



Legislative Assembly Hansard,

Extract from NSW Legislative Assembly Hansard and Papers Thursday, 20 November 2003.

CIVIL LIABILITY AMENDMENT (MENTAL ILLNESS) BILL

Bill introduced and read a first time.

Second Reading

Mr ANDREW TINK (Epping) [10.11 a.m.]: I move:

That this bill be now read a second time.

This bill is different to the Civil Liability Amendment Bill that was considered by this House last night because this bill covers the Presland matter. I moved an amendment last night in Committee, which was defeated along party lines, and I now bring this bill forward to specifically deal with Presland and the class of people like Presland. This is necessary because the way the Government has proceeded provides no guarantee that we have done all we can do to ensure that Presland does not get damages. Honourable members may recall that following his killing of a woman by slitting her throat, Presland was awarded \$300,000 damages. The Government is appealing that decision but there is no guarantee that the appeal will be upheld. I believe that the Government can, and should, be doing more to ensure that Presland does not get the money.

Last night the Minister for Health, on behalf of the Attorney General, made it clear that the Government's legislation covers Trimarchi and Rea, who have filed proceedings but whose proceedings have not at this stage proceeded to a judgment. In that respect Presland is different but the Government has embraced the concept of retrospectivity in this particular public policy area. In this bill I seek to extend the concept of retrospectivity back to and including Presland. I want to read onto the record advice given to me by Parliamentary Counsel specifically in relation to this bill so that, heaven forbid, if this matter does go pear shaped in the courts, there is a record of what the Opposition tried to do, based on what I believe is proper advice. On 14 October Parliamentary Counsel provided advice in relation to this bill and stated:

I refer to your request for advice about the operation of the Bill in connection with pending proceedings.

The bill makes it clear that the prohibition on the recovery of damages by a person who suffers loss or injury in connection with the person's commission of a serious criminal offence (section 54) extends to a person who is found not guilty of committing such an offence because of mental illness or who is unfit to be tried because of mental illness.

The bill is expressed to commence retrospectively on the date that notice of motion for the bill was given (i.e. 3 September 2003). The transitional provisions in schedule 1[2] declare that the bill applies to proceedings pending on that date (including proceedings on appeal on that date). The provision is intended to ensure that the bill applies to deny the recovery of damages by Presland (even if the current appeal against the award of damages to Presland would otherwise have been unsuccessful). The bill will also deny the recovery of damages by other similar plaintiffs whose cases have not yet been initially determined.

They are covered now by the Government's bill, but Presland is not. The advice continues:

The Presland decision is not reversed directly and specifically by the bill (because that would be likely to raise constitutional issues related to the Kable case) but by changing retrospectively the underlying law applicable to the case (and thereby requiring the Appeal Court to reverse the initial decision in favour of Presland).

It is unlikely that the transitional provisions would be construed as applying to the Presland case if the appeal is determined before the bill is passed (unless there is the possibility of a further appeal being lodged to challenge the decision).

Although the Civil Liability Act was in 2002 applied to proceedings instituted after the Premier's announcement of the proposed reforms and before the commencement of the Act, it did not apply to the Presland case because I understand the proceedings had been instituted before the Premier's announcement. Accordingly, in order to apply section 54 of the Act to the Presland case, it is necessary for the transitional provision in the bill to apply that section even though the proceedings were instituted before the Premier's announcement and the Act generally would not otherwise apply. This makes the transitional provisions particularly complex.

It must be said, however, that the attempt to apply the bill in a way that effectively reverses a court decision in the case concerned rather than in its future application is unprecedented (ordinarily retrospective legislation removed the prospect of success of litigants in pending proceedings that have not been decided by the initial court of trial). As the Kable case demonstrated, such unprecedented measures can sometimes have unexpected results.

I am only trying to ensure that we, on this side of the House, do absolutely everything to make sure that Presland does not keep \$300,000 awarded as a result of killing a woman by slitting her throat. The Opposition is doing everything it possibly can. I am very sorry that the Government rejected our amendment last night that would have had the same effect as this measure. I hope it will reconsider and support this bill. I commend the bill to the House.