NSW Legislative Assembly Hansard

Civil Liability Amendment Bill

Extract from NSW Legislative Assembly Hansard and Papers Wednesday 10 May 2006.

Second Reading

Mr NEVILLE NEWELL (Tweed—Parliamentary Secretary) [10.53 p.m.], on behalf of Mr Bob Debus: I move:

That this bill be now read a second time.

Until October 2005, so-called *Sullivan v Gordon* damages were awarded by courts in New South Wales in negligence actions. Such damages were said to compensate injured people for the cost of domestic services they were no longer able to provide to others because of their injury. In October 2005 the High Court overruled the award of such damages. The court highlighted a number of uncertainties concerning these damages. It found that they are inconsistent with the principles on which damages are awarded in tort actions. The court also noted the difficulty faced by courts in trying to identify boundaries for *Sullivan v Gordon* damages when there are no clear underlying principles for such damages. The High Court said that it should be a matter for Parliament, not the courts, to decide whether and in what circumstances these damages should be awarded. The Civil Liability Amendment Bill provides the Parliament with an opportunity to do just that.

The recent inquiry by the General Purpose Standing Committee No. 1 of the Legislative Council recommended that the Government consider reinstating these damages. The proposals contained in this bill have already been the subject of public consultation. When the Attorney General released an exposure draft of the bill in early April, he referred to two particular cases that highlight the potential hardship that might arise if these damages were no longer available. The first case involved an Adelaide woman who was dying of mesothelioma and who sought damages for the care involved in raising her nine-year-old triplets. The woman was the primary caregiver to her children because their father worked full-time to support the family. If *Sullivan v Gordon* damages were no longer available the family would have much more limited means to raise and care for the children.

The second case was that of a New South Wales man who was also diagnosed with mesothelioma. He was awarded *Sullivan v Gordon* damages for the cost of providing care to his legally blind wife. She relied on him to do all of the household shopping and chores, including cleaning windows, vacuuming, and cleaning the bathroom and showers. He also drove his wife to her medical appointments and accompanied her whenever she went out. The man has since died of mesothelioma and I understand that the *Sullivan v Gordon* damages are now subject to an appeal because of the High Court's decision. The bill responds to such cases by providing a right for seriously injured people to recover damages for the domestic services they are no longer able to provide to their dependants in cases of the greatest need.

The bill also extends the existing cap on the hourly rate for *Griffiths v Kerkemeyer* damages under the Civil Liability Act 2002 to dust diseases claims. Seventeen submissions were received in response to the exposure draft of the bill and the discussion paper. I thank all of those who made a submission. As the Government anticipated, some submissions argued that *Sullivan v Gordon* damages should be reinstated without any limitations. Generally, these submissions also argued that if there must be limits they should be more generous to claimants than proposed in the draft bill. Again as anticipated, other submissions argued that *Sullivan v Gordon* damages should not be reinstated at all.

Generally, these submissions also argued that if the damages must be reinstated they should be more restrictive than proposed. The Government has given careful consideration to all of the submissions. The bill is in substantially the same form as was released for public consultation. That is, it provides a partial reinstatement of *Sullivan v Gordon* damages, with limitations to ensure that those damages are available only in the cases of greatest need. The Government has made some amendments, however, to address specific concerns raised in submissions. I will highlight those amendments as I speak to the provisions of the bill in more detail.

I turn now to the provisions of the bill. I will start with item [11] of schedule 1. It inserts proposed section 15B into the Civil Liability Act to partially reinstate *Sullivan v Gordon* damages. The definitions in proposed section 15B (1) have been amended as a result of public consultation. First, in the definition of "dependants", the exposure draft bill referred to persons who are dependent at "the time of the injury". This language has been clarified in the bill. It now refers to "the time that the liability in respect of which the claim is made arises". The clarification is most relevant in cases of latent injury. For example, the relevant time for assessing dependency in a mesothelioma case will not be the time at which the claimant was exposed to asbestos. Rather, it will be the time at which the claimant is diagnosed with mesothelioma and can therefore proceed to claim damages. Equivalent changes have been made in other provisions in proposed section 15B to ensure a consistent time is used.

The second amendment to the definitions in proposed section 15B (1) is that the term "dependants" is now defined to include only persons with certain relationships to the claimant. Essentially, only dependants who stand in a specified family relationship to the claimant or who are members of the claimant's household are included. The claimant's husband or wife and de facto partner are specified first. The other family relationships specified in the definition of "dependants" are the claimant's parents, grandparents, children, grandchildren, aunts, uncles, nieces and nephews, including where such relationships are established by marriage or adoption. Any other person who is a member of the claimant's household and who is dependent on the claimant is also included. The categories of relationship to the claimant were introduced to this definition as a result of concerns expressed in some submissions on the exposure draft of the bill. In particular, some submissions expressed concern that, in the absence of such limitations, damages could be awarded where the claimant provided voluntary services to neighbours and others.

Some submissions also drew attention to comments made by the High Court as to the difficulty for courts in identifying who should be a "dependant" if no clear guidance is given. The Government has therefore accepted the need to give greater guidance in this area. The categories of relationship to the claimant are not designed to be unreasonably narrow. They are, for example, considerably broader than the categories of relationship recognised under the Compensation to Relatives Act. They draw the line, however, around relationships where it would be more reasonable to expect that the claimant would continue to provide gratuitous domestic services. These are also the relationships where an award of damages to the claimant is more likely to benefit the relative or household member who needs the domestic services. The third amendment to the definitions in proposed section 15B (1) also affects the definition of "dependants".

The Government has accepted the submissions which noted that the exposure draft bill would not have permitted damages to be awarded in respect of children who had been conceived but not born at the time of the claimant's injury. The definition of "dependants" has therefore been extended to cover such unborn children. The fourth amendment to the definitions in proposed section 15B (1) is the inclusion of a definition of "assisted care". This definition is used in a new provision which has been inserted as proposed section 15B (3). Some submissions expressed concern that short and occasional periods of respite care, or care by a non-custodial parent, might disentitle a person to damages. This concern arises because of the requirement that the claimant would, but for the injury, have provided the services for at least nine hours per week for a period of six consecutive months.

Some submissions argued that claimants who care for aged or disabled relatives who occasionally have the benefit of short-term respite care should not be disentitled to damages for that reason alone. Similarly, where the claimant has custody of children, but those children spend some time—perhaps a fortnight during school holidays—with the non-custodial parent, the claimant should not be disentitled to damages only because of these arrangements. The Government has responded to these concerns by permitting periods of assisted care to be disregarded in determining whether the test of nine hours per week for six consecutive months is met. Assisted care can be disregarded if the assisted care is only short term and occasional and if it is not provided in more than four weeks during the six-month period.

"Assisted care" is defined in proposed section 15B (1) to cover two types of care. First, "assisted care" covers respite care involving the provision of accommodation to a dependant who is aged or frail or who suffers from a physical or mental disability. Second, "assisted care" covers care involving the provision of accommodation to a minor by a parent of the minor, other than the claimant. This second limb of the definition of assisted care will cover circumstances where a child spends short-term and occasional periods of time with their non-custodial parent. As a final matter on proposed section 15B (1), some submissions called for the Government to define—and therefore limit—"domestic services" by listing categories of domestic services for which *Sullivan v Gordon* damages could be paid. The Government has not adopted this approach. The particular domestic services that might be reasonable in a given claim will depend upon the circumstances of the case.

The Government considers that the other elements of proposed section 15B are sufficient protection against abuse of these damages. In particular, the need for the domestic services must be reasonable in an objective sense. For example, basic garden maintenance might be reasonable in a particular case. It would not, however, be reasonable in any claim to expect services to maintain a prize-winning garden at its previous standard. The award of *Sullivan v Gordon* damages will be subject to the limitations set out in proposed section 15 (2). In particular, under proposed section 15 (2) (a), it will be necessary to show that the claimant provided the services to the dependants before the time that the liability in respect of which the claim is made arose. This test will not, of course, apply to the unborn children who are now included in the definition of "dependants". Such children will not receive gratuitous domestic services from the claimant before they are born.

The other requirements in proposed section 15B (2) have not changed as a result of public consultation. Under proposed section 15B (2) (b), the court will need to be satisfied that 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. For example, adult children with no particular disabilities or incapacities should be able to cook their own meals and do their own washing and cleaning, even if a now injured parent used to do these tasks for them. No damages will be payable in respect of such persons. Similarly, older children without disabilities should not need

the same amount of care as a newborn baby because there will be some things older children can do for themselves.

Under proposed section 15B (2) (c), it will also be necessary to demonstrate that there is a reasonable expectation that, but for the injury, the claimant would have provided the services to the claimant's dependants for at least nine hours per week and for a period of at least six consecutive months. The time requirements are designed to ensure that damages will be payable only where the claimant's dependants have an ongoing need for significant services previously provided by the claimant and, but for the injury, the claimant would have provided those services. Evidence of the amount of time the claimant spent providing the services before the claimant was injured will be important. Demonstrating that there is nothing—other than the claimant's injury—to suggest the claimant would not have continued to provide the services for at least nine hours per week and for at least six consecutive months will also be necessary.

For example, if the claimant's health was deteriorating independently of the injury such that the claimant, even if uninjured, would not have been able to provide the services for those hours and months, then damages would not be payable. Similarly, if the claimant was planning to travel or move away from the claimant's dependants such that the claimant would not have been able to provide the services for those hours and months, damages would also not be payable. Under proposed section 15 (2) (d), it will be necessary to show that the services are needed for at least nine hours per week and for at least six consecutive months, and that that need is reasonable in all the circumstances. This directs attention to two additional requirements. First, the services must in fact be needed for at least the minimum amounts of time. Second, the need must be reasonable in an objective sense. It will not be sufficient that the claimant used to help his or her dependants and the dependants wish to continue to receive such help.

The fact that a claimant provided services does not necessarily mean that the services are needed, or that they need to be provided for as many hours as the claimant spent in providing them. Rather, the services must in fact be needed for at least the minimum amount of time and this need for these services must also be objectively reasonable, taking into account the circumstances of the case. Before leaving proposed section 15B (2), I should respond to an issue raised in some submissions on the exposure draft bill. Some submissions argued that there was no basis for choosing a weekly threshold of nine hours for *Sullivan v Gordon* damages when the equivalent threshold for *Griffiths v Kerkemeyer* damages is only six hours. There is, however, a very clear basis for choosing a higher threshold for *Sullivan v Gordon* damages. The High Court made it very clear that *Sullivan v Gordon* damages do not arise directly from the injury, whereas *Griffiths v Kerkemeyer* damages do arise more directly from the injury. Therefore, there is no reason in principle why the two types of damages should be treated the same on this point. I have already addressed the recognition the bill gives to assisted care in proposed section 15B (3).

Proposed section 15B (4) requires that the rate at which these damages are to be calculated is to be determined in accordance with the hourly rate which applies to gratuitous attendant care services. That rate is one-fortieth of the average weekly total earnings of all employees in New South Wales, currently $21.60. Proposed section 15B (5) of the bill is intended to ensure that claimants are only to be compensated in respect of the loss of capacity to provide domestic services in accordance with proposed section 15B. Claimants are not to be compensated for this loss by any other means, for example, by way of an amount awarded as part of damages for non-economic loss. If a claimant does not meet the requirements of proposed section 15B so that he or she is not entitled to be compensated for the loss of capacity under proposed section 15B, then he or she will not entitled to any damages for that loss.

Subsections (6), (7), (8) and (9) of proposed section 15B address potential overlaps between damages under proposed section 15B and other damages, whether at common law or under the statutory schemes referred to in subsections (8) and (9) of proposed section 15B. These provisions ensure that there will be no double recovery for the one loss. As a result of public consultation, subsections (6) and (7) of proposed section 15B have been clarified to make express reference to recovery by the legal personal representative of a deceased claimant. Proposed section 15B (10) has been inserted to address the potential overlap between damages for attendant care services—so-called *Griffiths v Kerkemeyer* damages—and damages under section 15B. This issue arises where a loss could be compensated under either head of damages. For example, where a parent who is the primary carer of children is injured, the parent, in certain circumstances, could recover *Griffiths v Kerkemeyer* damages for the assistance he or she needs to look after the children.

Alternatively, the same assistance could be characterised as being for the children rather than the parent and therefore recovered as *Sullivan v Gordon* damages. Section 15B (10) will require claimants to characterise losses as *Griffiths v Kerkemeyer* losses where possible, and only claim *Sullivan v Gordon* damages if the loss cannot be characterised as a *Griffiths v Kerkemeyer* loss. This protects the integrity of the different requirements which apply to each type of damages. Consistent with the position under common law, proposed section 15B (11) requires the courts to take into account the claimant's capacity to provide the services before the claimant was injured and to make an allowance for the vicissitudes or contingencies of life. For example, an already elderly claimant might reasonably be expected to have a declining capacity to provide services as he or she ages. Proposed section 15B (11) has also been amended as a result of concerns raised in some submissions

on the exposure draft bill.

The proposed section now also requires the courts to take into account the extent to which a person will benefit from the services in circumstances where an award of damages cannot be made in respect of such a person. Many domestic services are provided on a household basis, rather than being provided to each member of the household individually. For example, cooking a meal for the household or maintaining the house and land will generally benefit all members of the household. For example, the claimant might have prepared family meals both for young children and for his or her spouse, who is not suffering any disabilities. If, following the injury of the claimant, damages are awarded to cover this service, they should be reduced to take account of the fact that the claimant's loss of the capacity to provide services to his or her spouse would not qualify for assistance under proposed section 15B. The Government has chosen not to be prescriptive as to how damages should be reduced to take account of this issue.

Generally, the courts have taken a very practical approach to calculating *Sullivan v Gordon* damages. As with *Griffiths v Kerkemeyer* damages, the courts generally have recognised the need to do justice between the parties without attempting to achieve a level of precision which simply would not be possible in these areas. The Government intends that the courts adopt the same practical approach they adopt to deal with issues of future contingencies and the like. As is the case for *Griffiths v Kerkemeyer* damages under section 15 of the Civil Liability Act, interest will not be payable on damages awarded under proposed section 15B. I turn to the first six items in schedule 1 to the bill. As members might recall, the Civil Liability Act does not apply to certain types of claims. In the absence of amendments to section 3B of the Civil Liability Act, the partial reinstatement of *Sullivan v Gordon* damages under proposed section 15B and the other changes in the bill would not apply to these types of claims.

The first six items in schedule 1 to the bill ensure that the changes in the bill, particularly the partial reinstatement of *Sullivan v Gordon* damages, apply to motor accident claims, dust diseases claims, tobacco and smoking claims and claims involving intentional torts or sexual assault. The last amendment I wish to discuss is item [7] of schedule 1 to the bill. The Civil Liability Act 2002 does not currently apply to dust diseases claims. As I have already mentioned, it is proposed to extend the partial reinstatement of *Sullivan v Gordon* damages to dust diseases claims. Without this change, the common law position would continue to apply and *Sullivan v Gordon* damages would not be recoverable in dust diseases claims, other than through damages for non-economic loss. The Government considers it to be more certain for claimants and defendants if the partial reinstatement of *Sullivan v Gordon* damages is extended to dust diseases claims.

Extending the partial reinstatement of *Sullivan v Gordon* damages to dust diseases claims without further changes, however, would create a significant discrepancy between *Sullivan v Gordon* damages and *Griffiths v Kerkemeyer* damages. The discrepancy would arise because *Sullivan v Gordon* damages would be payable at the capped hourly rate of one-fortieth of average weekly total earnings of all employees in New South Wales, while the hourly rate for *Griffiths v Kerkemeyer* damages in dust diseases claims would be uncapped. As there is no good reason for this discrepancy, proposed section 15A extends to dust diseases claims the same hourly rate that applies to *Griffiths v Kerkemeyer* damages for claims other than dust diseases claims and that will apply to *Sullivan v Gordon* damages under proposed section 15B. This change will ensure that the bill does not increase the overall cost of dust diseases claims to any defendant.

The bill does not, however, extend to dust diseases claims the cap on weekly damages of 40 hours per week, which generally applies to *Griffiths v Kerkemeyer* damages under the Civil Liability Act 2002. Such a cap would work particular injustice in mesothelioma cases where it is usually recognised that claimants need around-the-clock care for their last several weeks of life. This bill provides for *Sullivan v Gordon* damages to be available in cases of the greatest need, while ensuring that the changes are affordable for the community. Given the uncertain state of the law, and because there are cases currently before the courts that will be affected by the reforms, the Government considers that these reforms should proceed as soon as possible. I commend the bill to the House.