Legislative Assembly

Civil Liability Bill Hansard Extract

28/05/2002

Second Reading

Mr CARR (Maroubra—Premier, Minister for the Arts, and Minister for Citizenship) [4.32 p.m.]: I move:

That this bill be now read a second time.

On 7 May I released a consultation draft of the Government's Civil Liability Bill. Today, after three weeks of consultation, I introduce the Civil Liability Bill. The bill will implement stage one of the Government's tort law reforms. Three weeks ago I was in no doubt that these reforms were vital to the survival of our community. I have heard and seen the damage that the public liability crisis is doing to our sporting and cultural activities, small businesses and tourism operators, and our local communities. On 7 May no further evidence was required. However, we have had more evidence, such as the damages award against Waverley Council and news today that local councils across the State face a 35 per cent rise in insurance premiums from 1 July.

Since I released the consultation draft of the bill I have met with many local government and community representatives. They have told me that the approach of the courts to public liability is unsustainable, and the Government agrees with them. We need to protect our beaches and parks. We need our roads and schools to operate free from unrealistic standards—standards imposed by the courts with hindsight and with no regard for the cost to the community.

This bill implements stage one of the Government's tort law reform program. I will introduce stage two of the Government's tort law reform program next session. I have already outlined many of the issues that we will address in stage two. Stage two will introduce broad-ranging reforms to the law of negligence. It will ensure that risk warnings can operate as a good defence for risky entertainment or sporting activities—risk warnings should be enough. It will address the test for professional negligence, including medical negligence. Stage two will also ensure that public authorities have a good defence to a negligence claim if they comply with standards set for the particular activity. There will be special protections for good Samaritans. There will be an end to special consideration for people who were drunk when they were injured. There will be no damages for people suing for injuries they sustained while committing a crime.

These reforms are urgent and I understand, and share, the sense of urgency. But stage two will introduce broad-ranging reforms to the law of negligence. Stage two will reform an area of the law that Parliament has not previously addressed. The reforms that I am introducing today in stage one are tried and tested: they have worked in health care liability, in motor accidents and in workers compensation. In contrast, stage two is uncharted waters. We need to take the time to get it right. There are fundamental rights involved in what we are drafting and no-one wants to deprive the genuinely deserving of compensation. That is what we risk doing if we rush into stage two. It is more important to take three months longer and get these reforms than it is to rush in with hasty and piecemeal changes.

Before I turn to the detailed provisions of the bill, I want to say something about premiums and insurance companies. Some people have suggested that there is no real evidence that these reforms will have any impact on insurance premiums. However, I have the evidence. I seek leave to table the actuarial report to the New South Wales Treasury entitled "On Tort law Reforms in Public Liability Insurance" by PricewaterhouseCoopers, dated 28 May 2002.

Leave granted.

Document tabled.

PricewaterhouseCoopers has costed the Government's stage one reforms, and its best estimate of the reforms is as follows. There will be a 17.5 per cent reduction in the cost of personal injury claims. There will be a 14 per cent reduction in the cost of public liability claims as a whole. Most importantly, there should be a reduction of some 12 per cent in public liability premiums. While there might be variations between insurers and particular policies or classes of risk, this report shows that premiums should fall by some 12 per cent. The New South Wales Government cannot guarantee that premiums will fall. However, we can put in place the necessary reforms to enable them to fall, and that is what we are doing with this bill.

But to be sure that premiums will fall and that insurers will not make gains from these reforms, the Commonwealth must act. I have repeatedly called on the Prime Minister to take action to ensure that the Australian Prudential Regulation Authority, the Australian Competition and Consumer Commission and the Australian Securities and Investments Commission monitor insurance premiums and make sure that insurers pass on savings to consumers. Today I have written to the Prime Minister. I have given him a copy of our actuarial advice. I have shown him what our reforms are capable of doing and I have called on him to take immediate action to ensure that the benefit of these reforms goes to the community.

I turn now to the bill. I want to express the Government's appreciation for the contributions that a number of

groups have made to the consultation process. In particular, I thank the Bar Association and the Law Society for their constructive contributions to the bill. I think they understand the Government's resolve to pursue reform. I also acknowledge the contributions of the Local Government and Shires Association and the Insurance Council of Australia. Councillor Tracie Sonda, the Mayor of Sutherland Shire Council, is in the gallery. She is a strong supporter of the legislation. Why would she not be? Sutherland Shire Council has two claims made against it every day and, like all councils in the State, is under pressure to settle them out of court.

We cannot go on like this. I heard reports from the local government representatives that I spoke to yesterday and from the community representatives that they know of three generations of one family living off compensation claims; that they have stories of repeat claimants; that tripping over a defective pavement is a common syndrome. As people tell stories that they put money down on the lawyer's table and got a return from a judge dressed in Santa Claus gear, the practice will spread. People will think, "Why not take your chances?" Lawyers advertise in the print media, "Come to us. If you lose, we won't charge you." We have banned them from doing it in the print media and we have banned them from doing it in the electronic media. This is ambulance chasing to the nth degree. Local government cannot carry the cost of it; society cannot carry the cost of it; surf clubs, show societies and sporting organisations cannot carry the cost of it. It is a national problem. According to media reports on the weekend, equestrian events in Queensland are in trouble.

I refer to retrospectivity. As I made clear on 7 September, this bill will apply to proceedings commenced on or after 20 March. That is the day on which I announced the reforms. Following public consultation, however, we amended the bill to ensure that the Government does not claim the benefit of retrospectivity. The bill now provides that claims against the Crown, including statutory authorities and State-owned corporations, can proceed under the old law provided they satisfy two conditions. First, the claim must have been notified to the Crown before 20 March. This means that claims that were subject to settlement negotiations before that date can proceed to be determined on the old law. Second, proceedings must be commenced before 1 September this year. The only exception to this date will be if the claimant's injuries have not stabilised in time for them to meet that 1 September deadline. The exception will not apply to health care claims that were already subject to the Health Care Liability Act 2001.

The Government can afford to give up the benefit of retrospectivity because these reforms are about reducing public liability premiums. The Government is self-insured—it does not pay premiums in any real sense. We can make this concession on the Government's liability without affecting the overall strength of the reforms. The Government does not want to disadvantage people who have been negotiating settlements with the Crown. The bill introduces important controls with respect to the calculation of damages. It also imposes new requirements on lawyers. Today I will focus on some of the changes to the bill arising from the consultation we have been involved in since 7 May.

Under clause 9 the bill will apply to awards of personal injury damages. This includes personal injury damages awards made in public liability claims and health care claims. Clause 9 (2) sets out the awards that are excluded from the operation of the bill. Importantly, intentional acts done with intent to cause injury or death or acts involving sexual assault are excluded. This exclusion ensures that the compensation for injuries arising from serious criminal acts is not limited by the bill. The exclusion is not intended to cover claims against health care providers where informed consent to treatment may be an issue. The bill will apply to claims made under the Fair Trading Act. This is to ensure that claims that would ordinarily be dealt we under the law of negligence are not re-fashioned into claims under consumer protection law or contract law.

Clause 12 limits damages for lost earnings, loss of earning capacity or expectation of financial support. It requires the courts to disregard any amount claimed by the plaintiff that is greater than three times average weekly earnings. This will affect very high income earners only. The test of three times average weekly earnings has been adopted in preference to the dollar amount in the consultation draft of the bill. It is consistent with the test announced by the Queensland Government. Clause 15 adopts a number of requirements to apply to damages for gratuitous attendant care services. These are drawn from the motor accidents and health care liability schemes. A number of submissions on the draft bill called for the removal of the requirement that a carer must have lost income or forgone employment before these damages can be payable. The Government has deleted that requirement from the bill.

Clause 16 introduces a threshold for damages for non-economic loss. It also fixes the maximum amount of non-economic loss. The provision is drawn from the Health Care Liability Act. Guidance on it can be obtained from the second reading speech introducing the Health Care Liability Bill 2001. I draw members' attention to our actuarial advice on the threshold. This measure is the biggest contributor to savings, both directly and through its effect on legal costs. Our actuarial advice shows that the threshold will exclude smaller claims for general damages and will discourage people from bringing smaller claims. But, importantly, our actuarial advice shows that the threshold will lead to increased general damages for the more seriously injured plaintiffs. These are the people who have suffered the most and they will get more because of the threshold.

Clause 21 deals with exemplary damages. As a result of consultation on the bill, the prohibition on exemplary and punitive damages has been narrowed. These damages will be excluded only in negligence actions and actions where the fault concerned is negligence. For example, where an employer is sued on the basis of its vicarious liability for its employee's negligence, exemplary or punitive damages will not be available. The prohibition has been extended to aggravated damages. These are more commonly awarded in defamation cases than in personal injury cases. However, the Government does not want to provide an avenue for the courts to award other categories of damages to avoid the new provisions on the general damages.

I turn to the amendments to the Legal Profession Act. These provisions have been amended since the

Government released the consultation draft of the bill. The cap on plaintiff lawyers' costs for claims under $100,000 will be the greater of $10,000 or 20 per cent of the amount recovered by the plaintiff. The cap has been extended to the defendant lawyers' costs where it will be the greater of $10,000 or 20 per cent of the amount claimed by the plaintiff. Importantly, the bill now makes it clear that the cap applies to solicitors' and barristers' fees and the fees of their agents or employees. It does not apply to any other disbursements, such as medical reports, investigation reports and filing fees. The cap will not be a standard fee for lawyers to charge their clients. It is the maximum fee which applies unless there is a costs agreement. In many cases the Government expects lawyers to charge significantly less. Bills of costs will still be subject to the normal costs assessment rules in the Legal Profession Act. Lawyers will not be permitted to inflate their costs up to the cap.

The cap on fees will promote efficiency on the part of the legal profession and help to contain claims costs. The cap on costs will be the most that can be recovered from the other party in proceedings, unless the exceptions in clauses 198F or 198G apply. Clause 198F will enable the courts to award indemnity costs against a party if that party refuses an offer of compromise where the eventual outcome of the claim is no less favourable than the terms of the offer. The indemnity costs would apply for the period after the offer is made. Clause 198G will enable the court to order that some costs are not covered by the cap if it is satisfied that the costs are for legal services that were required because the other party took action that was not reasonably necessary for the advancement of its case.

For example, a defendant might make a number of pre-trial applications to the court, requiring the plaintiff's representatives to attend court and argue the various points. If the court finds these applications were not reasonably necessary for the defendant's case or they were intended to unnecessarily delay or complicate determination of the claim, the court can order the defendant to pay the plaintiff's costs of those applications in addition to the capped costs. The bill does not prevent a client agreeing to pay a lawyer extra fees in addition to the cap. However, extra fees can be paid only if there is a costs agreement between the lawyer and the client.

Clause 196 contains a regulation-making power which will enable the Government to introduce a cap on those parts of lawyers' fees which are not regulated by the bill. This is a consumer protection measure. The Government will not hesitate to make a regulation to impose a cap on the fees that can be agreed between lawyers and clients or to introduce a scale for those fees if plaintiff or defendant lawyers take advantage of their clients. These provisions in the bill will contain legal costs, while protecting clients. The Government has changed the standard for assessing unmeritorious claims in the bill. Under clause 198J the standard will be that the solicitor or barrister must reasonably believe, on the basis of provable facts and a reasonably arguable view of the law, that the claim has reasonable prospects of success. This requirement will also apply to defendant lawyers so that they cannot advance spurious defences. In either case solicitors or barristers must reasonably believe that the material available to them provides a proper basis for alleging the facts on which they want to rely.

We have excluded from these requirements preliminary advice on damages claims. A solicitor or barrister must be able to take initial instructions and advise the client on whether or not their claim or defence has reasonable prospects of success without being in breach of these clauses. Under clause 198L barristers and solicitors must satisfy the standard of reasonable prospects of success before they commence proceedings or file a defence. Under clause 198M they risk having costs awarded against them if they act without reasonable prospects of success. This bill introduces vital tort law reform. I will be sending the bill and the Government's actuarial advice to my counterparts in all other States and Territories. The bill builds on the Government's work with the insurance industry and other jurisdictions to find solutions for people affected by the public liability crisis. I commend the bill to the House.