Civil Liability Amendment (Offender Damages) Bill 2007

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CIVIL LIABILITY AMENDMENT (OFFENDER DAMAGES) BILL 2007

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Agreement in Principle

Debate resumed from an earlier hour.

Mr GREG SMITH (Epping) [12.04 a.m.]: I am privileged to speak on behalf of the Opposition on this bill, which the Opposition does not oppose, although it opposed previous amendments to the Civil Liability Act. The bill amends the Civil Liability Act 2002 in relation to the recovery of damages for injuries suffered by a person while an offender in custody. It includes in part 2A definitions of terms that are currently defined by reference to their meaning in another part of the Act to make it clear that limitations on the operation of that other part do not also extend to those items when used in part 2A. The bill also seeks to make it clear that a dispute about whether the degree of permanent impairment of an injured offender is at least 15 per cent, which is the threshold for an award of offender damages, cannot be referred for medical assessment unless the offender has provided a medical practitioner's report that assesses permanent impairment to be at least 15 per cent. The bill also seeks to make it clear that for the purposes of part 2A and savings and transitional provisions of the Act proceedings are not finally determined until any period for bringing an appeal has expired and any pending appeal has been disposed of.

The bill also seeks to clarify the operation of transitional provisions relating to 2006 amendments to the Act, which dealt with provisions that require offender damages to be held in trust for the payment of claims by the offender's victims, so that it will be absolutely clear that the amendments extend to cases in which offender damages were awarded before the commencement of the amendments. The aim of the bill is to overcome the effect of recent court decisions in *State of New South Wales v Bujdoso* [2007] *New South Wales Court of Appeal 44*, *Hiron v State of New South Wales and another* [2007] *New South Wales Supreme Court 152* and *State of New South Wales v Napier Keen Pty Limited* [2007] *New South Wales Supreme Court 644*.

The background to the bill is that the Courts Legislation Amendment Act 2006 was introduced in part to overturn the court's decision in *Bujdoso v State of New South Wales*. The changes were made to introduce a scheme to quarantine awards of damages and compensation made by a court to offenders into a trust fund, thereby enabling victims to lodge claims against them in the knowledge that the offender would not be able to dissipate the award of damages in order to avoid a claim. At that time the Coalition raised concerns about the legislation through the shadow Attorney General, the then member for Gosford.

Those concerns were based on the bill's retrospectivity and its intention to overrule one particular case. The Coalition moved amendments in the upper House that were defeated. At that time the legislation was broader and precluded claims against the Government in negligence under common law, rather receiving capped damages under the Civil Liability Act. Subsequent court cases have not followed the intent of the legislation, and this bill's intent is to make it evidently clear that provisions of division 6 of part 2A of the Act apply to all awards of personal injury damages to offenders, without exception, from the date of assent. I refer to the speech of Chris Hartcher on 15 November 2006, when he said:

> It is wrong that legislation presented as general amendment legislation takes away the rights of people who have instigated Supreme Court cases. It is morally wrong.

He then referred to a case being pursued by the family of a Mr Rose, who had been strangled. The accused was charged with murder but hanged himself in Long Bay jail before he was put on trial. The family commenced a Supreme Court action which was pending before the court on 15 November 2006. Mr Hartcher commented that the amendment to the Act proposed by the bill would deprive the family of the right granted to them at law at the time they instituted proceedings. He said:

> That right was to seek common law damages against the Crown for negligence in allowing this patient to be released from hospital without proper medical treatment. Under this legislation, which will be retrospective to catch these people out the family will be forced to accept capped damages under the Civil Liability Act.
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> That is a misuse of retrospectivity. Retrospectivity sometimes is necessary to protect the revenue of the Crown. Sometimes it is necessary to ensure that certain classes of actions are put to account. But it is not the practice of this State where Supreme Court proceedings are already on foot to introduce retrospective

legislation to overcome that Supreme Court case. The solicitors, the Bar Council and the Law Society strongly object to the bill's retrospectivity. It is that aspect of the bill that the Coalition will seek to amend in the Legislative Council.

The case of Bujdoso has a chequered career. On 16 February 1990 the respondent Bujdoso was sentenced to a term of imprisonment. On 21 September 1991, while he was serving his sentence at Silverwater Prison, he was assaulted by fellow prisoners and suffered serious injuries. After his release he commenced proceedings against the State of New South Wales on 15 September 1994 seeking damages for negligence by the State in failing to take reasonable steps to protect him from violent attack. The High Court affirmed the State's liability on 8 December 2005 and on 21 July 2006 Judge McLaughlin in the District Court awarded Mr Bujdoso damages in the sum of $175,000.

The State resisted payment of the damages on the basis that they were required to be held in a victim trust fund pursuant to division 6 of part 2A of the Civil Liability Act 2002. The proceedings in the Court of Appeal, the subject of a judgment dated 13 March 2007, sought a declaration in the Equity Court that division 6 of part 2A did not apply to him or to the award of damages in the District Court. On 5 September 2005 Justice Sully held that Bujdoso was entitled to the declaration sought on two bases. The first was pursuant to part 3B of the Civil Liability Act 2002 the provisions did not apply to the civil liability of the State in this case. Secondly, part 2A of the Act only applied to a person who was an inmate within the meaning of the Crimes (Administration of Sentences) Act 1999.

At the time of the injuries, pursuant to sections 26B and sections 26A the respondent Bujdoso was not an offender in custody as then defined in section 26A because at the time of his injury the 1999 Act was not in force. The State appealed against this decision on 28 September 2006 and after lodgement of the appeal, the Crimes and Courts Legislation Amendment Act 2006 was passed, which made relevant amendments to section 3B (1) (a) and section 26A (1) of the Act.

The issues for the Court of Appeal were, first, whether the State's liability was one in respect of an intentional act that was done with intent to cause injury or death so that the Act did not apply to the respondent Bujdoso's proceedings pursuant to section 3B (1) (a) of the Act as in force prior to the 2006 amendment Act. The second issue was whether the amendments to section 3B effected by the 2006 amendment Act achieved a different result. The third issue was whether the savings and transitional provisions of clauses 20 and 21 of schedule 1 to the Act, consequent upon the enactment of the Civil Liability Amendment (Offender Damages Trust Fund) Act 2005, extended the definition of "offender in custody" for the purposes of section 26B so as to cover the respondent and render part 2A applicable to him. The fourth issue was whether schedule 1, part 9, clause 26 applied division 6 of part 2A to the award of damages in the present case.

I am sure that no member will be surprised to hear that the court dismissed the appeal. This legislation seeks to clarify the intention of the Parliament to stop damages being paid to the former prisoner respondent to that appeal without the victim's damages first having been deducted. Arguments in favour of the legislation include the argument that the changes, while being retrospective and impeding the rights of individuals in jail to claim compensation, do not deviate significantly from changes proposed by the Government in the Crimes and Courts Legislation Amendment Bill 2006. The changes are also in line with community expectations that victims should have access to compensation from offenders rather than the offenders having the money themselves.

Arguments against the bill include the argument that it is retrospective and intentionally amends the law to target certain cases and preclude people exercising their legal rights in accordance with the law when they commence them. Such moves are usually only used in the most serious cases. This morning I was asked whether that means that prisoners can be injured or even brought close to death by injury and will never be able to recover damages. I think it means that victims of their own crimes have to be compensated first but then they or their relations would receive some damages at some stage. The Opposition, somewhat reluctantly but realistically, does not oppose the bill.

Mr BARRY COLLIER (Miranda—Parliamentary Secretary) [12.17 a.m.], in reply: The bill makes minor but necessary amendments to the offender damages provisions of the Civil Liability Act 2002 following several court decisions. The amendments clarify some of the definitions in part 2A of the Act and the application of the Act to historical cases, as well as addressing a problem in the use of medical reports in offender damages proceedings. The bill makes certain amendments to part 2A of the Civil Liability Act. For example, it includes definitions of terms that are currently defined by reference to their meaning in another part of the Act to make it clear that limitations on the operation of that other part do not also extend to those terms when used in part 2A. It makes it clear that for the purposes of part 2A, and savings and transitional provisions of the Act, the proceedings are not "finally determined" until any period for bringing an appeal has expired and any pending appeal has been disposed of.

The amendments clarify the operation of transitional provisions relating to 2006 amendments to the Act so that it will be absolutely clear that the amendments extend to cases in which offender damages were awarded before the commencement of the amendments. They also make it clear that a dispute about whether the degree of permanent impairment of an injured offender is at least 15 per cent, which is the threshold for offender damages, cannot be referred for medical assessment unless the offender has provided a medical practitioner's report that assesses permanent impairment to be at least 15 per cent.

The Government has introduced a number of bills since 2005 to redress the balance of justice in favour of victims over offenders who receive awards of damages for personal injury arising from claims against the State. The Civil Liability Amendment (Offender Damages Trust Fund) Act 2005 inserted division 6—Offender damages trust funds—into part 2A—Special Provisions for Offenders in Custody—of the Civil Liability Act 2002. The object of that Act was to amend the Civil Liability Act to require that damages awarded against the Department of Corrective Services and other public sector defendants for injuries suffered by an offender in custody—offender damages—are to be held in trust and used to satisfy a claim for damages, death or personal injury suffered by a victim of an offence committed by the offender, with any surplus remaining after victim claims are satisfied to be paid to the offender. Effectively, the Act was designed to introduce a scheme whereby victims may, if they wish, take their own civil action against the offender, at their own expense, in the knowledge that quarantined funds exist to satisfy successful claims. In the second reading speech the Minister said:

> Notwithstanding the limitations on offender damages imposed by Part 2A of the Civil Liability Act 2002, introduced by the Civil Liability (Offender Damages) Act 2004, the community is rightly outraged when offenders receive large amounts of compensation for injuries received in custody, particularly when the amount awarded is compared with the victims compensation available to their victims.
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> The community perceives such offenders to be using the law for their own purposes when it suits them, but disrespecting the law and the community in the commission of their crimes.

The Civil Liability Amendment (Offender Damages Trust Fund) Act 2005 contained savings and transitional provisions for the amendments to apply to all awards of offender damages that had not been satisfied before the commencement of the amendments, which commenced upon assent on 29 October 2005, including awards in respect of proceedings commenced and causes of action that arose before the commencement of the amendments, and regardless of whether the litigation that led to the award of damages was conducted under the Civil Liability Act or at common law. On 2 June 2005 the former Attorney General, the Hon. Bob Debus, MP, wrote to the Chief Justice seeking comments on the proposed Civil Liability Amendment (Offender Damages Trust Fund) Bill 2005. On 9 June 2000 the Acting Chief Justice, Justice Keith Mason, wrote to the former Attorney General and said:

> I refer to your letter of 2 June 2005 addressed to the Chief Justice. In his absence I referred the matter to the Chief Judge at Common Law for his views. Justice Wood has indicated that there appears to be no issue touching the Supreme Court that raises any policy concern. I am of like view.

Notwithstanding the views of Justice Mason and Justice Wood, subsequent court decisions in several matters have failed to adhere to the amendments or the intention of the amendments as advised to Parliament in the second reading speech on the bill. Honourable members may recall the matter of Bujdoso, which received considerable coverage in 2005 and 2006. Firstly, in 2005 the High Court upheld the Court of Appeal's decision that Bujdoso, a sex offender assaulted at Silverwater Correctional Centre in 1992, was entitled to compensation for the State's negligence in not preventing the assault, after common law litigation which did not involve the Civil Liability Act. The matter was remitted to the District Court, the original hearing court, where he was awarded $175,000 on 21 July 2006.

The Government then attempted to apply the Offender Damages Trust Fund provisions of the Act to Bujdoso's damages award, and Bujdoso sought a Supreme Court order that the legislation did not apply to him. On 5 September 2006 Justice Sully in the Supreme Court ruled in favour of Bujdoso—that is, that his damages award could not be quarantined for his victims—and the Court of Appeal unanimously upheld the Supreme Court's decision on 13 March 2007. It did find, however, that part of Justice Sully's judgment was erroneous. In the interim between the Supreme Court decision and the Court of Appeal hearing the Government introduced further amendments in the Crimes and Courts Legislation Amendment Bill 2006, which commenced upon assent on 29 November 2006, to overcome the Supreme Court decision. The second reading speech to that bill made the Government's intention clear:

> The amendments proposed in this bill to the Civil Liability Act will overturn that decision the Court of Appeal will have to take the amendments into account when determining the application of the offender damages trust fund provisions.

The Court of Appeal did consider the amendments in its decision on Bujdoso but decided the matter in favour of Bujdoso on reasoning outside the amendments that had been introduced to overcome the Supreme Court decision. The reasoning of the Court of Appeal in Bujdoso is complex and tortuous. The three judges all used different bases to find in favour of Bujdoso, and all those bases were outside the scope of the amendments introduced by the Crimes and Courts Legislation Amendment Act 2006.

Justice Hodgson, in the Court of Appeal, held that the words "any final determination of legal proceedings" in clause 26 (3) and (4) of schedule 1 to the Civil Liability Act are not expressed with sufficient clarity to capture

Bujdoso's case, and he contrasted the description of "final determination of legal proceedings" in section 26M (4) of the Act. Justice Ipp also considered unsatisfactory the meaning of "final determination of legal proceedings". The intention of the legislation was that "final determination of legal proceedings" in clause 26 (3) and (4) of schedule 1 to the Civil Liability Act referred to the legal proceedings between the parties which finally determine the issue of negligence and the amount of damages, in this case the District Court's decision of 21 July 2006. Justice Ipp, however, held that the "final determination of legal proceedings" occurred when the Supreme Court determined the most recent of all proceedings which led to the appeal before the Court of Appeal, those proceedings of 5 September 2006 that concerned what was to happen to the damages awarded on 21 July 2006.

Justice Ipp said, "Sully J's judgment finally determined the proceedings before him", which is undoubtedly true, but in the Government's view irrelevant since those proceedings could not change the finding of negligence or the quantification of the award of damages. Justice Basten, with Justice Ipp agreeing, held that the term "personal injury damages" was defined in part 2 of the Act for the purpose of part 2A and that part 2—Personal Injury Damages—does not apply to an award of damages in proceedings commenced before commencement of the Act on 20 March 2002 and, accordingly, that Bujdoso's claim, which was brought in 1994, was not for personal injury damages for the purpose of part 2 of the Act. He held that as that phrase is picked up and applied in part 2A, it follows that such damages will not be "personal injury damages" under part 2A either and, therefore, will not constitute offender damages as defined in section 26K (1).

Justice Basten observed that this reasoning was additional to the reasoning of Justice Sully in the Supreme Court decision of 5 September 2006 and was not picked up by the amendments introduced by the Crimes and Courts Legislation Amendment Act 2006. Accordingly, he held that "the conclusion reached by the primary judge was correct at the time it was reached, and is not affected by the change in the law effected by the 2006 Amendment Act". Justice Basten also held that "the whole of clause 26 should be understood to have commenced on the day of assent (of the Crimes and Courts Legislation Amendment Act 2006), namely 29 November 2006". The intention of this Act was that clause 26 commenced at the date of its earliest operation, since it includes the words "The definition of offender in custody or offender in section 26A (1) includes, and is taken to have always included, the following "

The amendments proposed by the Civil Liability Amendment (Offender Damages) Bill 2007 seek to overcome findings made in recent court cases. Placing definitions of "injury" and "personal injury damages" in part 2A, as well as in part 2, means that any limitation imposed on the terms by part 2 of the Act does not apply to those terms when they are used in part 2A. New section 26M (4) and new section 26R (1A) in schedule 1 to the bill will ensure that it will be clear when proceedings between the State and an offender have been finally determined, and therefore that the offender is subject to the Offender Damages Trust Fund provisions of the Act.

I referred earlier to the Bujdoso judgment, with which honourable Members may be familiar. Certainly the member for Epping was thoroughly familiar with it. I do not expect honourable members to be as familiar with the matter of *Hiron v The State of New South Wales,* which has led to the insertion of new section 26D (3A). In this matter, to which the Minister averted in his second reading speech, the offender submitted medical evidence but the evidence did not contain an assessment of "whole person impairment" in satisfaction of section 25C of the Act, "No damages unless permanent impairment of at least 15 per cent". The department provided medical evidence including an assessment below the 15 per cent threshold. Section 26D (3) of the Act provides:

> A dispute about the degree of permanent impairment of an injured offender, a court may not award damages unless the degree of impairment has been assessed by an approved medical specialist in accordance with the Workplace Injury Management and Workers Compensation Act 1998.

The department contended that the offender had failed to provide evidence of reaching the 15 per cent threshold, and his claim should be struck out. The offender contended that the department's medical evidence was incorrect; that this contention constituted a medical dispute and he was therefore entitled to an assessment by an approved medical specialist, thus prolonging his claim in the hope of a favourable assessment. Associate Justice Malpass in the Supreme Court found for the offender, holding that:

> the definition of "medical dispute" contemplates a dispute between the parties (and not a dispute between medical practitioners) about a specified matter or a question about any of them (these matters being of a medical nature).

The offender was therefore able to bypass the requirement to provide any medical evidence, and claimed his right to an assessment by an approved medical specialist. To nobody's surprise, this assessment later found him to have a degree of impairment of zero per cent. His case was hopeless from the outset, but he persisted in the futile hope of getting lucky. He caused the Government to waste resources in investigating the claim, conducting a medical examination of the offender to submit its own estimate of his degree of permanent impairment, and then defending the claim in the District Court and appealing to the Supreme Court—all expenses that it is most unlikely to recover given the financial position of the offender. New section 26D (3A) will ensure that other offenders with hopeless cases will not be able to sidetrack the Government in the way that this offender managed to, by requiring an offender to provide medical evidence of permanent impairment of at least 15 per cent for there to be a medical dispute. I commend the bill to the House.

Question—That this bill be now agreed to in principle—put and resolved in the affirmative.

Motion agreed to.

Bill agreed to in principle.

Passing of the Bill

Bill declared passed and returned to the Legislative Council without amendment.