



New South Wales

Civil Liability Amendment Bill 2006

Explanatory note

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

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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 motor accidents and dust-related conditions) 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 repeals 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 [8] 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 [9] enables 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:

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- (a) the claimant provided the services to the claimant's dependants before the injury occurred, 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 any persons who are wholly or partly dependent on the claimant at the time of the injury. 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] and [2]** will ensure that proposed section 15B will extend to the determination of civil liability for injury that results from a motor accident or a dust-related condition. However, the proposed section makes it clear that:

- (a) a claimant who is a participant in the Scheme under the proposed *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 [1], [3] and [5]–[7] make amendments that are consequential on the insertion of proposed sections 15A and 15B in the principal Act.

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Schedule 1 [10] 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 [4] and [11]** make consequential amendments to sections 3B and 18 respectively.

Schedule 1 [12] 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 [13] 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 the determination of civil liability in any proceedings commenced (but not finally determined) before the day on which the proposed section concerned commences.



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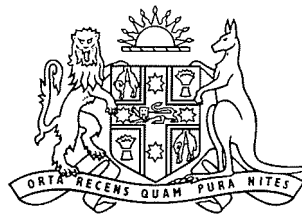
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No. , 2006

A Bill for

An Act to amend the *Civil Liability Act 2002* to make further provision with respect to damages for gratuitous attendant care services and for loss of capacity to provide domestic services; and for other purposes.

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Clause 1 Civil Liability Amendment Bill 2006

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Civil Liability Amendment Act 2006*.

2 Commencement

This Act commences on the date of assent to this Act.

3 Amendment of Civil Liability Act 2002 No 22

The *Civil Liability Act 2002* is amended as set out in Schedule 1.

4 Repeal of this Act

- (1) This Act is repealed on the day following the day on which this Act commences.
- (2) The repeal of this Act does not, because of the operation of section 30 of the *Interpretation Act 1987*, affect any amendment made by this Act.

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Civil Liability Amendment Bill 2006

Amendments

Schedule 1

Schedule 1 Amendments

(Section 3)

[1] Section 3B Civil liability excluded from Act

Insert “except sections 15A and 15B and section 18 (1) (in its application to damages for any loss of the kind referred to in section 18 (1) (c))” after “whole Act” in section 3B (1) (b).

[2] Section 3B (2) (a1)

Insert after section 3B (2) (a):

- (a1) section 15B (Damages for loss of capacity to provide domestic services),

[3] Section 3B (2) (b)

Omit “15A”. Insert instead “15C”.

[4] Section 3B (2) (c1)

Insert after section 3B (2) (c):

- (c1) section 18 (1) (in its application to damages for any loss of the kind referred to in section 18 (1) (c)),

[5] Section 15 Damages for gratuitous attendant care services: general

Relocate the note at the end of the section to the end of subsection (3).

[6] Section 15

Insert at the end of the section:

Note. By reason of the operation of section 3B (1) (b), this section does not apply to the determination of civil liability in proceedings of the kind referred to in section 11 (Claims for damages for dust diseases etc to be brought under this Act) of the *Dust Diseases Tribunal Act 1989*.

Section 15A makes provision with respect to the determination of damages for gratuitous attendant care services in proceedings of the kind referred to in section 11 of the *Dust Diseases Tribunal Act 1989*.

[7] Section 15A Damages for loss of superannuation entitlements

Renumber as section 15C.

[8] Section 15A

Insert after section 15:

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Schedule 1 Amendments

15A Damages for gratuitous attendant care services: dust-related conditions

- (1) This section applies to the determination of civil liability for damages for gratuitous attendant care services in proceedings of the kind referred to in section 11 (Claims for damages for dust diseases etc to be brought under this Act) of the *Dust Diseases Tribunal Act 1989*.
- (2) The amount of damages that may be awarded for gratuitous attendant care services in proceedings referred to in subsection (1) must not exceed the amount calculated at the same hourly rate as that provided by section 15 (5) regardless of the number of hours involved.
- (3) Except as provided by this section, nothing in this section affects any other law relating to the value of attendant care services.
- (4) In this section, *attendant care services* and *gratuitous attendant care services* have the same meanings as they have in section 15.

[9] Section 15B

Insert before section 15C (as renumbered by item [7]):

15B Damages for loss of capacity to provide domestic services

- (1) In this section:
dependants, in relation to a claimant, means any persons who are wholly or partly dependent on the claimant at the time of the injury.
gratuitous domestic services means services of a domestic nature for which the person providing the service has not been paid or is not liable to be paid.
- (2) Damages may be awarded 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) the claimant provided the services to the claimant's dependants before the injury occurred, 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

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Schedule 1

- (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.
- Note.** Section 18 provides that a court cannot order the payment of interest on damages awarded for any loss of capacity of a claimant to provide gratuitous domestic services to the claimant's dependants.
- (3) The amount of damages that may be awarded for any loss of the claimant's capacity to provide gratuitous domestic services must not exceed the amount calculated at the same hourly rate as that provided by section 15 (5) regardless of the number of hours involved.
 - (4) In determining the amount of damages (if any) to be awarded to a claimant for any loss of the claimant's capacity to provide gratuitous domestic services to the claimant's dependants, a court:
 - (a) may only award damages for that loss in accordance with the provisions of this section, and
 - (b) must not include in any damages awarded to the claimant for non-economic loss a component that compensates the claimant for the loss of that capacity.
 - (5) A claimant may not be awarded damages for any loss of the claimant's capacity to provide gratuitous domestic services to any dependant of the claimant if the dependant has previously recovered damages in respect of that loss of capacity.
 - (6) A person (including a dependant of a claimant) may not be awarded damages for a loss sustained by the person by reason of the claimant's loss of capacity to provide gratuitous domestic services if the claimant has previously recovered damages in respect of that loss of capacity.
 - (7) If a claimant is a participant in the Scheme under the *Motor Accidents (Lifetime Care and Support) Act 2006*, damages may not be awarded to the claimant under this section in respect of any loss of the claimant's capacity to provide gratuitous domestic services to the claimant's dependants while the person is a participant in the Scheme if (and to the extent that):
 - (a) the loss resulted from the motor accident injury (within the meaning of that Act) in respect of which the claimant is a participant in that Scheme, and
 - (b) the treatment and care needs (within the meaning of that Act) of the claimant that are provided for or are to be

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Schedule 1 Amendments

provided under the Scheme include the provision of such domestic services to the claimant's dependants.

- (8) Damages may not be awarded to a claimant under this section in respect of any loss of the claimant's capacity to provide gratuitous domestic services to the claimant's dependants if (and to the extent that):
- (a) the loss resulted from an injury caused by a motor accident (within the meaning of the *Motor Accidents Compensation Act 1999*), and
 - (b) an insurer has made, or is liable to make, payments to or on behalf of the claimant for such services under section 83 (Duty of insurer to make hospital, medical and other payments) of that Act.
- (9) In determining the value of any gratuitous domestic services that a claimant has lost the capacity to provide, the court must take into account:
- (a) the extent of the claimant's capacity to provide the services before the claimant sustained the injury that is the subject of the claim, and
 - (b) the vicissitudes or contingencies of life for which allowance is ordinarily made in the assessment of damages.

[10] Section 18 Interest on damages

Omit section 18 (1). Insert instead:

- (1) A court cannot order the payment of interest on damages awarded for any of the following:
- (a) non-economic loss,
 - (b) gratuitous attendant care services as defined in section 15 (other than gratuitous attendant care services to which section 15A applies),
 - (c) loss of a claimant's capacity to provide gratuitous domestic services to the claimant's dependants (as provided by section 15B).

[11] Section 18 (2)

Omit "(other than damages for non-economic loss or gratuitous attendant care services)".

Insert instead "(other than damages in respect of which a court cannot order the payment of interest under subsection (1))".

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Amendments

Schedule 1

[12] Schedule 1 Savings and transitional provisions

Insert at the end of clause 1 (1):

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[13] Schedule 1, Part 8

Insert after Part 7:

**Part 8 Provisions consequent on enactment of
Civil Liability Amendment Act 2006**

22 Definition

In this Part:

amending Act means the *Civil Liability Amendment Act 2006*.

23 Application of amendments made by amending Act

- (1) Section 15A (as inserted by the amending Act) extends to the determination of civil liability in any proceedings commenced (but not finally determined) before the day on which section 15A commences.
- (2) Section 15B (as inserted by the amending Act) and section 18 (1) (as amended by the amending Act) extend to the determination of civil liability in any proceedings commenced (but not finally determined) before the day on which section 15B commences.
- (3) For the purposes of subclause (1) and (2), section 3B (1) (b) and (2) (a1) and (c1) (as inserted or amended by the amending Act) also extends to the civil liability referred to in those subclauses.