suffered by another person as a result of the materialisation of an inherent risk.
- (2) An *inherent risk* is a risk of something occurring that cannot be avoided by the exercise of reasonable care and skill.
- (3) This section does not operate to exclude liability in connection with a duty to warn of a risk.

Division 4—Negligence on the part of persons professing to have a particular skill

40—Standard of care to be expected of persons professing to have a particular skill

In a case involving an allegation of negligence against a person (the *defendant*) who holds himself or herself out as possessing a particular skill, the standard to be applied by a court in determining whether the defendant acted with due care and skill is, subject to this Division, to be determined by reference to—

- (a) what could reasonably be expected of a person professing that skill; and
- (b) the relevant circumstances as at the date of the alleged negligence and not a later date.

41—Standard of care for professionals

- (1) A person who provides a professional service incurs no liability in negligence arising from the service if it is established that the provider acted in a manner that (at the time the service was provided) was widely accepted in Australia by members of the same profession as competent professional practice.
- (2) However, professional opinion cannot be relied on for the purposes of this section if the court considers that the opinion is irrational.
- (3) The fact that there are differing professional opinions widely accepted in Australia by members of the same profession does not prevent any one or more (or all) of those opinions being relied on for the purposes of this section.
- (4) Professional opinion does not have to be universally accepted to be considered widely accepted.
- (5) This section does not apply to liability arising in connection with the giving of (or the failure to give) a warning, advice or other information in respect of a risk of death of or injury associated with the provision of a health care service.

Division 5—Liability of road authorities

42—Liability of road authorities

- (1) A road authority is not liable in tort for a failure—
 - (a) to maintain, repair or renew a road; or
 - (b) to take other action to avoid or reduce the risk of harm that results from a failure to maintain, repair or renew a road.

- (2) In this section—

road means a street, road or thoroughfare to which public access is available to vehicles or pedestrians (or both), and includes—

- (a) a bridge, viaduct, busway (including the O-Bahn) or subway;
- (b) an alley, laneway or walkway;
- (c) a carpark;
- (d) a footpath;
- (e) a structure associated with a road;

road authority means—

- (a) a body or person in which the ownership of a road is vested by statute, or to which the care, control and management of a road is assigned by statute; or
- (b) if the road is on land of the Crown—the Crown or the Minister responsible for the care, control and management of the land; or
- (c) any other public authority or public body that is in fact responsible for the care, control and management of a road;

vehicle includes—

- (a) a motor vehicle;

- (b) a bicycle;
- (c) an animal that is being ridden;
- (d) an animal that is being used to draw a vehicle,

but does not include a tram or other vehicle (except an O-Bahn bus) that is driven on a fixed track.

Division 6—Exclusion of liability for criminal conduct

43—Exclusion of liability for criminal conduct

- (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—
 - (a) applies where damages are claimed for personal injury—
 - (i) arising from a motor accident (whether caused intentionally or unintentionally); or
 - (ii) arising from an accident caused wholly or in part—
 - (A) by negligence; or
 - (B) by some other unintentional tort on the part of a person other than the injured person; or
 - (C) by breach of a contractual duty of care; and
 - (b) if an injured person dies as a result of injury arising in the manner described in paragraph (a)—applies where damages for harm resulting from the death are claimed under Part 5; and
 - (c) does not affect the operation of a rule of law relating to joint illegal enterprises.

