

## 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.