Civil Liability Amendment Bill.

Second Reading

Mr MORRIS IEMMA (Lakemba—Minister for Health) [3.59 p.m.]: I move:

That this bill be now read a second time.

The main purpose of the Civil Liability Amendment Bill is to amend the Civil Liability Act 2002 to address issues arising from two recent court cases that caused considerable community concern. The bill also makes some minor amendments to the existing proportionate liability provisions in the interests of national consistency. The first case that the bill seeks to address is known as the Presland case. Kevin Presland, a mentally ill patient, killed his brother's fiancée after he was discharged from James Fletcher Hospital. Mr Presland was found not guilty of the woman's murder by reason of insanity. He sued the hospital for negligently discharging him, and was awarded $225,000 damages for the pain and suffering he experienced as a result of killing the woman plus $85,000 for lost earnings during his three years of detention as a forensic patient.

The community rightly was outraged about the court decision because it allowed Kevin Presland to benefit, even though he had caused the death of his brother's fiancée. NSW Health is currently appealing that decision. But it raises important issues that deserve to be put beyond doubt in legislation. Existing provisions of the Civil Liability Act concerning the liability of public authorities may have prevented the court from making this decision. However, the case was not determined according to that Act because the proceedings were commenced before the reforms applied. The Government has, however, decided to take further steps to ensure that there will not be a repeat of the kind of decision made in the Presland case. In addition, we are making changes to the Civil Liability Act to clarify the treatment of other situations where mentally ill people may benefit from actions that would otherwise be considered a crime.

Currently the Civil Liability Act prevents a criminal from recovering damages for injuries where the criminal sustained the injury while committing a serious offence. It is not clear that a mentally ill person who is injured while acting unlawfully but who cannot be convicted of a crime because of his or her mental illness would be precluded from recovering damages under the existing provisions. For example, a burglar who is injured while breaking and entering is prevented from suing the home owner. However, if the burglar cannot be convicted of breaking and entering because of mental illness he or she could still sue the home owner for injuries sustained while unlawfully on the home owner's premises.
Proposed section 54A restricts the damages that can be awarded to people who are injured while committing what would otherwise be a serious offence but who cannot be found criminally responsible because they are mentally ill. The bill prevents such people from recovering damages for non-economic loss, such as pain and suffering, and for loss of earnings. They will still be able to recover damages for medical and future care needs. People acting in self-defence need to be confident that they will be protected by the existing law against having to pay damages to their attackers, regardless of the mental condition of the attacker. Currently the Civil Liability Act protects a person who injures another while acting in self-defence. The amendment to section 52 clarifies that this protection applies to a person who injures a mentally ill person while acting in self-defence.

The Presland case has highlighted also the difficulties faced by people who have statutory decision-making powers—such as doctors or psychiatrists. On the one hand, the law gives them a broad discretion to exercise their decision-making powers. However, despite those people having a broad discretion, negligence laws can constrain the exercise of those powers. This was highlighted in the Presland case, where a doctor was found to be negligent for the way he exercised the discretion given to him under the Mental Health Act to detain a mentally ill patient. In exercising that discretion a doctor has to balance a whole range of factors, including the safety of the community on the one hand and the right of the patient to be free on the other. These are very difficult decisions and doctors—as well as other decision-makers—must be able to use their statutory discretion without the fear of litigation hanging over them.

We are all aware of the extraordinary pressures doctors are facing at this time. The last thing we want the courts to be doing is adding to those pressures. In the mental health context, the Presland case has created the risk that doctors will behave too conservatively, detaining patients unnecessarily, out of fear that they can be sued by the patient for anything he or she does if not detained. Other decision-makers may be similarly constrained when trying to decide how to exercise their powers in the public interest. Therefore, the bill inserts a new section 43A that applies to the exercise of, or failure to exercise, a "special statutory power". This will apply to powers that persons generally could only exercise with specific statutory authority, such as the power of a medical officer to detain a person under the Mental Health Act.

In a case involving a special statutory power, a public authority will be liable only if its decision is so unreasonable that no public authority having such a power could consider it to be reasonable. It will not affect the exercise of "operational" functions of agencies, for example, where they are given general functions to provide particular services. The bill

makes it clear that this principle covers public authorities as well as individuals, such as psychiatrists in hospitals, who have public official functions. These amendments will apply to proceedings that have already commenced in order to ensure that the precedent set by the Presland case will not be followed. The Government recognises that affecting cases that are already before the courts should be done in only the most exceptional circumstances. The bill will not affect the appeal in the Presland case. It will, however, apply to existing cases. This is not being done lightly. As the strength of the community's reaction demonstrates, these are exceptional circumstances, and there are at least two cases comparable to that of Presland currently on foot. The bill will apply to them.

Mr Andrew Tink: But not to Presland's?

Mr MORRIS IEMMA: It does not affect the appeal in the Presland case, which is currently being determined. But there are two other cases on foot. The final problem highlighted by the Presland case is that health professionals exercising their powers under the Mental Health Act in good faith are open to being sued personally for their decisions. This adds significant pressure to what is already a very difficult job. There is certainly a risk that the fear of personal liability may influence the way important decisions are made, and that is not in the public interest. The Mental Health Act already protects police, magistrates and Mental Health Review Tribunal members from personal liability for the exercise in good faith of their functions under the Act. It is appropriate that this protection is extended to health care professionals where they are exercising functions under the Mental Health Act.

The second case that the bill seeks to address is the High Court case of *Cattanach v Melchior*. This related to a Queensland case of wrongful birth. In that case the High Court decided for the first time that, where a healthy child is born following a failed sterilisation the child's parents can recover damages for the costs of raising the child. Prior to this decision Australian courts had refused to award damages for the birth of a healthy child. There is a strong moral objection to such damages because they classify the birth and existence of a child as an "injury" to the child's parents. This moral objection was voiced by the community, which expressed serious concerns about the High Court decision. A further concern is that such damages almost inevitably will be awarded against doctors, adding to the crisis in medical indemnity insurance. In effect, the negligent doctor—or his or her insurer—is made financially responsible for raising the child. Although the damages sought in the High Court in this case were quite low, at $105,000, the court recognised that they could be much higher in other cases. They could, for example, include the cost of expensive education, overseas holidays and the like.

Damages for the costs of raising a child would not be means tested. On the contrary, the more expensive the lifestyle of the family the higher the damages are likely to be. The Government has responded to the community's concern over this decision. The bill will not allow the birth of a child to be treated as an injury to its parents. Therefore, the bill excludes the right to recover any damages for the costs of rearing and maintaining a healthy child. It is important to clarify that this will not preclude the recovery of additional costs associated with raising a child born with a disability. These damages were available before the High Court decision, and the Government does not seek to displace them. The bill also excludes damages for any loss of earnings suffered by the parents while rearing or maintaining the child, for example, if a parent gives up work or refuses promotion to look after the child.

When a pregnancy is the result of somebody's negligence the mother will still be able to recover damages for the pregnancy and the birth, but not for the costs of raising the child. In addition to addressing these two recent cases, the bill makes some minor amendments to the proportionate liability provisions in the Civil Liability Act which are designed to ensure that people are held responsible for the consequences of their actions but not for the consequences of other people's actions. When two or more people cause another person to suffer economic loss or property damage the court can look at the role each person plays in causing that loss and apportion the damages between each of them. Last year the Government introduced proportionate liability. Since then the Commonwealth and other States and Territories have decided to adopt the New South Wales model with some minor variations.

In the interests of national consistency the bill makes some small changes to the proportionate liability provisions to adopt the changes discussed with other jurisdictions. In particular, the new provisions will place a duty on the defendant to help identify other potential defendants who may have contributed to the loss. This will ensure that plaintiffs are not disadvantaged by defendants who fail to identify other potential wrongdoers early in the proceedings. Finally, the bill clarifies that the exclusions from liability in the Civil Liability Act extend to exclude vicarious liability as well as principal liability. The bill continues the Government's commitment to ensuring that the tort system operates in a fair and balanced manner. I commend the bill to the House.