Legislative Council

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Civil Liability Amendment (Personal Responsibility) Bill Hansard - Extract

Second Reading

The Hon. MICHAEL EGAN (Treasurer, Minister for State Development, and Vice-President of the Executive Council) [2.43 p.m.]: I move:

That this bill be now read a second time.

I seek leave to incorporate the second reading speech made by the Premier in the other place. However, I also intend to make some further comments, at the request of the Opposition, in relation to specific issues raised by honourable members in the other place. I also foreshadow three Government amendments to the bill.

Leave granted.

The introduction of this bill today is a triumph for commonsense.

Personal responsibility will rightly assume a much higher profile in our law thanks to these reforms.

Simple pleasures enjoyed by the community will be able to continue because of them.

But, regardless of the commonsense of these reforms, we recognise that Parliament will be debating some of the most fundamental changes to the law of negligence ever made.

Thanks to the historic joint sitting last month and the assistance of four eminent speakers, I am sure that we will all have a much better appreciation of how the law of negligence has developed. I am hopeful the seminar will mean that this debate is of a high calibre.

Honourable Members might also be interested in the Senate economics committee report on public liability and professional indemnity insurance released only yesterday.

The bill I am introducing today is different to the consultation draft I released in early September. The consultation draft opened up some authentic consultation and the Government has listened. However, most of the changes implement or draw on the recommendations by the expert panel, which released its final report, "The Review of the Law of Negligence", late last month.

That report became known as the Ipp report after the Chair of the panel, Justice David Ipp.

The New South Wales Government has taken the lead in responding to the recommendations in the report, and the need for New South Wales to move quickly has been recognised by the other States, Territories and the Commonwealth who noted that the particular hardships faced by the New South Wales community, the most litigious in Australia, deserved prompt attention.

That is what we have done. We are further down the road than any other jurisdiction in Australia. However, the Government acknowledges that national consistency is desirable to some reforms in this area. For that reason we have modelled many of the new provisions in the bill following the original exposure draft on those recommendations in the Ipp report that are more likely to have a national impact on the Law of negligence.

I stress, however, that not all reforms in the bill or in the Ipp report need to be made in other jurisdictions or in exactly the same terms.

But it would be helpful to the community and the courts if those reforms dealing with basic principles of the law of negligence were consistent.

That is why we have been so ready to change the draft bill. I understand that the Queensland Government also proposes to introduce further reforms by the end of the year, and is considering this approach. I am confident that we now have a more comprehensive and finely honed bill to debate. Our stage one and proposed stage two reforms have already led to announcements by the insurance industry that new public liability insurance products will be made available to New South Wales community organisations.

But I emphasise that these reforms are not only a response to the current problems regarding insurance. It is important to remember that these reforms are not only about reducing premiums.

The insurance crisis served to highlight just how far the law has drifted away from the concept of personal responsibility. This is the Americanisation of our legal system.

I want this Parliament to seize the opportunity to wind back this culture of blame. If we do, we will help to preserve the community's access to socially important activities.

Our community deserves our best efforts to preserve the Australian way of life. That is what it is about. I turn now to the detail of the bill.

The bill modifies particular aspects of the common law. It does not establish a complete code.

We have adopted the approach in the Ipp report to the duty of care and causation. A risk has to be not insignificant before a court can find it was reasonably foreseeable. This will send a clear message to the courts that, under the current common law, liability for insignificant risk is too easily imposed.

Our new formulation will emphasise the community's reasonable expectation that people should have to guard only against risks that are a real possibility.

A court will not be able to rely solely on the benefit of hindsight, on evidence of subsequent remedial action by the defendant or the mere fact that a risk was easily avoidable. Although people might argue that these considerations are already the law, putting them in this bill will help to curtail the willingness of some courts to find a creative way around them.

The bill will also deal with causation. Its intention is to guide the courts as they apply a commonsense approach. The rules for factual causation are set out, including the very limited exception to the but for test.

This exception was developed by the court for those rare cases, often in the dust diseases context, where there are particular evidentiary gaps.

By including this exception in the bill it is not intended that the bill extend the common law in any way. Rather, it is to focus the courts on the fact that they should tread very carefully when considering a departure from the but for test. It is only for the most limited and exceptional circumstances where any departure can be justified.

The bill will limit claims that arise from an inherent or obvious risk, or from the plaintiff's own contributory negligence. There will be a presumption that a person is aware of obvious risks, as was recommended in the Ipp report.

Similarly, there will be no duty to warn of an obvious risk, providing that no written law requires such a warning in the particular case. Nor will there be any liability for the obvious risks of particularly dangerous sports and other risky activities.

The bill will also codify the current law so that there is no liability for the materialisation of inherent risks. Inherent risks are those risks that no amount of reasonable care and skill can avoid or minimise. If a person has a duty under the common law to warn of an inherent risk that is not obvious, that duty will not be affected by the bill.

The bill also refers to the common law position that plaintiffs cannot be found 100 per cent responsible for their own injury. If plaintiffs acted with such little regard for their own safety that they should not recover, the court will be able to find them 100 per cent contributory negligent.

As was the case under the consultation draft of the bill, there will be no liability for injury, death or property damage resulting from the risk of recreational activity in respect of which a risk warning has been given. Risk warnings will be effective for children and disabled people in certain circumstances. It is important because it would be unreasonable that a recreational service provider should not be able to rely on warnings given, for example, to parents before their child goes horse riding.

You cannot expect potential defendants to take better care of a child than the child's own parents would take. It is also important to note that risk warnings will be effective if given in such a way that most people would understand.

It will not matter that particular individuals say they did not see the sign, or could not read English, or could not understand clear symbols. The courts will have to apply an objective test about the effectiveness of the warning. A participant in a recreational activity will also be able to assume responsibility for an injury received and waive the implied contractual requirement that services be provided with due care and skill. The Commonwealth has recognised that, for many recreational service providers, the right to assume such a risk under a contract also requires amendments to the Trade Practices Act. That amendment is before the Senate.

Naturally, the new protections for risk warnings and waivers will be subject to compliance with the safety laws of the Commonwealth and the State. Shoddy operators will not be able to escape liability if they are in breach of specific safety laws. The bill will clamp down on plaintiffs who are injured while they are intoxicated. A defendant will not owe a plaintiff a higher standard of care simply because the plaintiff was intoxicated. Nor will personal injury

damages be available for an intoxicated person unless the accident was likely to have occurred even if the person had not been intoxicated.

If the accident is likely to have occurred anyway, the intoxicated person's damages will be reduced on a presumption of contributory negligence of 25 per cent, or more if appropriate, unless the person's intoxication played no part in the accident. Very importantly, the bill will limit people claiming damages for injuries received while committing a crime. The general rule under the bill will be that no damages are payable if the injured person was engaged in conduct constituting a serious offence.

Serious offences include a very wide range of crimes: entering a dwelling house, breaking and entering, and escaping lawful custody. People who engage in such criminal conduct should not sue for slipping over while they do so.

Nor will any damages be available if the criminal was injured through reasonable self-defence. Also, no damages will be payable if the criminal was injured through excessive self-defence, unless the court considers the circumstances are exceptional. No damages will be available at all for pain and suffering for a criminal injured through self-defence.

The bill also creates an additional defence to alleged professional negligence if the professional acted in a manner that was widely accepted in Australia by pure professional opinion as competent professional practice.

This reflects the Ipp report. A court will still be able to find that peer opinion was irrational, where warranted. Irrationality is not the same as unreasonableness. We are making it much harder for the court to disregard experts in the field. We have ensured, however, that there is no change to any common law duty of a professional to advise, inform or warn about the risks of personal injury in the provision of the services.

Obviously, the most important application for this carve-out will be for medical practitioners. The carve-out is quite reasonable because patients—and clients of other professionals, where relevant—need to have enough information about the risk of personal injury to decide whether to proceed to obtain the service. The common law rule in the case of *Rogers v Whittaker* will, therefore, continue to apply in relation to any duty to warn in such situations.

The bill will also provide, as recommended by the Ipp Report, that non-delegable duty claims will be subject to the reforms contained in the bill. Proportionate liability will also be introduced for claims for economic loss or property damage, other than in personal injury claims. This means that a person jointly responsible with some other person or persons will be liable only to the extent of their responsibility.

The bill will make important changes to the way that courts deal with claims against public authorities. These changes simply recognise that services provided to the community by public authorities are not provided for commercial gain but for the public good.

The bill will not, therefore, sanction a public authority to act in a negligent or unsafe way. It will, however, require the courts to take into account principles relating to the financial and other resources available to the authority, the general responsibilities of the authority, and its compliance with general practices and applicable standards. The bill will also protect regulatory and roads authorities if they could have done something to avoid a risk but did not do so. It is more than reasonable that functions performed by a public authority are treated differently under the law. Public authorities carry out what is often a limitless task with necessarily limited resources. We must ensure, therefore, that it is not left to the courts to determine a public authority's expenditure on its tasks.

In keeping with this approach, the bill will also provide immunity for a public or other authority for breach of statutory duty, unless it has acted irrationally. An authority that has not exercised a regulatory function—such as a power to close a fishery—will also not be liable unless it could have been compelled by a court to exercise that power.

A "roads authority" that has not exercised a discretionary power to mend, for example, a pothole will not be liable unless it actually knew about the particular risk that led to the injury. This will reintroduce a protection for certain "non-feasance" on the part of roads authorities.

If a roads authority did know about the particular risk, it will still be able to rely on the general "resources" protection in the bill for public authorities. The bill will also protect the good faith actions of good Samaritans who come to the assistance of a person in danger. This will mean no liability for voluntary rescue organisations, such as surf life saving clubs, if a person is injured in the course of or in connection with a rescue.

Individual volunteers will also be protected from law suits where their actions were done in good faith. It is not intended to alter the potential liability of a community organisation by providing the individual members with immunity.

The Ipp Report recommended codifying the law in relation to mental harm. The bill follows these recommendations. Instead of using the imprecise term "nervous shock", the bill will provide that damages are only recoverable for a recognised psychiatric illness.

The bill also provides that the only people who can recover for mental harm are victims of the negligence, people

present at an accident scene, or a family member of a victim.

This eliminates the relatives of criminals making a bid for $10,000 to compensate for the nervous shock they sustained. That is an unbelievable situation and is, in essence, why this legislation is required.

An apology by or on behalf of the defendant will also not constitute an admission of liability and will not be relevant to the determination of fault or liability in connection with civil liability. Injured people often simply want an explanation and an apology for what happened to them. If these are not available, a conflict can ensue. This is, therefore, an important change that is likely to see far fewer cases end up in court. The bill will facilitate structured settlements by providing that the courts must give a further opportunity to parties to negotiate a structured settlement. Lawyers will also have to notify parties about the availability of such a settlement.

The Ipp Report recommends that personal injury actions should not be brought more than three years after the date of "discoverability". The new time period will run against every injured person, with three exceptions: first, if the person is a child or a disabled person without a capable parent or guardian to look after his or her interests; second, if an injury to a child was caused by a person in a close personal relationship with the child or the child's parents; and third, if a child's parents "irrationally" fail to bring a claim on the injured child's behalf. The new discoverability test should provide more certainty and limit applications for extensions of time. This bill is one of the most important pieces of legislation to be put before this Parliament in recent years. We need to get it right. That is why we had public consultation and took notice of what came out in Canberra's Ipp Report. It is fair to say that we have held public consultation and we have looked carefully at the Ipp Report. Now it is time for this House to debate a proposal for the most important reform of the laws of negligence in 70 years.

I commend the bill to the House.

This bill represents groundbreaking reform. The bill places New South Wales as the leading jurisdiction in tort law reform. The draft bill was released for public comment on 2 September 2002 and the bill before the House reflects the outcome of the consultation process. The bill also includes important new reforms that have been recommended by the Expert Panel on Negligence, or the Ipp committee. The Ipp panel's report was released only a month ago, on 2 October, and the speed with which the bill has been introduced by the Government reflects the overwhelming commitment of the Government to pursuing measured and principled tort law reform.

Some Opposition members in the other place have expressed the view that the Government has delayed dealing with the matters in the bill, while at the same time asserting that national uniformity is critical to tort law reform. As is quite obvious, the Government has moved with alacrity, overturning 30 years case law after just six months work—work that included a broad consultation process with all those interested in law reform, including industry groups, committee organisations, insurers, the legal profession and professional bodies.

As I have already indicated, the Expert Panel on Negligence reported only a month ago and the bill reflects many of the recommendations of the panel. Honourable members would also be aware that as Treasurer I met with other State and Territory Ministers and Senator Coonan last week in Brisbane to discuss the proposed reforms. I believe that the process which the finance Ministers and Senator Coonan has established is almost a model process. It has been so successful that some of us have suggested that we should contract ourselves out to other portfolio areas across government and we could solve a lot of problems. We might even have a go in the international arena. This was the fourth meeting of Ministers chaired by Senator Coonan and it was as successful as the previous three. I emphasise that the Ministers agreed that the New South Wales bill provides a model to develop nationally consistent reform.

The Attorney General also put forward the bill as a reform model to other Attorneys General when they met last week, and he has urged his State and Territory colleagues to follow our lead. The honourable member for Southern Highlands, among others, suggested that the reforms will not guarantee reductions in premium prices. Of course, the reforms do not offer a guarantee. It is nonsense, however, to assert that the reforms that comprised stage one and the impending changes in stage two of the Government's tort law reform process—in other words, those in the bill before the House now—have offered no relief.

Insurers have started to make public liability insurance more broadly available in New South Wales due to the Carr Government's reforms. The NRMA, QBE, Allianz and the Insurance Council of Australia have announced a new community insurance initiative to address the public liability insurance needs of organisations that have been experiencing difficulty in finding suitable cover. Implementation of this scheme is contingent upon passage of this bill, the Commonwealth proposed amendments to the Trade Practices Act and the approval of the ACCC. Suncorp GIO has also announced that it will make public liability insurance available to a much broader range of businesses, consumers and community organisations.

Suncorp GIO has said that reforms in New South Wales will reduce costs in the public liability system, providing an opportunity to make public liability insurance available at a reasonable price to more consumers. In recognition of the significant legislative changes implemented by the New South Wales Government, both groups have made the insurance available in New South Wales only. I emphasise that it is available in New South Wales only. Nor are the tort law reforms the only area in which the Government is acting. The honourable member for Vaucluse, in the other place, asked for clarification of the Government's position on a no-fault compensation scheme.

The New South Wales Government has already urged the Commonwealth to introduce a no-fault scheme to meet

the future care costs of the catastrophically injured. The Government is continuing to press the case for a national scheme with the Commonwealth. We recognise that access to proper care is vital for catastrophically injured people. A sophisticated and civilised society should have in place a system that ensures these needs are met, without having to go to court to fight about the details of how much and by whom. The Commonwealth needs to show leadership on this issue. The honourable member for Vaucluse has also asked for elucidation of the provisions in the bill conferring protection on public authorities.

The bill first sets out matters that must be taken into account by the courts in deciding whether a public authority has breached its duty of care. These are commonsense matters, such as the budget, the broad range of functions of the authority, and compliance with the general procedures and applicable standards. This provision recognises the wide responsibilities and limited resources of public authorities and their duties to the public as a whole. It has been included in the bill to ensure that the lower courts, in particular, are aware of the importance of these matters when considering claims against public authorities.

The additional protections are carefully targeted to tackle extensions of the common law that have, over recent times in particular, seen public authorities bearing a disproportionate legal burden when compared to other defendants. The bill cuts back on these extensions while retaining the right to sue in negligence when an authority actually performs one of its functions badly and in breach of its duty of care. The bill will also allow other organisations to be prescribed as a public authority for the purpose of accessing the protections afforded by these new principles.

This regulation-making power recognises that some non-government organisations perform functions of a public character and that they should be treated in substantially the same way under negligence law. For example, in recent discussions with the Catholic Education Commission, the Catholic Commission for Employee Relations and the Association of Independent Schools, the Government was asked whether non-government schools could be prescribed for this purpose. The answer to that question is yes. Non-government schools are one of the group of entities that it is envisaged might be included in future regulations.

The bill also makes provision to limit the circumstances in which a claim can be made for a breach of statutory duty. It is important to understand the distinction between an action for breach of a statutory duty and a general common law claim of negligence. Clause 43 of the bill deals only with those cases in which breach of statutory duty is pleaded. It does not offer immunity from ordinary negligence claims. Special provision is also made in the bill in relation to regulatory functions, such as licensing. These are functions that can only be exercised by public authorities. Because these functions have a uniquely public character, a private person is not normally able to ask a court to order a public authority to carry them out. The bill recognises that under the current law it is anomalous that a private person could, nonetheless, seek damages from a public authority for not carrying out the same function. The bill will ensure that only those private persons who are entitled to force a regulatory authority to act are entitled to seek damages in relation to the failure to act.

Of course, if an authority exercises its regulatory powers negligently, the bill will not offer the authority any special protection. The bill also introduces a special protection for roads authorities in recognition of the difficulty of maintaining vast tracts of roads in remote areas. However, there will be no immunity if the authority knew about the risk that caused the injury. I will also foreshadow that the Government intends to move an amendment to this section to clarify that this new nonfeasance immunity cannot be construed as increasing the standard of care currently required by roads authorities. If the immunity does not apply, the authority will be judged by the ordinary principles of negligence, including those contained in clause 42 of the bill.

The honourable member for Vaucluse also suggested that the protection conferred by the bill on public authorities might unduly expose private contractors. However, this is a misunderstanding of the position. The bill will not increase the exposure of private contractors who undertake work on behalf of public authorities. On the contrary, it gives them, and other service providers, greater protection. In particular, the introduction of proportionate liability for claims involving pure economic loss will benefit contractors. The honourable member for Vaucluse also asked whether the definition of "recreational activities" should be confined to those activities involving a significant degree of physical risk.

The bill already restricts the new immunity for the materialisation of obvious risks to dangerous recreational activities. This is consistent with the Ipp report. However, the bill does not restrict the application of the risk warning and risk waiver protections to dangerous recreational activities. The bill must apply these protections to ordinary recreational activities if the risk warnings and risk waivers are to be of any use to the community. It is not just bungee-jumping operators who are facing problems with public liability: it is local festivals, organised school sports and even local sewing groups. These are not necessarily dangerous activities. The bill is intended to help schools whose students are playing softball, not just those who might be learning how to skydive. The bill is intended to help local jazz festivals as well as rodeos.

The honourable member for Lachlan asked the Government to clarify how the risk waiver provisions in the bill would apply to parents and guardians signing waivers on behalf of children. The bill will not change the law in relation to whether a waiver given on behalf of a child is valid. When children are involved the Government intends that the provisions relating to risk warnings—rather than risk waivers—will be of most benefit to recreational service providers. Warnings to parents under the bill will, therefore, be effective in relation to children. This is a fair and realistic position.

The honourable member for Wagga Wagga asked the Government to expand upon the benefits for medical

specialists. The bill contains important benefits, such as a new peer acceptance defence and protection for giving apologies. The limitation provisions should also be of particular benefit to obstetricians, but without unfairly disadvantaging injured children. These protections should give medical or indemnity organisations considerable comfort about their long-term risk exposure. However, naturally the Commonwealth Government must develop a solution to the current insurance crisis facing doctors in private practice.

The honourable member for Wakehurst managed to misinterpret the intoxication provisions in the bill. If a person's intoxication does not contribute to the accident, then he or she will not automatically be found to be 25 per cent responsible for his or her injuries. The honourable member for Vaucluse and other members in the other place expressed the view that the protections afforded by the bill to volunteer rescue organisations may not be wide enough. I wish to take this opportunity to praise the role of the volunteer emergency and rescue bodies in this State, whose members risk their lives to save those of others. Their services are vital to the community as a whole.

The protection conferred by the bill was carefully formulated. It recognises the need to ensure that the unique and vital rescue and emergency services provided by the Volunteer Rescue Association and its affiliated bodies can be provided without fear of unwarranted litigation. However, the Government does not consider that blanket immunity for these organisations is appropriate, any more than it would be appropriate for a public authority or for a specialist doctor. There may be times when a person who is a member of a rescue organisation acts negligently and hurts someone. If that negligence did not happen in the course of a rescue or an emergency, it is difficult to see why the organisation itself should be completely immune. However, it is important to remember that the general provisions of the bill already offer considerable comfort to individual members of rescue and emergency organisations.

The bill provides that a volunteer will not incur any personal liability for an act or omission done or made by a volunteer in good faith when doing community work organised by a community organisation or as an office-holder of a community organisation. This provision will ensure that all of those members of the community who give their time to help others, including, for example, charity workers, members of community groups and sporting and educational organisations, will be protected from liability in the event of negligence. Therefore, volunteer rescue workers who perform other duties for the organisation will be protected by this bill, even if their actions were not in the course of an emergency or rescue.

The bill also affords protection to the very special group of people who come to the aid of a person who is apparently injured or at risk of being injured. A good Samaritan does not incur any personal civil liability for any act or omission done or made by the good Samaritan when assisting a person who is injured or at risk of being injured. This will also apply to members of volunteer rescue organisations. The general provisions under the bill relating to duty of care, obvious risks, contributory negligence, recreational activities and intoxication will also provide volunteer organisations with much greater certainty about their potential liabilities.

The bill implements a new scheme for limitation periods. The honourable member for Vaucluse asked whether the extension of time for children to sue when they are injured by a person in a close personal relationship to them, or their parents, would increase uncertainty for insurers. The answer is no. There will be very few cases that fall within this important exception. In the main, this exception will be used when a child has been the victim of abuse. It is highly unlikely that such an exception could detract in any way from the potential positive impact the changes will otherwise have on the availability and affordability of insurance. Another exception for children is when their parents irrationally fail to bring an action on their behalf. The honourable member for Vaucluse asked why the exception has been confined in this way and does not use the term "unreasonably".

The new scheme recognises that in the vast majority of cases parents or guardians can bring an action on behalf of the child before the child is an adult. The "irrational" exception will, however, operate to ameliorate any harshness brought about by the new limitation period. It will allow the courts to extend the period in cases when a parent fails to bring an action on behalf of their child and the court considers that the decision was not one that any rational person could have made. The term "irrational" will be a harder test to meet than "unreasonable". "Unreasonable" simply would not work in this area in practice, and would undermine the certainty that these reforms are designed to achieve. I foreshadow that the Government will be moving two other technical amendments to the bill. These amendments are being made following further consultation with the chair of the expert panel, Justice David Ipp. The Government is very grateful for the judge's valuable assistance.

The proposed amendments will more closely reflect the wording and intention of the panel's recommendations regarding causation and non-delegable duties. The changes to causation relate to new section 5D (2). Instead of codifying when the exception to the "but for" test should apply, the bill will leave the current position intact. This will ensure that it is clear that no departure from the current exceptions, wider or narrower, is being proposed by the bill. New section 5D (2) will require a court to consider expressly whether and why the circumstances are exceptional enough to warrant imposing liability, even though the "but for" test cannot be satisfied. The proposed changes to section 5Q clarify that the bill is not intended to abolish non-delegable duties altogether. Instead, this provision will reflect the approach of the Ipp report more closely by requiring the courts to treat a breach of such a duty as if it were vicarious liability. This approach will still ensure that plaintiffs cannot circumvent the reforms under the bill by framing an action as a breach of a non-delegable duty. The broader question of how the courts should formulate the test for whether a non-delegable duty exists will be given further consideration in the future. I look forward to constructive and positive debate on this bill. I commend the bill to the House.