



Civil Liability Amendment (Offender Damages) Bill.

Second Reading

The Hon. JOHN HATZISTERGOS (Minister for Justice, and Minister Assisting the Premier on Citizenship) [8.15 p.m.]:
I move:

That this bill be now read a second time.

I seek leave to have the second reading speech incorporated in *Hansard*.

Leave granted.

The principal Act this bill seeks to amend, the Civil Liability Act 2002, is one of the most significant pieces of legislation introduced by this Government. The Civil Liability Act 2002, and the amendments proposed by the Civil Liability Amendment (Personal Responsibility) Act 2002 and the Civil Liability Amendment Act 2003, have had a striking impact on litigation in New South Wales. Figures from the District Court indicate that 7,912 new civil matters were registered in 2003, compared to 12,686 new civil matters registered in 2002 and 20,784 new civil matters registered in 2001—a decrease of some 62 per cent in two years. At the same time, the number of pending cases dropped from 23,547 in 2001, to 19,128 cases in 2002 and 9,104 cases in 2003—a decrease of some 61 per cent in two years. The primary cause of the reduction in new matters was the Civil Liability Act 2002. The marked decrease in court registrations began in the second half of 2002, after the commencement of the Act, which received assent on 18 June 2002. The amendments relating to personal responsibility, most of which commenced in December 2002, were a considered response to the insurance crisis that had resulted from an increasing litigious tendency from some elements in the community and some unrealistically high damages awards. As the Premier noted in his second reading speech:

The insurance crisis served to highlight just how far the law has drifted away from the concept of personal responsibility.

On 12 November 2003, in answer to a question without notice, the Premier noted that as a result of the Government's reforms to tort law there had been a 43 per cent reduction in businesses experiencing difficulties getting insurance. The amendments the bill introduces are in response to concerns from one particular area—namely, offenders who sue the State, through the Department of Corrective Services or the Department of Juvenile Justice, for injuries that befall them whilst they are in custody or performing work under community service orders. The bill does not remove the right of offenders to sue the State—it is accepted law that custodial authorities owe a duty of care to a person they lawfully detain to take reasonable care to protect that person from injury caused by third parties or, for that matter, by the person himself or herself.

Under the amendments proposed by this bill, liability will be assessed uniformly, injuries will be assessed uniformly, catastrophic injuries will result in compensation to no greater extent than catastrophic injuries suffered by injured workers in civilian employment, minor injuries will not be eligible for compensation, and other injuries will be eligible for limited compensation. If an offender suffers a genuine serious injury due to the negligence of a government agency or a management company exercising an official function with respect to offenders in custody, he or she will receive fair compensation. This bill will remove some of the more fanciful claims from offenders that the community are entitled to regard as spurious by setting thresholds on injuries and limits on damages payable to offenders.

No offender can expect to "win the lottery" by suffering a minor injury. The bill also removes the anomalies in the existing mixture of legislation and common law governing claims by inmates and offenders against the State. At present, a successful claim of negligence can be assessed in a number of ways. An offender injured performing community service work is assessed differently to an offender injured performing other work or an offender suffering an injury in an accident within a correctional or detention centre. Two offender workers suffering identical injuries may receive very different awards of damages depending on the type of work they were doing when injured. Under the scheme to be introduced by this bill, there will be no unfairness between compensation available to different groups of offenders, and no offender will receive compensation that is unavailable to a law-abiding worker suffering the same injury.

The bill also requires offenders to comply with their own responsibility to repay compensation paid to their victims if they expect to hold the State to its civil responsibility towards them. Just as the Civil Liability Amendment (Personal Responsibility) Act 2002 requires ordinary citizens to take reasonable responsibility for their own actions, the Government expects inmates in a correctional setting to take reasonable responsibility to look after themselves. The Government also expects courts to take into account, when considering the State's duty of care to an inmate, that the person is in a correctional environment. The community is rightly disturbed if offenders are seen to receive benefits that are not available to law-abiding citizens. The Government's underlying philosophy behind the proposed amendments is

to create a scheme whereby an injured offender will not recover a greater amount of damages than a worker in civilian employment who receives an identical injury in the course of his or her employment.

I will move now to the detail of the bill. The Civil Liability Amendment (Offender Damages) Bill will establish one fault-based negligence scheme for inmates, periodic detainees, home detainees and offenders performing work under a community service order—that is, one scheme combining liability, assessment of injury and payment of damages. The object of the bill is to amend the Civil Liability Act 2002 to impose special restrictions on the damages that can be recovered by a person for injury resulting from the negligence of a protected defendant suffered while the person was an offender in custody. An offender in custody is a prison inmate, periodic detainee, home detainee, or a person performing community service work under a community service order. The bill extends to children in detention centres and children performing work under community service orders.

Protected defendants are the Crown, government departments and public health organisations and their employees, and other persons exercising official functions with respect to offenders in custody, including management companies and employees of management companies. The scheme introduced by the bill is fault-based. Liability in negligence must be established under the Civil Liability Act 2002. No damages can be awarded unless the injury results in the death of the offender or a degree of permanent impairment of at least 15 per cent, with the degree of impairment being assessed in the same way that it is under the Workplace Injury Management and Workers Compensation Act 1998. Damages for economic loss for past and future loss of earnings will be limited in the same way that those damages are limited under the Workers Compensation Act 1987 for damages for workplace injury.

In assessing future loss of earnings, earning capacity after the age of 65 is to be disregarded, in line with similar provisions for damages for workplace injury. Damages for non-economic loss are limited to the equivalent statutory workers compensation that would be payable for workplace injury. As the new provisions applying to adult offenders were publicly announced on 15 January 2004, the restrictions will extend to existing claims unless proceedings on the claim were commenced before this date or unless an award of damages has been made on the claim before the date of assent. If the claim concerns an injured child detainee or a child performing work under a community service order, the new restrictions will not apply if proceedings were commenced before the introduction of this bill into Parliament. This small degree of retrospectivity is necessary to prevent a flood of speculative claims.

I point out to the House that the existing immunity to liability enjoyed by community organisations who provide community service work for offenders will not be affected by these amendments. Section 121 of the Crimes (Administration of Sentences) Act 1999 and section 26D of the Children (Community Service Orders) Act 1987 both provide that no act or omission of a person or organisation for whom community service work is performed gives rise to civil liability towards an offender performing community service work if the act or omission occurs in the course of that work. Instead, a civil action that would otherwise lie against a person or organisation providing community service work lies against the Crown. The only exceptions to this provision arise if the work concerned was not approved by the Commissioner of Corrective Services or the director-general of the Department of Juvenile Justice, or if the act or omission was intended to cause injury, loss or damage.

The bill also enacts provisions that allow a protected defendant to withhold and deduct from the damages payable to an offender any amount payable by the offender pursuant to an order for restitution under the Victims Support and Rehabilitation Act 1996. The Department of Corrective Services and the Attorney General's Department will establish a protocol to ensure that the director of the Victims Compensation Fund is aware of any offender who sues the Department of Corrective Services. The director can then advise the department of any amount owed by the offender under a restitution order, in order for that amount to be recovered before the offender receives any damages.

The bill also enacts a number of minor amendments to the Crimes (Administration of Sentences) Act 1999 relating to work performed by offenders. Further, it enacts consequential savings and transitional provisions and makes clarifying and consequential amendments to the Crimes (Administration of Sentences) Act 1999 and the Children (Community Service Orders) Act 1987. This bill affects only negligence-based actions by offenders in custody against protected defendants, as defined. It does not apply to intentional torts. It will not affect actions based on false imprisonment or deliberate assaults by persons in authority on offenders in their care. I commend the bill to the House.

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