



New South Wales

## Civil Liability Amendment Bill 2006

### Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

### Overview of Bill

In *Griffiths v Kerkemeyer* (1977) 139 CLR 161, the High Court held that in a claim for personal injury, the plaintiff is entitled to recover damages for the cost of nursing and domestic services that have been provided in the past and will be provided in the future to the plaintiff by his or her family or friends. Section 15 of the *Civil Liability Act 2002* (the *principal Act*) limits the circumstances in which such damages may be recovered and the amount of damages that may be recovered.

Relying in part on the decision in *Griffiths v Kerkemeyer*, the NSW Court of Appeal held in *Sullivan v Gordon* (1999) 47 NSWLR 319 that a plaintiff who has a claim for personal injury may recover damages to compensate the plaintiff for his or her loss of capacity to provide domestic assistance to a dependant (in that case, the plaintiff's ill wife).

Damages of the kind awarded in *Sullivan v Gordon* differ from those awarded in *Griffiths v Kerkemeyer* because they are awarded for the loss of the plaintiff's capacity to provide services to another person rather than for the cost of services that the plaintiff has required or will in the future require.

In *CSR Limited v Eddy* [2005] HCA 64 (21 October 2005), the High Court overruled a line of cases of which *Sullivan v Gordon* forms part. As a consequence, the position

at common law in Australia is currently that a plaintiff in a personal injury claim cannot recover special damages to compensate the plaintiff for the loss of the plaintiff's capacity to provide domestic services to his or her dependants.

The object of this Bill is to amend the principal Act:

- (a) to enable certain claimants who have personal injury claims (including in respect of intentional acts, sexual misconduct, motor accidents, dust-related conditions and smoking and tobacco products) to recover damages for the loss of their capacity to provide gratuitous domestic services to their dependants, and
- (b) to provide a cap on the hourly rate for calculating the amount of *Griffiths v Kerkemeyer* damages that claimants with personal injury claims in respect of dust-related conditions may recover.

## Outline of provisions

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on the date of assent to the proposed Act.

**Clause 3** is a formal provision that gives effect to the amendments to the principal Act set out in Schedule 1.

**Clause 4** provides for the repeal of the proposed Act on the day following the day on which it commences. Section 30 of the *Interpretation Act 1987* provides that the repeal of an Act does not affect any amendment previously made by the repealed Act.

## Schedule 1 Amendments

**Schedule 1 [10]** inserts a new section 15A in the principal Act. The new section provides for a cap on the hourly rate for calculating the amount of *Griffiths v Kerkemeyer* damages that may be awarded in respect of personal injury for dust-related conditions to which section 11 of the *Dust Diseases Tribunal Act 1989* applies.

The cap is the same hourly rate provided in section 15 of the principal Act. However, section 15 does not currently extend to the calculation of *Griffiths v Kerkemeyer* damages in proceedings involving dust-related conditions. The cap provided by section 15 is calculated at an hourly rate of one-fortieth of the amount per week comprising the amount estimated by the Australian Statistician as the average weekly total earnings of all employees in New South Wales for the relevant quarter for the injury concerned.

**Schedule 1 [11]** inserts a new section 15B in the principal Act to enable a court in certain circumstances to award damages of the kind recognised by the Court of Appeal in *Sullivan v Gordon*. The proposed section provides that a court may award damages to a claimant for any loss of the claimant's capacity to provide gratuitous domestic services to the claimant's dependants, but only if the court is satisfied that:

- (a) in the case of any dependants of the claimant of the kind referred to in paragraph (a) of the definition of *dependants* set out below—the claimant provided the services to those dependants before the time that the liability in respect of which the claim is made arose, and
- (b) the claimant’s dependants were not (or will not be) capable of performing the services themselves by reason of their age or physical or mental incapacity, and
- (c) there is a reasonable expectation that, but for the injury to which the damages relate, the claimant would have provided the services to the claimant’s dependants:
  - (i) for at least 9 hours per week, and
  - (ii) for a period of at least 6 consecutive months, and
- (d) there will be a need for the services to be provided for those hours per week and that consecutive period of time and that need is reasonable in all the circumstances.

For the purposes of the proposed section, the *dependants* of a claimant are defined to mean:

- (a) such of the following persons as are wholly or partly dependent on the claimant at the time that the liability in respect of which the claim is made arises:
  - (i) the husband or wife of the claimant,
  - (ii) a de facto partner of the claimant, being a person who has a de facto relationship (within the meaning of the *Property (Relationships) Act 1984*) with the claimant,
  - (iii) a child, grandchild, sibling, uncle, aunt, niece, nephew, parent or grandparent of the claimant (whether derived through subparagraph (i) or (ii), adoption or otherwise),
  - (iv) any other person who is a member of the claimant’s household, and
- (b) any unborn child of the claimant (whether derived through paragraph (a) (i) or (ii), adoption or otherwise) at the time that the liability in respect of which the claim is made arises and who is born after that time.

The term *gratuitous domestic services* is defined to mean services of a domestic nature for which the person providing the service has not been paid or is not liable to be paid.

The proposed section also imposes a cap on the hourly rate for calculating the amount of such damages that is the same as that provided by section 15 of the principal Act and proposed section 15A.

The proposed section also makes it clear that such damages are not available if the claimant or dependant has previously recovered damages for the loss.

The amendments made to section 3B of the principal Act by **Schedule 1 [1]–[4]** will ensure that proposed section 15B will extend to the determination of civil liability for injury that results from an intentional act, sexual misconduct, a motor accident, a dust-related condition or from smoking or the use of tobacco products. However, the proposed section makes it clear that:

- (a) a claimant who is a participant in the Scheme under the *Motor Accidents (Lifetime Care and Support) Act 2006* may not recover damages for his or her loss of capacity to provide gratuitous domestic services to dependants to the extent that those services are (or are to be) provided under the Scheme, and
- (b) a claimant may not recover damages for his or her loss of capacity to provide gratuitous domestic services to dependants to the extent that those services are paid for (or liable to be paid for) by an insurer under section 83 (Duty of insurer to make hospital, medical and other payments) of the *Motor Accidents Compensation Act 1999*.

**Schedule 1 [5] and [7]–[9]** make amendments that are consequential on the insertion of proposed sections 15A and 15B in the principal Act.

**Schedule 1 [12]** amends section 18 (1) of the principal Act to provide that a court may not order the payment of interest on damages for the loss of a claimant's capacity to provide gratuitous domestic services to the claimant's dependants. The amendment also makes it clear that the current prohibition on the payment of such interest on awards of *Griffiths v Kerkemeyer* damages does not extend to damages awarded in cases involving dust-related conditions. **Schedule 1 [6] and [13]** make consequential amendments to sections 3B and 18 respectively.

**Schedule 1 [14]** amends clause 1 of Schedule 1 to the principal Act to enable the Governor to make regulations of a savings or transitional nature consequent on the enactment of the proposed Act.

**Schedule 1 [15]** inserts a new Part in Schedule 1 to the principal Act that contains savings and transitional provisions consequent on the enactment of the proposed Act. In particular, it provides that proposed sections 15A and 15B extend to civil liability arising before the commencement of the section concerned, but do not apply to any proceedings that were finally determined before that commencement.

First print



New South Wales

# Civil Liability Amendment Bill 2006

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New South Wales

## Civil Liability Amendment Bill 2006

No. , 2006

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### A Bill for

An Act to amend the *Civil Liability Act 2002* to make further provision with respect to damages for gratuitous attendant care services and for loss of capacity to provide domestic services; and for other purposes.

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<b>The Legislature of New South Wales enacts:</b>	1
<b>1 Name of Act</b>	2
This Act is the <i>Civil Liability Amendment Act 2006</i> .	3
<b>2 Commencement</b>	4
This Act commences on the date of assent to this Act.	5
<b>3 Amendment of Civil Liability Act 2002 No 22</b>	6
The <i>Civil Liability Act 2002</i> is amended as set out in Schedule 1.	7
<b>4 Repeal of Act</b>	8
(1) This Act is repealed on the day following the day on which this Act commences.	9 10
(2) The repeal of this Act does not, because of the operation of section 30 of the <i>Interpretation Act 1987</i> , affect any amendment made by this Act.	11 12



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**Schedule 1      Amendments**

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<b>[7] Section 15 Damages for gratuitous attendant care services: general</b>	1
Relocate the note at the end of the section to the end of subsection (3).	2
<b>[8] Section 15</b>	3
Insert at the end of the section:	4
<b>Note.</b> By reason of the operation of section 3B (1) (b), this section does not apply to the determination of civil liability in proceedings of the kind referred to in section 11 (Claims for damages for dust diseases etc to be brought under this Act) of the <i>Dust Diseases Tribunal Act 1989</i> .	5 6 7 8
Section 15A makes provision with respect to the determination of damages for gratuitous attendant care services in proceedings of the kind referred to in section 11 of the <i>Dust Diseases Tribunal Act 1989</i> .	9 10 11
<b>[9] Section 15A Damages for loss of superannuation entitlements</b>	12
Renumber the section as section 15C.	13
<b>[10] Section 15A</b>	14
Insert after section 15:	15
<b>15A Damages for gratuitous attendant care services: dust-related conditions</b>	16 17
(1) This section applies to the determination of civil liability for damages for gratuitous attendant care services in proceedings of the kind referred to in section 11 (Claims for damages for dust diseases etc to be brought under this Act) of the <i>Dust Diseases Tribunal Act 1989</i> .	18 19 20 21 22
(2) The amount of damages that may be awarded for gratuitous attendant care services in proceedings referred to in subsection (1) must not exceed the amount calculated at the same hourly rate as that provided by section 15 (5) regardless of the number of hours involved.	23 24 25 26 27
(3) Except as provided by this section, nothing in this section affects any other law relating to the value of attendant care services.	28 29
(4) In this section, <i>attendant care services</i> and <i>gratuitous attendant care services</i> have the same meanings as they have in section 15.	30 31

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<b>[11] Section 15B</b>	1
Insert before section 15C (as renumbered by item [9]):	2
<b>15B Damages for loss of capacity to provide domestic services</b>	3
(1) <b>Definitions</b>	4
In this section:	5
<i>assisted care</i> , in relation to a dependant of a claimant, means any	6
of the following kinds of care (whether or not the care is provided	7
gratuitously):	8
(a) any respite care (being care that includes accommodation	9
that is provided by a person other than the claimant to a	10
dependant who is aged or frail, or who suffers from a	11
physical or mental disability, with the primary purpose of	12
giving the dependant or claimant, or both, a break from	13
their usual care arrangements),	14
(b) if the dependant is a minor (but without limiting	15
paragraph (a))—any care that is provided to the dependant	16
by a person other than the claimant where:	17
(i) the person is a parent of the dependant (whether	18
derived through paragraph (a) (i) or (ii) of the	19
definition of <i>dependants</i> in this subsection,	20
adoption or otherwise), and	21
(ii) the care includes the provision of accommodation to	22
the dependant.	23
<i>dependants</i> , in relation to a claimant, means:	24
(a) such of the following persons as are wholly or partly	25
dependent on the claimant at the time that the liability in	26
respect of which the claim is made arises:	27
(i) the husband or wife of the claimant,	28
(ii) a de facto partner of the claimant, being a person	29
who has a de facto relationship (within the meaning	30
of the <i>Property (Relationships) Act 1984</i> ) with the	31
claimant,	32
(iii) a child, grandchild, sibling, uncle, aunt, niece,	33
nephew, parent or grandparent of the claimant	34
(whether derived through subparagraph (i) or (ii),	35
adoption or otherwise),	36
(iv) any other person who is a member of the claimant's	37
household, and	38

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- (b) any unborn child of the claimant (whether derived through paragraph (a) (i) or (ii), adoption or otherwise) at the time that the liability in respect of which the claim is made arises and who is born after that time. 1  
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- gratuitous domestic services* means services of a domestic nature for which the person providing the service has not been paid or is not liable to be paid. 5  
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- (2) **When damages may be awarded** 8
- Damages may be awarded to a claimant for any loss of the claimant’s capacity to provide gratuitous domestic services to the claimant’s dependants, but only if the court is satisfied that: 9  
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- (a) in the case of any dependants of the claimant of the kind referred to in paragraph (a) of the definition of *dependants* in subsection (1)—the claimant provided the services to those dependants before the time that the liability in respect of which the claim is made arose, and 12  
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- (b) the claimant’s dependants were not (or will not be) capable of performing the services themselves by reason of their age or physical or mental incapacity, and 17  
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- (c) there is a reasonable expectation that, but for the injury to which the damages relate, the claimant would have provided the services to the claimant’s dependants: 20  
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- (i) for at least 9 hours per week, and 23
- (ii) for a period of at least 6 consecutive months, and 24
- (d) there will be a need for the services to be provided for those hours per week and that consecutive period of time and that need is reasonable in all the circumstances. 25  
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- Note.** Section 18 provides that a court cannot order the payment of interest on damages awarded for any loss of capacity of a claimant to provide gratuitous domestic services to the claimant’s dependants. 28  
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- (3) If a dependant of the claimant received (or will receive) assisted care during the 6-month period referred to in subsection (2) (c) (ii) and the court is satisfied that the periods of that care were (or will be) short-term and occasional, the court may: 31  
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- (a) in determining whether the claimant would have provided gratuitous domestic services to the dependant during a particular week for at least the 9 hours referred to in subsection (2) (c) (i), disregard the week if assisted care was (or will be) provided during that week, and 35  
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- (b) in determining whether the claimant would have provided gratuitous domestic services to the dependant during the 6-month period referred to in subsection (2) (c) (ii), 40  
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|     | disregard any periods during which the assisted care was            | 1  |
|     | (or will be) provided in that 6-month period,                       | 2  |
|     | but only if the total number of weeks in which the care was (or     | 3  |
|     | will be) provided during the 6-month period does not exceed 4       | 4  |
|     | weeks in total.   | 5  |
| (4) | <b>Determination of amount of damages</b>                           | 6  |
|     | The amount of damages that may be awarded for any loss of the       | 7  |
|     | claimant's capacity to provide gratuitous domestic services must    | 8  |
|     | not exceed the amount calculated at the same hourly rate as that    | 9  |
|     | provided by section 15 (5) regardless of the number of hours        | 10 |
|     | involved.   | 11 |
| (5) | In determining the amount of damages (if any) to be awarded to      | 12 |
|     | a claimant for any loss of the claimant's capacity to provide       | 13 |
|     | gratuitous domestic services to the claimant's dependants, a        | 14 |
|     | court:  | 15 |
|     | (a) may only award damages for that loss in accordance with         | 16 |
|     | the provisions of this section, and                                 | 17 |
|     | (b) must not include in any damages awarded to the claimant         | 18 |
|     | for non-economic loss a component that compensates the              | 19 |
|     | claimant for the loss of that capacity.                             | 20 |
| (6) | <b>Circumstances when damages may not be awarded</b>                | 21 |
|     | The claimant (or the legal personal representative of a deceased    | 22 |
|     | claimant) may not be awarded damages for any loss of the            | 23 |
|     | claimant's capacity to provide gratuitous domestic services to      | 24 |
|     | any dependant of the claimant if the dependant has previously       | 25 |
|     | recovered damages in respect of that loss of capacity.              | 26 |
| (7) | A person (including a dependant of a claimant) may not be           | 27 |
|     | awarded damages for a loss sustained by the person by reason of     | 28 |
|     | the claimant's loss of capacity to provide gratuitous domestic      | 29 |
|     | services if the claimant (or the legal personal representative of a | 30 |
|     | deceased claimant) has previously recovered damages in respect      | 31 |
|     | of that loss of capacity.   | 32 |
| (8) | If a claimant is a participant in the Scheme under the <i>Motor</i> | 33 |
|     | <i>Accidents (Lifetime Care and Support) Act 2006</i> , damages may | 34 |
|     | not be awarded to the claimant under this section in respect of any | 35 |
|     | loss of the claimant's capacity to provide gratuitous domestic      | 36 |
|     | services to the claimant's dependants while the claimant is a       | 37 |
|     | participant in the Scheme if (and to the extent that):              | 38 |
|     | (a) the loss resulted from the motor accident injury (within the    | 39 |
|     | meaning of that Act) in respect of which the claimant is a          | 40 |
|     | participant in that Scheme, and                                     | 41 |
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(b)	the treatment and care needs (within the meaning of that Act) of the claimant that are provided for or are to be provided under the Scheme include the provision of such domestic services to the claimant's dependants.	1 2 3 4
(9)	Damages may not be awarded to a claimant under this section in respect of any loss of the claimant's capacity to provide gratuitous domestic services to the claimant's dependants if (and to the extent that):	5 6 7 8
(a)	the loss resulted from an injury caused by a motor accident (within the meaning of the <i>Motor Accidents Compensation Act 1999</i> ), and	9 10 11
(b)	an insurer has made, or is liable to make, payments to or on behalf of the claimant for such services under section 83 (Duty of insurer to make hospital, medical and other payments) of that Act.	12 13 14 15
(10)	<b>Damages may not be awarded if they can be recovered as damages for attendant care services</b>	16 17
	Damages may not be awarded to a claimant under this section in respect of any loss of the claimant's capacity to provide gratuitous domestic services to the claimant's dependants if (and to the extent that):	18 19 20 21
(a)	the claimant could recover damages for gratuitous attendant care services (within the meaning of section 15) in respect of the same injury that caused the loss, and	22 23 24
(b)	the provision of such attendant care services to the claimant also resulted (or would also result) in the claimant's dependants being provided with the domestic services that the claimant has lost the capacity to provide.	25 26 27 28
(11)	<b>Determining value of gratuitous domestic services</b>	29
	In determining the value of any gratuitous domestic services that a claimant has lost the capacity to provide, the court must take into account:	30 31 32
(a)	the extent of the claimant's capacity to provide the services before the claimant sustained the injury that is the subject of the claim, and	33 34 35
(b)	the extent to which provision of the services would, but for the injury sustained by the claimant, have also benefited persons in respect of whom damages could not be awarded under subsection (2), and	36 37 38 39

	(c) the vicissitudes or contingencies of life for which allowance is ordinarily made in the assessment of damages.	1 2 3
<b>[12]</b>	<b>Section 18 Interest on damages</b>	4
	Omit section 18 (1). Insert instead:	5
	(1) A court cannot order the payment of interest on damages awarded for any of the following:	6 7
	(a) non-economic loss,	8
	(b) gratuitous attendant care services as defined in section 15 (other than gratuitous attendant care services to which section 15A applies),	9 10 11
	(c) loss of a claimant's capacity to provide gratuitous domestic services to the claimant's dependants (as provided by section 15B).	12 13 14
<b>[13]</b>	<b>Section 18 (2)</b>	15
	Omit "(other than damages for non-economic loss or gratuitous attendant care services)".	16 17
	Insert instead "(other than damages in respect of which a court cannot order the payment of interest under subsection (1))".	18 19
<b>[14]</b>	<b>Schedule 1 Savings and transitional provisions</b>	20
	Insert at the end of clause 1 (1):	21
	<i>Civil Liability Amendment Act 2006</i>	22
<b>[15]</b>	<b>Schedule 1, Part 8</b>	23
	Insert after Part 7:	24
	<b>Part 8 Provisions consequent on enactment of Civil Liability Amendment Act 2006</b>	25 26
	<b>22 Definition</b>	27
	In this Part:	28
	<i>amending Act</i> means the <i>Civil Liability Amendment Act 2006</i> .	29
	<b>23 Application of amendments made by amending Act</b>	30
	(1) Section 15A (as inserted by the amending Act) extends to civil liability arising before the commencement of section 15A, but	31 32

Civil Liability Amendment Bill 2006

Schedule 1 Amendments

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- does not apply to any proceedings that were finally determined before that commencement. 1  
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- (2) Section 15B (as inserted by the amending Act) and section 18 (1) (as amended by the amending Act) extend to civil liability arising before the commencement of section 15B, but do not apply to any proceedings that were finally determined before that commencement. 3  
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- (3) For the purposes of subclauses (1) and (2), section 3B (1) (a)–(c) and (2) (a1) and (c1) (as inserted or amended by the amending Act) also extend to the civil liability referred to in those subclauses. 8  
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