



Civil Liability Amendment (Personal Responsibility) Bill.

CIVIL LIABILITY AMENDMENT (PERSONAL RESPONSIBILITY) BILL

Page: 5764

Bill introduced and read a first time.

Second Reading

Mr CARR (Maroubra—Premier, Minister for the Arts, and Minister for Citizenship) [12.08 p.m.]: I move:

That this bill be now read a second time.

The introduction of this bill today is a triumph for commonsense. Personal responsibility will rightly assume a much higher profile in our law thanks to these reforms. Simple pleasures enjoyed by the community will be able to continue because of them. But, regardless of the commonsense of these reforms, we recognise that Parliament will be debating some of the most fundamental changes to the law of negligence ever made. Thanks to the historic joint sitting last month and the assistance of four eminent speakers, I am sure that we will all have a much better appreciation of how the law of negligence has developed. I am hopeful the seminar will mean that this debate is of a high calibre. Honourable members might also be interested in the Senate economics committee report on public liability and professional indemnity insurance released only yesterday. The bill I am introducing today is different to the consultation draft I released in early September. The consultation draft opened up some authentic consultation and the Government has listened.

However, most of the changes implement or draw on the recommendations by the expert panel, which released its final report, "The Review of the Law of Negligence", late last month. That report became known as the Ipp report after the Chair of the panel, Justice David Ipp. The New South Wales Government has taken the lead in responding to the recommendations in the report, and the need for New South Wales to move quickly has been recognised by the other States, Territories and the Commonwealth who noted that the particular hardships faced by the New South Wales community, the most litigious in Australia, deserved prompt attention. That is what we have done. We are further down the road than any other jurisdiction in Australia.

However, the Government acknowledges that national consistency is desirable to some reforms in this area. For that reason we have modelled many of the new provisions in the bill following the original exposure draft on those recommendations in the Ipp report that are more likely to have a national impact on the Law of negligence. I stress, however, that not all reforms in the bill or in the Ipp report need to be made in other jurisdictions or in exactly the same terms. But it would be helpful to the community and the courts if those reforms dealing with basic principles of the law of negligence were consistent. That is why we have been so ready to change the draft bill. I understand that the Queensland Government also proposes to introduce further reforms by the end of the year, and is considering this approach. I am confident that we now have a more comprehensive and finely honed bill to debate.

Our stage one and proposed stage two reforms have already led to announcements by the insurance industry that new public liability insurance products will be made available to New South Wales community organisations. But I emphasise that these reforms are not only a response to the current problems regarding insurance. It is important to remember that these reforms are not only about reducing premiums. The insurance crisis served to highlight just how far the law has drifted away from the concept of personal responsibility. This is the Americanisation of our legal system. I want this Parliament to seize the opportunity to wind back this culture of blame. If we do, we will help to preserve the community's access to socially important activities. Our community deserves our best efforts to preserve the Australian way of life. That is what it is about.

I turn now to the detail of the bill. The bill modifies particular aspects of the common law. It does not establish a complete code. We have adopted the approach in the Ipp report to the duty of care and causation. A risk has to be not insignificant before a court can find it was reasonably foreseeable. This will send a clear message to the courts that, under the current common law, liability for insignificant risk is too

easily imposed. Our new formulation will emphasise the community's reasonable expectation that people should have to guard only against risks that are a real possibility. A court will not be able to rely solely on the benefit of hindsight, on evidence of subsequent remedial action by the defendant or the mere fact that a risk was easily avoidable.

Although people might argue that these considerations are already the law, putting them in this bill will help to curtail the willingness of some courts to find a creative way around them. The bill will also deal with causation. Its intention is to guide the courts as they apply a commonsense approach. The rules for factual causation are set out, including the very limited exception to the "but for" test. This exception was developed by the court for those rare cases, often in the dust diseases context, where there are particular evidentiary gaps. By including this exception in the bill it is not intended that the bill extend the common law in any way. Rather, it is to focus the courts on the fact that they should tread very carefully when considering a departure from the but for test.

It is only for the most limited and exceptional circumstances where any departure can be justified. The bill will limit claims that arise from an inherent or obvious risk, or from the plaintiff's own contributory negligence. There will be a presumption that a person is aware of obvious risks, as was recommended in the Ipp report. Similarly, there will be no duty to warn of an obvious risk, providing that no written law requires such a warning in the particular case. Nor will there be any liability for the obvious risks of particularly dangerous sports and other risky activities. The bill will also codify the current law so that there is no liability for the materialisation of inherent risks.

Inherent risks are those risks that no amount of reasonable care and skill can avoid or minimise. If a person has a duty under the common law to warn of an inherent risk that is not obvious, that duty will not be affected by the bill. The bill also refers to the common law position that plaintiffs cannot be found 100 per cent responsible for their own injury. If plaintiffs acted with such little regard for their own safety that they should not recover, the court will be able to find them 100 per cent contributory negligent. As was the case under the consultation draft of the bill, there will be no liability for injury, death or property damage resulting from the risk of recreational activity in respect of which a risk warning has been given.

Risk warnings will be effective for children and disabled people in certain circumstances. It is important because it would be unreasonable that a recreational service provider should not be able to rely on warnings given, for example, to parents before their child goes horse riding. You cannot expect potential defendants to take better care of a child than the child's own parents would take. It is also important to note that risk warnings will be effective if given in such a way that most people would understand. It will not matter that particular individuals say they did not see the sign, or could not read English, or could not understand clear symbols. The courts will have to apply an objective test about the effectiveness of the warning.

A participant in a recreational activity will also be able to assume responsibility for an injury received and waive the implied contractual requirement that services be provided with due care and skill. The Commonwealth has recognised that, for many recreational service providers, the right to assume such a risk under a contract also requires amendments to the Trade Practices Act. That amendment is before the Senate. Naturally, the new protections for risk warnings and waivers will be subject to compliance with the safety laws of the Commonwealth and the State. Shoddy operators will not be able to escape liability if they are in breach of specific safety laws.

The bill will clamp down on plaintiffs who are injured while they are intoxicated. A defendant will not owe a plaintiff a higher standard of care simply because the plaintiff was intoxicated. Nor will personal injury damages be available for an intoxicated person unless the accident was likely to have occurred even if the person had not been intoxicated. If the accident is likely to have occurred anyway, the intoxicated person's damages will be reduced on a presumption of contributory negligence of 25 per cent, or more if appropriate, unless the person's intoxication played no part in the accident.

Very importantly, the bill will limit people claiming damages for injuries received while committing a crime. The general rule under the bill will be that no damages are payable if the injured person was engaged in conduct constituting a serious offence. Serious offences include a very wide range of crimes: entering a dwelling house, breaking and entering, and escaping lawful custody. People who engage in such criminal conduct should not sue for slipping over while they do so. Nor will any damages be available if the criminal was injured through reasonable self-defence. Also, no damages will be payable if the criminal was injured through excessive self-defence, unless the court considers the circumstances are exceptional.

No damages will be available at all for pain and suffering for a criminal injured through self-defence. The bill also creates an additional defence to alleged professional negligence if the professional acted in a manner that was widely accepted in Australia by pure professional opinion as competent professional

practice. This reflects the Ipp report. A court will still be able to find that peer opinion was irrational, where warranted. Irrationality is not the same as unreasonableness. We are making it much harder for the court to disregard experts in the field.

We have ensured, however, that there is no change to any common law duty of a professional to advise, inform or warn about the risks of personal injury in the provision of the services. Obviously, the most important application for this carve-out will be for medical practitioners. The carve-out is quite reasonable because patients—and clients of other professionals, where relevant—need to have enough information about the risk of personal injury to decide whether to proceed to obtain the service. The common law rule in the case of *Rogers v Whittaker* will, therefore, continue to apply in relation to any duty to warn in such situations. The bill will also provide, as recommended by the Ipp Report, that non-delegable duty claims will be subject to the reforms contained in the bill.

Proportionate liability will also be introduced for claims for economic loss or property damage, other than in personal injury claims. This means that a person jointly responsible with some other person or persons will be liable only to the extent of their responsibility. The bill will make important changes to the way that courts deal with claims against public authorities. These changes simply recognise that services provided to the community by public authorities are not provided for commercial gain but for the public good. The bill will not, therefore, sanction a public authority to act in a negligent or unsafe way. It will, however, require the courts to take into account principles relating to the financial and other resources available to the authority, the general responsibilities of the authority, and its compliance with general practices and applicable standards.

The bill will also protect regulatory and roads authorities if they could have done something to avoid a risk but did not do so. It is more than reasonable that functions performed by a public authority are treated differently under the law. Public authorities carry out what is often a limitless task with necessarily limited resources. We must ensure, therefore, that it is not left to the courts to determine a public authority's expenditure on its tasks. In keeping with this approach, the bill will also provide immunity for a public or other authority for breach of statutory duty, unless it has acted irrationally.

An authority that has not exercised a regulatory function—such as a power to close a fishery—will also not be liable unless it could have been compelled by a court to exercise that power. A "roads authority" that has not exercised a discretionary power to mend, for example, a pothole will not be liable unless it actually knew about the particular risk that led to the injury. This will reintroduce a protection for certain "non-feasance" on the part of roads authorities. If a roads authority did know about the particular risk, it will still be able to rely on the general "resources" protection in the bill for public authorities.

The bill will also protect the good faith actions of good Samaritans who come to the assistance of a person in danger. This will mean no liability for voluntary rescue organisations, such as surf life saving clubs, if a person is injured in the course of or in connection with a rescue. Individual volunteers will also be protected from law suits where their actions were done in good faith. It is not intended to alter the potential liability of a community organisation by providing the individual members with immunity. The Ipp Report recommended codifying the law in relation to mental harm. The bill follows these recommendations.

Instead of using the imprecise term "nervous shock", the bill will provide that damages are only recoverable for a recognised psychiatric illness. The bill also provides that the only people who can recover for mental harm are victims of the negligence, people present at an accident scene, or a family member of a victim. This eliminates the relatives of criminals making a bid for \$10,000 to compensate for the nervous shock they sustained. That is an unbelievable situation and is, in essence, why this legislation is required. An apology by or on behalf of the defendant will also not constitute an admission of liability and will not be relevant to the determination of fault or liability in connection with civil liability. Injured people often simply want an explanation and an apology for what happened to them. If these are not available, a conflict can ensue. This is, therefore, an important change that is likely to see far fewer cases ending up in court.

The bill will facilitate structured settlements by providing that the courts must give a further opportunity to parties to negotiate a structured settlement. Lawyers will also have to notify parties about the availability of such a settlement. The Ipp Report recommends that personal injury actions should not be brought more than three years after the date of "discoverability". The new time period will run against every injured person, with three exceptions: first, if the person is a child or a disabled person without a capable parent or guardian to look after his or her interests; second, if an injury to a child was caused by a person in a close personal relationship with the child or the child's parents; and third, if a child's parents "irrationally" fail to bring a claim on the injured child's behalf. The new discoverability test should provide more certainty and limit applications for extensions of time.

This bill is one of the most important pieces of legislation to be put before this Parliament in recent years. We need to get it right. That is why we had public consultation and took notice of what came out in Canberra's Ipp Report. It is fair to say that we have held public consultation and we have looked carefully at the Ipp Report. Now it is time for this House to debate a proposal for the most important reform of the laws of negligence in 70 years. I commend the bill to the House

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