

Passed by both Houses



New South Wales

Civil Liability Amendment Bill 2006

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I certify that this PUBLIC BILL, which originated in the LEGISLATIVE ASSEMBLY, has finally passed the LEGISLATIVE COUNCIL and the LEGISLATIVE ASSEMBLY of NEW SOUTH WALES.

*Clerk of the Legislative Assembly.
Legislative Assembly,
Sydney, , 2006*



New South Wales

Civil Liability Amendment Bill 2006

Act No , 2006

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.

I have examined this Bill, and find it to correspond in all respects with the Bill as finally passed by both Houses.

Chairman of Committees of the Legislative Assembly.

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 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- (1) This Act is repealed on the day following the day on which this Act commences.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.

Schedule 1 Amendments

(Section 3)

[1] Section 3B Civil liability excluded from Act

Omit section 3B (1) (a). Insert instead:

- (a) civil liability in respect of an intentional act that is done with intent to cause injury or death or that is sexual assault or other sexual misconduct—the whole Act except:
 - (i) section 15B and section 18 (1) (in its application to damages for any loss of the kind referred to in section 18 (1) (c)), and
 - (ii) Part 7 (Self-defence and recovery by criminals) in respect of civil liability in respect of an intentional act that is done with intent to cause injury or death,

[2] Section 3B (1) (b)

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”.

[3] Section 3B (1) (c)

Insert “except section 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”.

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

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

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

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

Omit “15A”. Insert instead “15C”.

[6] 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)),

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

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

[8] 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*.

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

Re-number the section as section 15C.

[10] Section 15A

Insert after section 15:

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.

[11] Section 15B

Insert before section 15C (as renumbered by item [9]):

15B Damages for loss of capacity to provide domestic services

(1) Definitions

In this section:

assisted care, in relation to a dependant of a claimant, means any of the following kinds of care (whether or not the care is provided gratuitously):

- (a) any respite care (being care that includes accommodation that is provided by a person other than the claimant to a dependant who is aged or frail, or who suffers from a physical or mental disability, with the primary purpose of giving the dependant or claimant, or both, a break from their usual care arrangements),
- (b) if the dependant is a minor (but without limiting paragraph (a))—any care that is provided to the dependant by a person other than the claimant where:
 - (i) the person is a parent of the dependant (whether derived through paragraph (a) (i) or (ii) of the definition of *dependants* in this subsection, adoption or otherwise), and
 - (ii) the care includes the provision of accommodation to the dependant.

dependants, in relation to a claimant, means:

- (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.

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) **When damages may be awarded**

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) in the case of any dependants of the claimant of the kind referred to in paragraph (a) of the definition of **dependants** in subsection (1)—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 6 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.

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) If a dependant of the claimant received (or will receive) assisted care during the 6-month period referred to in subsection (2) (c) (ii) and the court is satisfied that the periods of that care were (or will be) short-term and occasional, the court may:
 - (a) in determining whether the claimant would have provided gratuitous domestic services to the dependant during a particular week for at least the 6 hours referred to in subsection (2) (c) (i), disregard the week if assisted care was (or will be) provided during that week, and
 - (b) in determining whether the claimant would have provided gratuitous domestic services to the dependant during the 6-month period referred to in subsection (2) (c) (ii),

disregard any periods during which the assisted care was (or will be) provided in that 6-month period,

but only if the total number of weeks in which the care was (or will be) provided during the 6-month period does not exceed 4 weeks in total.

(4) **Determination of amount of damages**

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.

(5) 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.

(6) **Circumstances when damages may not be awarded**

The claimant (or the legal personal representative of a deceased 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.

(7) 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 (or the legal personal representative of a deceased claimant) has previously recovered damages in respect of that loss of capacity.

(8) 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 claimant 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 provided under the Scheme include the provision of such domestic services to the claimant's dependants.
- (9) 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.
- (10) **Damages may not be awarded if they can be recovered as damages for attendant care services**

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 claimant could recover damages for gratuitous attendant care services (within the meaning of section 15) in respect of the same injury that caused the loss, and
 - (b) the provision of such attendant care services to the claimant also resulted (or would also result) in the claimant's dependants being provided with the domestic services that the claimant has lost the capacity to provide.
- (11) **Determining value of gratuitous domestic services**

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 extent to which provision of the services would, but for the injury sustained by the claimant, have also benefited persons in respect of whom damages could not be awarded under subsection (2), and

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- (c) the vicissitudes or contingencies of life for which allowance is ordinarily made in the assessment of damages.

[12] 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).

[13] 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))".

[14] Schedule 1 Savings and transitional provisions

Insert at the end of clause 1 (1):

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[15] 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 civil liability arising before the commencement of section 15A, but

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Schedule 1 Amendments

does not apply to any proceedings that were finally determined before that commencement.

- (2) Section 15B (as inserted by the amending Act) and section 18 (1) (as amended by the amending Act) extend to civil liability arising before the commencement of section 15B, but do not apply to any proceedings that were finally determined before that commencement.
- (3) For the purposes of subclauses (1) and (2), section 3B (1) (a)–(c) and (2) (a1) and (c1) (as inserted or amended by the amending Act) also extend to the civil liability referred to in those subclauses.