

**Wrongs and Limitation of Actions Acts (Insurance
Reform) Act 2003**
Act No. 60/2003

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Victoria

No. 60 of 2003

Wrongs and Limitation of Actions Acts (Insurance Reform) Act 2003[†]

[Assented to 16 June 2003]

The Parliament of Victoria enacts as follows:

PART 1—PRELIMINARY

1. *Purposes*

The main purposes of this Act are—

- (a) to amend the **Wrongs Act 1958**—
 - (i) to provide for thresholds in relation to the recovery of damages for non-economic loss; and

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- (ii) to limit the damages that may be awarded for gratuitous attendant care services; and
 - (iii) to provide for proportionate liability in proceedings for economic loss; and
 - (b) to amend the **Limitation of Actions Act 1958** to provide for new limitation periods for certain civil actions for damages that relate to death or personal injury; and
 - (c) to amend the **Building Act 1993** to repeal the provisions relating to proportionate liability; and
 - (d) to amend the **Accident Compensation Act 1985** in relation to the role of Medical Panels under the **Wrongs Act 1958**.

2. Commencement

- (1) This Act (except sections 3, 17 and 18) is deemed to have come into operation on 21 May 2003.
 - (2) Sections 3, 17 and 18 come into operation on a day to be proclaimed.
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PART 2—AMENDMENTS TO WRONGS ACT 1958

3. *New Part IVAA inserted*

After Part IV of the **Wrongs Act 1958** insert—

'PART IVAA—PROPORTIONATE LIABILITY

24AE. *Definitions*

In this Part—

"apportionable claim" means a claim to which this Part applies;

"court" includes tribunal and, in relation to a claim for damages, means any court or tribunal by or before which the claim falls to be determined;

"damages" includes any form of monetary compensation;

"defendant" includes any person joined as a defendant or other party in the proceeding (except as a plaintiff) whether joined under this Part, under rules of court or otherwise;

"economic loss" means any one or more of the following—

- (a) past economic loss due to loss of earnings or the deprivation or impairment of earning capacity;
- (b) future economic loss due to the deprivation or impairment of earning capacity;
- (c) the loss of expectation of financial support;

See:
Act No.
6420/1958.
Reprint No. 7
as at
19 November
1998
and
amending
Act Nos
75/2000
and 49/2002.
LawToday:
www.dms.dpc.vic.gov.au

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"injury" means personal or bodily injury
and includes—

- (a) pre-natal injury; and
- (b) psychological or psychiatric injury; and
- (c) disease; and
- (d) aggravation, acceleration or recurrence of an injury or disease.

24AF. Application of Part

- (1) This Part applies to—
 - (a) a claim for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from a failure to take reasonable care; and
 - (b) a claim for damages for a contravention of section 9 of the **Fair Trading Act 1999**.
 - (2) If a proceeding involves 2 or more apportionable claims arising out of different causes of action, liability for the apportionable claims is to be determined in accordance with this Part as if the claims were a single claim.
 - (3) A provision of this Part that gives protection from civil liability does not limit or otherwise affect any protection from liability given by any other provision of this Act or by another Act or law.
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24AG. *What claims are excluded from this Part?*

- (1) This Part does not apply to claims arising out of an injury.
 - (2) Without limiting sub-section (1), this Part does not apply to the following—
 - (a) a claim to which Part 3, 6 or 10 of the **Transport Accident Act 1986** applies;
 - (b) a claim to which Part IV of the **Accident Compensation Act 1985** applies;
 - (c) a claim in respect of an injury which entitles, or may entitle, a worker, or a dependant of a worker, within the meaning of the **Workers Compensation Act 1958** to compensation under that Act;
 - (d) a claim for compensation under Part V of the **Country Fire Authority Act 1958** or a claim for compensation under a compensation scheme established under the regulations made under that Act;
 - (e) an application for compensation under Part 3 of the **Victoria State Emergency Service Act 1987**;
 - (f) a claim for compensation under Part 6 of the **Emergency Management Act 1986**;
 - (g) an application for compensation under the **Police Assistance Compensation Act 1968**;
 - (h) an application for assistance under the **Victims of Crime Assistance Act 1996**;
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- (i) a complaint under the **Equal Opportunity Act 1995**;
 - (j) a claim for compensation under Part 8 of the **Juries Act 2000** or Part VII of the **Juries Act 1967**;
 - (k) a claim for compensation under Division 6 of Part II of the **Education Act 1958**.
- (3) This Part does not apply to claims in proceedings of a class that is excluded by the regulations from the operation of this Part.

24AH. *Who is a concurrent wrongdoer?*

- (1) A concurrent wrongdoer, in relation to a claim, is a person who is one of 2 or more persons whose acts or omissions caused, independently of each other or jointly, the loss or damage that is the subject of the claim.
- (2) For the purposes of this Part it does not matter that a concurrent wrongdoer is insolvent, is being wound up, has ceased to exist or has died.

24AI. *Proportionate liability for apportionable claims*

- (1) In any proceeding involving an apportionable claim—
 - (a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the loss or damage claimed that the court considers just having regard to the extent of the defendant's responsibility for the loss or damage; and
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- (b) judgment must not be given against the defendant for more than that amount in relation to that claim.
 - (2) If the proceeding involves both an apportionable claim and a claim that is not an apportionable claim—
 - (a) liability for the apportionable claim is to be determined in accordance with this Part; and
 - (b) liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from this Part) are relevant.
 - (3) In apportioning responsibility between defendants in the proceeding the court must not have regard to the comparative responsibility of any person who is not a party to the proceeding unless the person is not a party to the proceeding because the person is dead or, if the person is a corporation, the corporation has been wound-up.

24AJ. *Contribution not recoverable from defendant*

Despite anything to the contrary in Part IV, a defendant against whom judgment is given under this Part as a concurrent wrongdoer in relation to an apportionable claim—

- (a) cannot be required to contribute to the damages recovered or recoverable from another concurrent wrongdoer in the same proceeding for the apportionable claim; and

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- (b) cannot be required to indemnify any such wrongdoer.

24AK. *Subsequent actions*

- (1) In relation to an apportionable claim, nothing in this Part or any other law prevents a plaintiff who has previously recovered judgment against a concurrent wrongdoer for an apportionable part of any loss or damage from bringing another action against any other concurrent wrongdoer for that loss or damage.
- (2) However, in any proceeding in respect of any such action the plaintiff cannot recover an amount of damages that, having regard to any damages previously recovered by the plaintiff in respect of the loss or damage, would result in the plaintiff receiving compensation for loss or damage that is greater than the loss or damage actually suffered by the plaintiff.

24AL. *Joining non-party concurrent wrongdoer in the action*

- (1) Subject to sub-section (2), the court may give leave for any one or more persons who are concurrent wrongdoers in relation to an apportionable claim to be joined as defendants in a proceeding in relation to that claim.
- (2) The court is not to give leave for the joinder of any person who was a party to any previously concluded proceeding in relation to the apportionable claim.

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24AM. *What if a defendant is fraudulent?*

Despite sections 24AI and 24AJ, a defendant in a proceeding in relation to an apportionable claim who is found liable for damages and against whom a finding of fraud is made is jointly and severally liable for the damages awarded against any other defendant in the proceeding.

24AN. *Liability for contributory negligence not affected*

Nothing in this Part affects the operation of section 26.

24AO. *Effect of Part IV*

Except as provided in section 24AJ, nothing in this Part affects the operation of Part IV.

24AP. *Part not to affect other liability*

Nothing in this Part—

- (a) prevents a person from being held vicariously liable for a proportion of any apportionable claim for which another person is liable; or
- (b) prevents a person from being held jointly and severally liable for the damages awarded against another person as agent of the person; or
- (c) prevents a partner from being held jointly and severally liable with another partner for that proportion of an apportionable claim for which the other partner is liable; or
- (d) prevents a court from awarding exemplary or punitive damages against a defendant in a proceeding; or

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- (e) affects the operation of any other Act to the extent that it imposes several liability on any person in respect of what would otherwise be an apportionable claim.

24AQ. *Supreme Court—limitation of jurisdiction*

It is the intention of sections 24AI and 24AL to alter or vary section 85 of the **Constitution Act 1975**.

24AR. *Regulations*

- (1) The Governor in Council may make regulations generally prescribing any matter or thing required or permitted by this Part to be prescribed or necessary to be prescribed to give effect to this Part.
- (2) The regulations—
 - (a) may leave any matter to be determined by the Minister; and
 - (b) may apply, adopt or incorporate, wholly or partially or as amended by the regulations, any matter contained in any document as existing or in force—
 - (i) from time to time; or
 - (ii) at a particular time.

24AS. *Transitional*

This Part applies to proceedings that are commenced in a court on or after the commencement of section 3 of the **Wrongs and Limitation of Actions Acts (Insurance Reform) Act 2003**.'

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4. Insertion of Part VBA

After Part VB of the **Wrongs Act 1958**
insert—

**'PART VBA—THRESHOLDS IN RELATION TO
RECOVERY OF DAMAGES FOR NON-
ECONOMIC LOSS**

Division 1—Introductory

28LB. Definitions

In this Part—

"A.M.A. Guides" means the American Medical Association's Guides to the Evaluation of Permanent Impairment (Fourth Edition) (other than Chapter 15) as modified by or under this Part;

"approved medical practitioner" means—

- (a) if a training course has been approved under section 91(1)(b) of the **Accident Compensation Act 1985**, a medical practitioner who has successfully completed the course; or
- (b) if a training course has not been so approved, a medical practitioner;

"certificate of assessment" means a certificate provided under section 28LN;

"claimant" means a person who makes or is entitled to make a claim for damages that relate to the injury to a person caused by the fault of another person;

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"Convenor" means the Convenor or Deputy Convenor appointed under section 63 of the **Accident Compensation Act 1985**;

"court" includes tribunal and, in relation to a claim for damages, means any court or tribunal by or before which the claim falls to be determined;

"fault" includes act or omission;

"injury" means personal or bodily injury and includes—

- (a) pre-natal injury; and
- (b) psychological or psychiatric injury; and
- (c) disease; and
- (d) aggravation, acceleration or recurrence of an injury or disease;

"Medical Panel" means a Medical Panel under the **Accident Compensation Act 1985**;

"medical practitioner" means a registered medical practitioner (within the meaning of the **Medical Practice Act 1994**) and, in relation to anything done for the purposes of this Act in a place outside Victoria, includes a medical practitioner who is lawfully qualified under a law in force in that place to do that thing;

"medical question" means a question as to the degree of impairment of a person resulting from injury;

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"non-economic loss" means any one or more of the following—

- (a) pain and suffering;
- (b) loss of amenities of life;
- (c) loss of enjoyment of life;

"registered health practitioner" means—

- (a) a medical practitioner; or
- (b) a registered dentist within the meaning of the **Dental Practice Act 1999**; or
- (c) a registered chiropractor within the meaning of the **Chiropractors Registration Act 1996**; or
- (d) a registered optometrist within the meaning of the **Optometrists Registration Act 1996**; or
- (e) a registered osteopath within the meaning of the **Osteopaths Registration Act 1996**; or
- (f) a registered physiotherapist within the meaning of the **Physiotherapists Registration Act 1998**; or
- (g) a registered podiatrist within the meaning of the **Podiatrists Registration Act 1997**; or
- (h) a registered psychologist within the meaning of the **Psychologists Registration Act 2000**; or
- (i) a registered Chinese medicine practitioner within the meaning of the **Chinese Medicine Registration Act 2000**;

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"respondent", in relation to a claim, means the person against whom the claim is made;

"threshold level" means—

- (a) in the case of injury (other than psychiatric injury), impairment of more than 5 per cent;
- (b) in the case of psychiatric injury, impairment of more than 10 per cent.

28LC. Application of Part

- (1) This Part applies to claims for the recovery of damages for non-economic loss, except claims that are excluded by sub-section (2) or (3).
 - (2) This Part does not apply to the following claims for the recovery of damages for non-economic loss—
 - (a) a claim where the fault concerned is, or relates to, an intentional act that is done with intent to cause death or injury or that is sexual assault or other sexual misconduct;
 - (b) a claim to which Part 3, 6 or 10 of the **Transport Accident Act 1986** applies;
 - (c) a claim to which Part IV of the **Accident Compensation Act 1985** applies;
 - (d) a claim in respect of an injury or death which entitles, or may entitle, a worker, or a dependant of a worker, within the meaning of the **Workers Compensation Act 1958** to compensation under that Act.
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- (3) This Part does not apply to claims in proceedings of a class that is excluded by the regulations from the operation of this Part.
 - (4) This Part extends to a claim for damages for non-economic loss even if the claim is founded on breach of contract or any other cause of action.

28LD. *This Part is substantive law*

For the avoidance of doubt it is declared that all the provisions of this Part contain matters that are substantive law and are not procedural in nature.

Division 2—Restriction on Recovery of Damages for Non-Economic Loss

28LE. *Restriction on recovery of damages for non-economic loss*

A person is not entitled to recover damages for non-economic loss in any proceeding in a court in respect of an injury to a person caused by the fault of another person unless the person injured has suffered significant injury.

28LF. *What is significant injury?*

- (1) For the purposes of this Part injury to a person (other than a psychiatric injury) is significant injury if—
 - (a) the degree of impairment of the whole person resulting from the injury has been assessed by an approved medical practitioner in accordance with this Part as satisfying the threshold level, unless a Medical Panel has made a determination as to the threshold level under Division 5; or

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- (b) a Medical Panel has determined under Division 5 that the degree of impairment of the whole person resulting from the injury satisfies the threshold level; or
 - (c) the injury is loss of a foetus; or
 - (d) the injury is loss of a breast.
- (2) For the purposes of this Part psychiatric injury to a person is significant injury if—
 - (a) the degree of impairment resulting from the injury has been assessed by an approved medical practitioner in accordance with this Part as satisfying the threshold level, unless a Medical Panel has made a determination as to the threshold level under Division 5; or
 - (b) a Medical Panel has determined under Division 5 that the degree of impairment resulting from the injury satisfies the threshold level.
- (3) For the purposes of this Part injury to a person is deemed to be significant injury if—
 - (a) an agreement is given under Division 4 to waive the requirement for assessment in respect of the injury; or
 - (b) the court makes a determination in respect of that person under section 28LZN.

Division 3—Assessment of Impairment

28LG. *Who can assess impairment?*

The assessment of degree of impairment must be made by an approved medical practitioner.

28LH. *How is the degree of impairment to be assessed?*

Subject to this Division, an approved medical practitioner must make an assessment of impairment under this Part—

- (a) in accordance with—
 - (i) the A.M.A. Guides; or
 - (ii) the methods prescribed for the purposes of this Part; and
- (b) in accordance with operational guidelines (if any) as to the use of those Guides or methods issued by the Minister.

28LI. *Assessment of psychiatric impairment*

For the purposes of assessing the degree of psychiatric impairment, the A.M.A. Guides apply, subject to the regulations, as if for Chapter 14 there were substituted the *Clinical Guidelines to the Rating of Psychiatric Impairment* prepared by the Medical Panel (Psychiatry) Melbourne, Victoria in October 1997 and published in the Government Gazette on 28 August 1998.

28LJ. *Regard not to be had to secondary psychiatric or psychological impairment*

In assessing a degree of impairment of a person under this Part, regard must not be had to any psychiatric or psychological injury, impairment or symptoms arising as a consequence of, or secondary to, a physical injury.

28LK. Assessment of hearing impairment

- (1) For the purposes of assessing the degree of impairment of the whole person resulting from binaural hearing impairment, the percentage of the diminution of hearing determined in accordance with sub-section (2) is to be converted as follows—
 - (a) if the binaural loss of hearing is 5 per cent NAL or less, the degree of impairment is to be assessed as zero;
 - (b) if the binaural loss of hearing is a percentage that is more than 5 per cent NAL, the degree of impairment is to be assessed at that percentage.
- (2) For the purposes of this section, the percentage of diminution of hearing—
 - (a) must be determined—
 - (i) by a person or class of persons approved; and
 - (ii) in the manner approved—
under section 91(4) of the **Accident Compensation Act 1985**; and
 - (b) must be determined in accordance with the Improved Procedure for Determination of Percentage Loss of Hearing (1988 Edition or a later prescribed edition) published by the National Acoustic Laboratory.

28LL. Assessment in relation to injuries arising out of the same incident

- (1) If a person has more than one impairment resulting from injuries which arose out of the same incident, all of those impairments must be included in the one assessment.
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- (2) For the purposes of this Part, impairments, other than psychiatric impairments, resulting from injuries which arose out of the same incident are to be assessed together using the combination tables in the A.M.A. Guides or the methods prescribed for the purposes of this Part.
 - (3) For the purposes of this Part, impairments from unrelated injuries or causes are to be disregarded in making an assessment.

28LM. *Prescribed methods for assessment*

If methods are prescribed for the purposes of this Part and apply to an assessment of impairment, the assessment must be made in accordance with those methods rather than in accordance with the A.M.A. Guides.

28LN. *Certificate of assessment*

- (1) An approved medical practitioner who makes an assessment of degree of impairment under this Part must provide to the person seeking the assessment a certificate of assessment.
- (2) The certificate of assessment must state whether the degree of impairment resulting from the injury satisfies the threshold level but must not state the specific degree of impairment.

Division 4—Procedure for Claim for Non-Economic Loss

28LO. *Agreement to waive assessment of impairment*

- (1) A claimant may, in writing, ask the respondent to waive the requirement for an assessment of degree of impairment under this Part.
 - (2) A respondent to whom a request under subsection (1) is made must respond in writing to the request within 30 days after receiving it.
 - (3) The response must—
 - (a) state that the respondent is a proper respondent to the claim and state that the respondent agrees to waive the requirement for the assessment of degree of impairment under this Part because the injury is significant injury; or
 - (b) state that the respondent is a proper respondent to the claim and request that the claimant obtain an assessment of degree of impairment under this Part; or
 - (c) if the respondent is unable to decide, on the information contained in the notice of claim, whether the respondent is a proper respondent to the claim, advise the claimant of the further information the respondent reasonably needs to decide whether the respondent is a proper respondent to the claim; or
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- (d) state that the respondent believes that the respondent is not a proper respondent to the claim, give the reasons for the belief and give any information that may help the claimant to identify the proper respondent.
- (4) If the respondent fails to respond within the 30 days, the requirement for the assessment of degree of impairment cannot be waived by the respondent.

28LP. *What if the respondent asks for more information?*

- (1) If under section 28LO(3)(c) a respondent advises a claimant that specified further information is needed, the claimant must give the respondent the information the respondent reasonably needs to decide whether the respondent is a proper respondent to the claim.
- (2) The respondent must respond in the manner set out in section 28LO(3)(a), (b) or (d) within 30 days after receiving the information.
- (3) If the respondent fails to respond within the 30 days, the requirement for the assessment of degree of impairment cannot be waived by the respondent.

28LQ. *What if the respondent disputes responsibility?*

- (1) If a respondent responds in accordance with section 28LO(3)(d), the claimant must give written notice to the respondent, within 14 days after receiving the response, that either—

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- (a) on the information available to the claimant, the claimant accepts that the respondent is not a proper respondent to the claim; or
 - (b) the claimant considers that the respondent is a proper respondent to the claim and requires the respondent to respond to the notice.
- (2) The respondent must respond in writing to a notice under sub-section (1)(b) within 14 days after receiving the notice.
- (3) The response under this section must—
- (a) state that the respondent agrees to waive the requirement for the assessment of degree of impairment under this Part because the injury is significant injury; or
 - (b) request that the claimant obtain an assessment of degree of impairment under this Part.
- (4) If the respondent fails to respond within the 14 days, the requirement for the assessment of degree of impairment cannot be waived by the respondent.

28LR. *Can a respondent bind any other respondent?*

An agreement under this Division by a respondent to a claim that the assessment is not required because the injury is significant injury does not bind any other respondent.

28LS. *Statement not admission of liability*

A statement under this Division that a respondent is a proper respondent to a claim is not an admission of liability in respect of the claim.

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28LT. *Copy of certificate of assessment to be served on respondent*

A claimant must serve on the respondent a copy of a certificate of assessment (if any) obtained under this Part on which the claimant intends to rely.

28LU. *Multiple respondents*

- (1) If there are 2 or more respondents to a claim, one of the respondents (the **respondents' claim manager**) may act for one or more of the other respondents, with the agreement of those other respondents, for the purposes of the claim.
 - (2) The respondents' claim manager—
 - (a) may exercise the powers and perform the duties conferred by this Part in relation to the claim and the claimant for all respondents for whom the respondents' claim manager acts; and
 - (b) must act as far as practicable with the agreement of the other respondents for whom the respondents' claim manager acts.
 - (3) Action taken or an agreement made by the respondents' claim manager in relation to the claim is binding on each respondent for whom the respondents' claim manager acts so far as it affects the claimant.
 - (4) If the respondents' claim manager acts beyond the scope of the respondents' claim manager's authority under the agreement referred to in sub-section (1), the respondents' claim manager is liable to each other respondent who is a party to the agreement for any loss suffered by the other respondent.
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28LV. *Limitation period suspended*

Service of a copy of a certificate of assessment on a respondent suspends the relevant period of limitation under the **Limitation of Actions Act 1958** or this Act in respect of the claim until the expiry of 3 months after whichever of the following first occurs—

- (a) the respondent accepts in writing under section 28LW the assessment in the certificate of assessment;
- (b) the respondent is deemed under section 28LW or 28LZA to have accepted the assessment;
- (c) if the respondent refers a medical question in relation to the assessment to a Medical Panel for opinion under this Part, the expiry of any period for bringing an application for any relief or remedy in relation to the opinion of the Medical Panel, unless such an application is brought within that period;
- (d) if the respondent brings an application for any relief or remedy in relation to the opinion of a Medical Panel, the final determination of that application.

28LW. *Response to medical assessment*

- (1) The respondent must within 30 days after being served with a copy of the certificate of assessment—
 - (a) accept in writing the assessment for the purposes of this Part; or

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- (b) refer a medical question in relation to the assessment to a Medical Panel for opinion under this Part and advise the claimant in writing that the reference has been made.
- (2) If the respondent fails to respond in writing under sub-section (1) within the 30 days, the respondent is deemed to have accepted the assessment.

28LX. *Respondent to pay costs of referral*

The respondent is liable for the costs of a referral of a medical question to a Medical Panel for opinion under this Part including the costs of—

- (a) any attendance before the Medical Panel under section 28LZE of a registered health practitioner; and
- (b) copying documents to be provided under section 28LZC or 28LZE; and
- (c) reasonable transport arrangements for persons attending the Medical Panel.

Division 5—Procedure of Medical Panel

28LY. *Application*

This Division sets out the powers and procedures of a Medical Panel in relation to a medical question referred to it under Division 4.

28LZ. *Procedure of Medical Panel*

- (1) A Medical Panel is not bound by rules or practices as to evidence, but may inform itself on any matter relating to a reference in any manner it thinks fit.

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- (2) A Medical Panel must act informally, without regard to technicalities or legal forms and as speedily as a proper consideration of the reference allows.
- (3) A Medical Panel must comply with—
 - (a) any relevant guidelines as to the procedures of Medical Panels issued under section 65(8) of the **Accident Compensation Act 1985**; and
 - (b) any relevant directions as to the procedures of Medical Panels given by the Convenor under section 65(9) of that Act.
- (4) The guidelines and directions referred to in sub-section (3) apply for the purposes of this Part with any necessary modifications.

28LZA. Respondent must provide information to Medical Panel

- (1) A respondent referring a medical question to a Medical Panel must submit to the Medical Panel—
 - (a) a notice in writing setting out—
 - (i) the medical question; and
 - (ii) any other prescribed information; and
 - (b) a copy of any relevant certificate of assessment served on the respondent by the claimant under section 28LT.
 - (2) A respondent referring a medical question to a Medical Panel must submit to the Panel copies of all documents in the possession of that respondent that relate to the medical question.
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- (3) The Medical Panel may refuse to proceed to consider a medical question if it is not provided with the required documents under this section.
 - (4) If the respondent fails to provide the Medical Panel with the required documents within 30 days after being requested in writing to do so by the Convenor, the respondent is deemed to have accepted the assessment in the certificate of assessment.
 - (5) The Convenor must notify the claimant in writing within 7 days of a deemed acceptance under sub-section (4).

28LZB. *What if there is more than one referral in relation to an assessment?*

The Convenor may direct that referrals by 2 or more respondents to the Medical Panel that concern the same assessment be consolidated.

28LZC. *What can a Medical Panel ask a claimant to do?*

A Medical Panel may ask a claimant—

- (a) to meet with the Panel and answer questions;
- (b) to supply to the Panel copies of all documents in the possession of the claimant that relate to the medical question;
- (c) to submit to a medical examination by the Panel or by a member of the Panel.

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28LZD. *Attendance before Medical Panel to be private*

- (1) Any attendance of a claimant before a Medical Panel must be in private, unless the Medical Panel considers that it is necessary for another person to be present.
- (2) If the claimant is a person under disability, the Medical Panel must permit a representative of the claimant to be present.
- (3) In this section "**person under disability**" means a person who is—
 - (a) a minor; or
 - (b) incapable by reason of injury, disease, senility, illness or physical or mental infirmity of managing his or her affairs in relation to the matter before the Medical Panel.

28LZE. *Medical Panel can ask a registered health practitioner to attend*

If a Medical Panel so requests and the claimant consents, a registered health practitioner who has examined the claimant must—

- (a) meet with the Panel and answer questions; and
- (b) supply relevant documents to the Panel.

28LZF. *Protection of information given to Medical Panel*

Information given to a Medical Panel cannot be used in any civil or criminal proceeding in any court, other than a proceeding—

- (a) relating to the claim for which the opinion is sought; or

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- (b) for an offence against the **Crimes Act 1958** which arises in connection with the claim.

28LZG. Opinions

- (1) An assessment by a Medical Panel of the degree of impairment of a person must be made in accordance with Division 3.
- (2) A Medical Panel must give the claimant and the respondent its opinion on a medical question referred to it within 60 days after the reference is made or such longer period as is agreed by the claimant and the respondent.
- (3) The opinion of the Medical Panel must be given in writing and certified by the Medical Panel.
- (4) The opinion must state whether the degree of impairment resulting from the injury satisfies the threshold level but must not state the specific degree of impairment.

28LZH. Effect of determination as to threshold level

- (1) A determination by the Medical Panel under this Division that the degree of impairment resulting from an injury satisfies the threshold level must be accepted by a court in any proceeding on the claim as a determination of significant injury for the purposes of this Part.
- (2) A determination by the Medical Panel under this Division that the degree of impairment resulting from an injury does not satisfy the threshold level must be accepted by a court in any proceeding on the claim as a determination that the injury is not significant injury for the purposes of this Part.

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28LZI. *Limitations on appeal in relation to assessments and determinations*

- (1) No appeal on the merits may be made to a court from an assessment or determination of a Medical Panel under this Division.
- (2) Nothing in sub-section (1) affects any right of a court to grant any other relief or remedy in relation to an assessment or determination of a Medical Panel under this Division.

28LZJ. *Treating medical practitioner not to be on Medical Panel*

If a medical practitioner has treated or examined or has been engaged to treat or examine the claimant (otherwise than in his or her capacity as a member of a Medical Panel), he or she must not be a member of a Medical Panel considering a medical question relating to the claimant.

28LZK. *Validity of acts or decisions*

An act or decision of a Medical Panel under this Division is not invalid by reason only of any defect or irregularity in or in connection with the appointment of a member.

28LZL. *Operation of Panel provisions of the Accident Compensation Act*

- (1) Sections 65(1) to (6B), 66, 67 and 68 of the **Accident Compensation Act 1985** do not apply to or in relation to—
 - (a) the procedure of a Medical Panel under this Part; or
 - (b) a matter referred to a Medical Panel under this Part.

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- (2) Except as provided in sub-section (1), and subject to any inconsistency of context or subject-matter, Division 3 of Part III of the **Accident Compensation Act 1985** applies to a Medical Panel appointed for the purposes of this Part.

Division 6—Proceedings on Claim

28LZM. *Provision of assessment information to court*

- (1) This section applies to a claimant who brings a proceeding in a court in respect of a claim for damages for non-economic loss to which this Part applies in respect of injury to a person caused by the fault of another person.
- (2) The claimant must file in the court before the determination of the claim—
- (a) if the claimant intends to rely on a certificate of assessment under this Part, a copy of that certificate; or
 - (b) if the claimant intends to rely on the written agreement of any respondent under Division 4 to waive the requirement for assessment in respect of the injury, a copy of that agreement.
- (3) If a Medical Panel has made a determination as to the threshold level under Division 5, the claimant must also file in the court a copy of the certificate of opinion of the Medical Panel.
- (4) If the respondent is deemed to have accepted an assessment under this Part, the claimant must also file in the court a statement to that effect.

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28LZN. *Alternative procedure for special cases*

- (1) A claimant may apply to a court for a determination of significant injury for the purposes of this Part.
- (2) The court may make a determination of significant injury in respect of a claimant if the court is satisfied that—
 - (a) the claim should be dealt with urgently because of the imminent death of the claimant; and
 - (b) the injury, if assessed under Division 3, would be significant injury.
- (3) The court may make a determination of significant injury in respect of a claimant if the court is satisfied that—
 - (a) the claim relates to a cause of action that survives for the benefit of the estate of a deceased person under section 29(1) of the **Administration and Probate Act 1958**; and
 - (b) the deceased person died from a cause other than the injury to which the claim relates; and
 - (c) the injury to which the claim relates, if it had been assessed under Division 3, would be significant injury.

Division 7—General

28LZO. *Supreme Court—limitation of jurisdiction*

It is the intention of sections 28LE, 28LZH, 28LZI and 28LZL to alter or vary section 85 of the **Constitution Act 1975**.

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28LZP. Regulations

- (1) The Governor in Council may make regulations generally prescribing any matter or thing required or permitted by this Part to be prescribed or necessary to be prescribed to give effect to this Part.
- (2) The regulations—
 - (a) may leave any matter to be determined by the Minister; and
 - (b) may apply, adopt or incorporate, wholly or partially or as amended by the regulations, any matter contained in any document as existing or in force at the time the regulations are made.
- (3) Without limiting sub-sections (1) and (2), the regulations may modify the A.M.A. Guides.
- (4) Without limiting sub-sections (1) and (2), the regulations may fix the methods to be used for the purpose of assessing the degree of impairment in respect of injury to a person.
- (5) Regulations made under sub-section (4)—
 - (a) must specify the methods to be used and any modifications of those methods that are to apply; and
 - (b) can only apply for the purpose of assessing the degree of impairment of a person who receives an injury on or after the date that the regulations are made or on or after a later date specified in the regulations.

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28LZQ. Transitional

- (1) This Part applies to an award of damages for non-economic loss that relates to an injury received on or after 21 May 2003.
- (2) On and from 1 October 2003, this Part applies to an award of damages for non-economic loss that relates to an injury received before 21 May 2003.
- (3) Sub-section (2) does not apply to an award of damages in a proceeding commenced in a court before 1 October 2003.'

5. New definitions

In section 28B of the **Wrongs Act 1958** insert the following definitions—

' "**attendant care services**" means any of the following—

- (a) services of a domestic nature;
- (b) services relating to nursing;
- (c) services that aim to alleviate the consequences of an injury;

"**gratuitous attendant care services**" means attendant care services—

- (a) that have or are to be provided by another person to a claimant; and
- (b) for which the claimant has not paid or is not liable to pay;'

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6. New sections 28IA, 28IB and 28IC inserted

After section 28I of the **Wrongs Act 1958**
insert—

"28IA. *Limitation on damages for gratuitous attendant care*

- (1) No damages may be awarded to a claimant for gratuitous attendant care services unless the court is satisfied that—
 - (a) there is (or was) a reasonable need for the services to be provided; and
 - (b) the need has arisen (or arose) solely because of the injury to which the damages relate; and
 - (c) the services would not be (or would not have been) provided to the claimant but for the injury.
- (2) Further, no damages may be awarded to a claimant for gratuitous attendant care services if the services are provided, or are to be provided—
 - (a) for less than 6 hours per week; and
 - (b) for less than 6 months.

28IB. *Calculation of damages*

- (1) If gratuitous attendant care services are provided or are to be provided for not less than 40 hours per week, the amount of damages that may be awarded for the services must not exceed—
 - (a) the amount per week comprising the amount estimated by the Australian Statistician as the average weekly total earnings of all employees in Victoria for—

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- (i) in respect of the whole or any part of a quarter occurring between the date of the injury in relation to which the award is made and the date of the award, being a quarter for which such an amount has been estimated by the Australian Statistician and is, at the date of the award, available to the court making the award—that quarter; or
- (ii) in respect of the whole or any part of any other quarter—the most recent quarter occurring before the date of the award for which such an amount has been estimated by the Australian Statistician and is, at that date, available to the court making the award; or
- (b) if the Australian Statistician fails or ceases to estimate the amount referred to in paragraph (a), the prescribed amount or the amount determined in such manner or by reference to such matters, or both, as may be prescribed.
- (2) If gratuitous attendant care services are provided or are to be provided for less than 40 hours per week, the amount of damages that may be awarded for the services must not exceed the amount calculated at an hourly rate of one-fortieth of the amount determined in accordance with sub-section (1)(a) or (b), as the case requires.
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28IC. *Other laws not to be affected*

Except as provided by sections 28IA and 28IB, nothing in those sections affects any other law relating to the value of attendant care services."

7. *Supreme Court—limitation of jurisdiction*

At the end of section 28J of the **Wrongs Act 1958** insert—

"(2) It is the intention of section 28D (as affected by the amendments made to this Part by the **Wrongs and Limitation of Actions Acts (Insurance Reform) Act 2003**) to alter or vary section 85 of the **Constitution Act 1975**."

8. *Transitional*

In section 28L(1) of the **Wrongs Act 1958** after "Part" insert "(except sections 28IA, 28IB, 28IC and 28J(2))".

9. *New section 28LA inserted*

After section 28L of the **Wrongs Act 1958** insert—

"28LA. *Transitional for gratuitous attendant care services*

- (1) Sections 28IA, 28IB, 28IC and 28J(2) apply to an award of damages for gratuitous attendant care services that relates to an injury received on or after 21 May 2003.
- (2) On and from 1 October 2003, sections 28IA, 28IB, 28IC and 28J(2) apply to an award of damages for gratuitous attendant care services that relates to an injury received before 21 May 2003.

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- (3) Despite sub-section (2), sections 28IA, 28IB, 28IC and 28J(2) do not apply to an award of damages for gratuitous attendant care services that relates to an injury received before 21 May 2003 if the award is made in a proceeding commenced in a court before 1 October 2003."

10. Amendment of section 20

After section 20(6) of the **Wrongs Act 1958**
insert—

- "(7) This section does not apply in respect of a cause of action to which Part IIA of the **Limitation of Actions Act 1958** applies."
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11. *Amendment of section 5*

After section 5(8) of the **Limitation of Actions Act 1958** insert—

"(9) Despite sub-section (1C), this section does not apply to an action to which Part IIA applies."

See:
Act No.
6295/1958
Reprint No. 7
as at
23 April 1998
and
amending
Act Nos
52/1998,
74/2000 and
52/2002.
LawToday:
www.dms.dpc.vic.gov.au

12. *Amendment of section 23*

After section 23(1) of the **Limitation of Actions Act 1958** insert—

"(1A) Sub-section (1) does not apply to a right of action to which Part IIA applies."

13. *Amendment of section 23A*

After section 23A(5) of the **Limitation of Actions Act 1958** insert—

"(6) Except as provided by section 27M(2), this section does not apply to an action to which Part IIA applies."

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14. New Part IIA inserted

After Part II of the **Limitation of Actions Act 1958** insert—

'PART IIA—PERSONAL INJURY ACTIONS

Division 1—Introductory

27A. Interpretation

(1) In this Part—

"guardian" of a minor includes any person who is granted guardianship of the minor under the **Children and Young Persons Act 1989** or any other Act or law;

"long-stop limitation period", in relation to a cause of action for damages that relate to death or personal injury, means the period of 12 years from the date of the act or omission alleged to have resulted in the death or personal injury with which the action is concerned;

"parent" includes any person who has all the duties, powers, responsibilities and authority (whether conferred by a court or otherwise) which, by law, parents have in relation to children;

"survivor action" means a cause of action that survives for the benefit of the estate of a deceased person under section 29(1) of the **Administration and Probate Act 1958** but does not include a cause of action to which section 29(2A) of that Act applies.

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- (2) In this Part in relation to a cause of action under section 159 of the **Fair Trading Act 1999**, a reference to a court includes a reference to the Victorian Civil and Administrative Tribunal established by the **Victorian Civil and Administrative Tribunal Act 1998**.

27B. Application

- (1) This Part applies to a cause of action for damages that relate to the death of or personal injury to a person, regardless of whether the action for damages is founded in tort, in contract, under statute or otherwise.
- (2) This Part does not apply to the following—
- (a) actions for damages to which Part IV of the **Accident Compensation Act 1985** applies;
 - (b) actions for damages in respect of an injury which entitles, or may entitle, a worker within the meaning of the **Workers Compensation Act 1958** to compensation under that Act;
 - (c) actions for damages to which Part 6 or Part 10 of the **Transport Accident Act 1986** applies;
 - (d) actions for damages in respect of an injury that is a dust-related condition within the meaning of the **Administration and Probate Act 1958**;
 - (e) actions for damages in respect of an injury resulting from smoking or other use of tobacco products (within the meaning of the **Tobacco Act 1987**) or exposure to tobacco smoke.

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- (3) This Part extends to a cause of action that—
 - (a) is a survivor action; or
 - (b) is an action that arises under Part III of the **Wrongs Act 1958**.
- (4) This Part applies despite anything to the contrary in section 159(3) of the **Fair Trading Act 1999**.

**Division 2—Limitation Period for Personal
Injury Actions**

27C. Application of Division

The provisions of this Division have effect subject to the provisions of Division 3.

27D. Limitation period for personal injury actions—general

- (1) An action in respect of a cause of action to which this Part applies shall not be brought after the expiration of whichever of the following periods is the first to expire—
 - (a) the period of 3 years from the date on which the cause of action is discoverable by the plaintiff;
 - (b) the period of 12 years from the date of the act or omission alleged to have resulted in the death or personal injury with which the action is concerned.
- (2) This section does not apply to a cause of action that is founded on a personal injury to a person who was under a disability at the date of the act or omission alleged to have resulted in the personal injury.

27E. *Limitation period for personal injury actions—persons under a disability*

- (1) This section applies to a cause of action to which this Part applies which is founded on a personal injury to a person who was under a disability at the date of the act or omission alleged to have resulted in the personal injury.
- (2) An action in respect of a cause of action to which this section applies shall not be brought after the expiration of whichever of the following periods is the first to expire—
 - (a) the period of 6 years from the date on which the cause of action is discoverable by the plaintiff;
 - (b) the period of 12 years from the date of the act or omission alleged to have resulted in the personal injury with which the action is concerned.

27F. *Date cause of action is discoverable*

- (1) For the purposes of this Part, a cause of action is *discoverable* by a person on the first date that the person knows or ought to have known of all of the following facts—
 - (a) the fact that the death or personal injury concerned has occurred;
 - (b) the fact that the death or personal injury was caused by the fault of the defendant;
 - (c) in the case of personal injury, the fact that the personal injury was sufficiently serious to justify the bringing of an action on the cause of action.

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- (2) A person *ought to know* of a fact at a particular date if the fact would have been ascertained by the person had the person taken all reasonable steps before that date to ascertain the fact.
- (3) In determining what a person knows or ought to have known, a court may have regard to the conduct and statements, oral or in writing, of the person.
- (4) To remove doubt, a cause of action that arises under Part III of the **Wrongs Act 1958** is not discoverable before the date of death of the deceased.

27G. Application to survivor actions

Subject to section 27I, for the purposes of the application of this Part to a survivor action, the cause of action is deemed to be discoverable by the plaintiff at whichever is the earliest of the following dates—

- (a) the date on which the cause of action is discoverable by the deceased if the cause of action is discoverable by the deceased more than 3 years before the death of the deceased;
- (b) the date of appointment of the plaintiff as the deceased's executor or administrator if the cause of action is discoverable by the plaintiff at or before the date of that appointment;
- (c) the date on which the cause of action is discoverable by the plaintiff if the cause of action is discoverable by the plaintiff after the appointment of the plaintiff as the deceased's executor or administrator.

27H. Application to Part III Wrongs Act actions

For the purposes of the application of this Part to a cause of action that arises under Part III of the **Wrongs Act 1958**, the long-stop limitation period is deemed to run from the date of death of the deceased.

27I. Special limitation period for minors injured by close relatives or close associates

- (1) If a cause of action is founded on the death of or personal injury to a person (**the victim**) who was a minor at the date of the act or omission alleged to have resulted in that death or personal injury and the cause of action is against a person who at that date was a parent or guardian of the victim or a close associate of a parent or guardian of the victim—
 - (a) the cause of action is, for the purposes of this Part, deemed to be discoverable by the victim when the victim turns 25 years of age or when the cause of action is actually discoverable by the victim, whichever is the later; and
 - (b) the long-stop limitation period for the cause of action is the period of 12 years from when the victim turns 25 years of age.
- (2) A person is a close associate of a parent or guardian of the victim if the person is a person whose relationship with the parent or guardian is such that—
 - (a) the parent or guardian might be influenced by the person not to bring an action on behalf of the victim against the person; or

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- (b) the victim might be unwilling to disclose to the parent or guardian the act or omission alleged to have resulted in the death or personal injury.
- (3) If the victim dies before turning 25 years of age, the period of limitation applicable to a survivor action that survives on the death of the victim is to be determined as if references in this section to when the victim turns 25 years of age were references to the death of the victim.

27J. *Effect of legal incapacity on limitation period*

- (1) A person is *under a legal incapacity* for the purposes of this section while the person—
 - (a) is a minor, but not while the minor is in the custody of a capable parent or guardian; or
 - (b) is an incapacitated person for a continuous period of 28 days or more, but not while—
 - (i) the person is a represented person; and
 - (ii) the guardian of the person is authorised by law to bring actions in the person's name.
 - (2) If a person has a cause of action for which a period of limitation has commenced to run and the person is under a legal incapacity, the running of the period of limitation is suspended for the duration of the legal incapacity.
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(3) In determining when a cause of action is discoverable by a person who is a minor or an incapacitated person and who is not under a legal incapacity, facts that are known or ought to be known by a capable parent or guardian of the minor or the guardian of the represented person are deemed to be facts that are known or ought to be known by the minor or incapacitated person.

(4) In this section—

"capable parent or guardian" of a minor means a person—

- (a) who is a parent or guardian of the minor; and
- (b) who is not under a legal incapacity;

"guardian", in relation to a represented person, means—

- (a) the guardian or administrator of that person under the **Guardianship and Administration Act 1986**; or
- (b) in the case of a protected person, State Trustees Limited;

"incapacitated person" means a person who is incapable of, or substantially impeded in, the management of his or her affairs in relation to the cause of action in respect of which the question arises, by reason of any disease or any impairment of his or her physical or mental condition;

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"represented person" means—

- (a) represented person within the meaning of the **Guardianship and Administration Act 1986**; or
- (b) protected person within the meaning of section 85 of that Act.

**Division 3—Extension of Limitation Period for
Personal Injury Actions**

27K. *Extension of limitation periods*

- (1) A person claiming to have a cause of action to which this Part applies may apply to a court for an extension of a period of limitation applicable to the cause of action under Division 2.
- (2) Subject to section 27L, the court—
 - (a) may hear any of the persons likely to be affected by the application as it sees fit; and
 - (b) may, if it decides that it is just and reasonable to do so, order the extension of the period of limitation applicable to the cause of action for such period as the court determines.
- (3) If a court orders the extension of a period of limitation applicable to a cause of action under this section, that period of limitation is accordingly extended for the purposes of an action brought by the applicant in that court on the cause of action that the applicant claims to have.

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27L. Matters to be considered in determining applications for extension of limitation period

- (1) In exercising the powers conferred on it by section 27K, a court shall have regard to all the circumstances of the case, including (but not limited to) the following—
- (a) the length of and reasons for the delay on the part of the plaintiff;
 - (b) the extent to which, having regard to the delay, there is or is likely to be prejudice to the defendant;
 - (c) the extent, if any, to which the defendant had taken steps to make available to the plaintiff means of ascertaining facts which were or might be relevant to the cause of action of the plaintiff against the defendant;
 - (d) the duration of any disability or legal incapacity of the plaintiff arising on or after the date of discoverability;
 - (e) the time within which the cause of action was discoverable;
 - (f) the extent to which the plaintiff acted promptly and reasonably once the plaintiff knew that the act or omission of the defendant, to which the injury of the plaintiff was attributable, might be capable at that time of giving rise to an action for damages;
 - (g) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of the advice he or she may have received.

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- (2) To avoid doubt, the circumstances referred to in sub-section (1) include the following—
 - (a) whether the passage of time has prejudiced a fair trial of the claim; and
 - (b) the nature and extent of the plaintiff's loss; and
 - (c) the nature of the defendant's conduct.
- (3) In the application of this section to a cause of action that is a survivor action references in sub-section (1) to the plaintiff include references to the deceased and the applicant, or any of them, as appropriate in the circumstances.
- (4) In the application of this section to a cause of action that arises under Part III of the **Wrongs Act 1958**, references in sub-section (1) to the plaintiff include references to the deceased, the executor or administrator of the deceased, and the beneficiaries, or any of them, as appropriate in the circumstances.

27M. *Effect of expiry of limitation period prior to extension*

- (1) The powers conferred on a court by this Division may be exercised at any time even though—
 - (a) the period of limitation has already expired; or
 - (b) an action in respect of the death or personal injury has been commenced.
 - (2) Section 23A(5) applies, with any necessary modifications, to an application under this Division.
-

Division 4—Transitional

27N. Transitional

- (1) This Part applies to causes of action where the act or omission alleged to have resulted in the death or personal injury with which the action is concerned occurs on or after 21 May 2003.
- (2) On and from 1 October 2003, this Part applies to causes of action where the act or omission alleged to have resulted in the death or personal injury with which the action is concerned occurred before 21 May 2003.
- (3) Sub-section (2) does not apply to a cause of action for which proceedings were commenced in a court before 1 October 2003.
- (4) Despite sub-section (2), nothing in Division 2 operates to extend a period of limitation applicable to a cause of action in relation to an act or omission that occurred before 21 May 2003 to a period longer than the period of limitation that would have applied to the cause of action if this Part had not been enacted.
- (5) Nothing in sub-section (4) operates to prevent an application being made under Division 3 to extend a period of limitation referred to in that sub-section.

15. Amendment of section 33

In section 33 of the **Limitation of Actions Act 1958** after "foregoing," insert "and except as provided in Part IIA,".

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16. *New section 38A inserted*

After section 38 of the **Limitation of Actions Act 1958** insert—

"38A. *Supreme Court—limitation of jurisdiction*

It is the intention of Part IIA to alter or vary section 85 of the **Constitution Act 1975**."

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PART 4—AMENDMENTS TO OTHER ACTS

17. *Repeal of sections 131 to 133 of the Building Act 1993*

Sections 131, 132 and 133 of the **Building Act 1993** are **repealed**.

18. *New section 267 inserted in Building Act 1993*

After section 266 of the **Building Act 1993**
insert—

"267. *Transitional—proportionate liability*

Despite the repeal of sections 131, 132 and 133 by the **Wrongs and Limitation of Actions Acts (Insurance Reform) Act 2003**, those sections continue to apply to and in relation to an award of damages in a building action commenced before that repeal."

19. *Amendments to Accident Compensation Act 1985*

- (1) In section 48(1) of the **Accident Compensation Act 1985** after "Act" **insert** "or Part VBA of the **Wrongs Act 1958**".
- (2) In section 63(1) of the **Accident Compensation Act 1985—**
 - (a) after "this Act" (where first occurring) **insert** "and Part VBA of the **Wrongs Act 1958**";
and
 - (b) after "this Act" (where secondly occurring) **insert** "or that Part".
- (3) After section 65(8) of the **Accident Compensation Act 1985** **insert—**

"(8A) The Minister must consult with the Attorney-General before issuing any guidelines under this section."

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Part 4—Amendments to Other Acts

20. Amendments to Fair Trading Act 1999

At the end of section 159(3) of the **Fair Trading Act 1999** insert—

"Note: This sub-section is subject to Part IIA of the **Limitation of Actions Act 1958**."

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Endnotes

ENDNOTES

† *Minister's second reading speech—*

Legislative Assembly: 21 May 2003

Legislative Council: 10 June 2003

The long title for the Bill for this Act was "to amend the **Wrongs Act 1958** to provide for thresholds in relation to the recovery of damages for non-economic loss, to limit the recovery of damages for gratuitous attendant care services and to provide for proportionate liability in certain proceedings, to amend the **Limitation of Actions Act 1958** in relation to actions that relate to death or personal injury and for other purposes."

Constitution Act 1975:

Section 85(5) statement:

Legislative Assembly: 21 May 2003

Legislative Council: 10 June 2003

Absolute majorities:

Legislative Assembly: 5 June 2003

Legislative Council: 10 June 2003