

**SUBMISSIONS TO THE NEW SOUTH WALES LAW REFORM
COMMISSION INQUIRY INTO AMENDMENTS TO THE
*COMPENSATION TO RELATIVES ACT***

1. These submissions are prepared on behalf of the Asbestos Diseases Foundation of Australia, the Australian Manufacturing Workers Union and Unions NSW. They are motivated by what is perceived to be unfairness in the current law governing the effect of the receipt of damages for the deceased's pain and suffering by the estate of a person who died from an asbestos-related illness, upon a claim by the dependants under the *Compensation to Relatives Act 1897 (NSW)*.

2. Because of what it undoubtedly perceived to be the special suffering of the victims and the families of victims of asbestos-related diseases, in 1998 the New South Wales government introduced legislation¹ to enable the estate of a person whose death was caused by a dust-related condition (of which asbestos diseases are the most common) to recover damages for the deceased's pain and suffering, bodily or mental harm and loss of expectation of life, provided proceedings were commenced by the deceased in the Dust Diseases Tribunal before his or her death.

3. In enacting the 1998 amendments the legislature considered that damages for the deceased's pain and suffering in cases where the death was due to a dust-related condition required special treatment. The general rule, applicable to all other illnesses causing death, is that where the death of the person has been caused by the act or omission giving rise to the cause of action, the damages recoverable by the estate "shall not include any damages for the pain or suffering of that person or for any bodily or mental harm suffered by the person or for the curtailment of the person's expectation of life."² The *Dust Diseases Tribunal Act 1989* was amended by the 1998 legislation to

¹ *Workers Compensation Legislation Amendment (Dust Diseases and Other Matters) Act 1998*

² *Law Reform (Miscellaneous Provisions) Act 1944*, s 2(2)(d)

include s 12B. This section³ overcomes the effect of s 2(2)(d) of the *Law Reform (Miscellaneous Provisions) Act 1944* to permit damages for the death of the deceased from a dust-related condition to survive the death for the benefit of the estate.

4. However in some instances of death due to asbestos-related diseases the persons who share in the deceased's estate are family members who were also dependant upon the deceased. In that latter capacity they have enjoyed rights for over a century to claim for loss of expectation of pecuniary benefits from the deceased under the *Compensation to Relatives Act*. As the law currently stands in New South Wales, in the exceptional case of dust diseases where the parliament has considered that the claim for non-pecuniary loss should survive for the estate, in circumstances where the beneficiaries of that estate or some of them are also dependants, credit for their share of the deceased's general damages must be given in actions under *Lord Campbell's Act*. Such was decided by the House of Lords in *Davies v Powell Duffryn Associated Collieries Ltd*⁴ in relation to claims under both the English *Fatal Accidents Act 1846* and the English *Law Reform (Miscellaneous Provisions) Act 1934*. In that case damages for the shortened expectation of life of the deceased survived under the *Law Reform Act* for the benefit of his estate. His widow was entitled to the whole of the estate. The damages for loss of expectation of life deducted from the damages awarded under *Lord Campbell's Act*.
5. In *Public Trustee v Zoanetti*⁵ the High Court followed *Davies*. Dixon J said:

“In jurisdictions where the survival of causes of action for civil wrongs has been provided for by statute, as has been done in England by the *Law Reform (Miscellaneous Provisions) Act 1934* and in South Australia by the *Survival of Causes of Action Act 1940*, the damages recoverable by the legal personal

³ In conjunction with the new s 2(7) of the *Law Reform (Miscellaneous Provisions) Act 1944*

⁴ [1942] AC 601 (HC)

⁵ [1945] 70 CLR 267; see also *Willis v The Commonwealth* [1946] 73 CLR 105

representative of the deceased go to swell the estate in which the widow or other relative may share, whether under his will or on intestate. It will, therefore, operate to increase the interest which, in the absence of any legislative direction to the contrary, must be taken into account by way of reduction of the pecuniary loss otherwise resulting to the widow of the deceased or his relative.” (emphasis added)

6. In *BI (Contracting) Pty Ltd v Eileen Sylvia Strikwerda and Anor*⁶ the New South Wales Court of Appeal considered the effect of *Davies* and *Zoanetti* in the context of the death of a husband caused by an asbestos-related dust disease, mesothelioma, and a claim by his widow who was at once the beneficiary of his estate and his dependant. Section 3(2) of the *Survival of Causes of Action Act 1940 (SA)*⁷ allowed the recovery of damages for pain and suffering, bodily and mental harm, and curtailment of expectation of life, for the benefit of the estate. The New South Wales Court of Appeal decided that the Dust Diseases Tribunal had correctly concluded that in assessing damages in the dependency claim brought under the *Wrongs Act 1936 (SA)*, (subsequently renamed the *Civil Liability Act 1936 (SA)*), it was proper to take into account pecuniary benefits passing to the dependant widow as a result of the death of the deceased, including the damages in respect of the deceased’s pain and suffering which were part of the estate which she inherited. Quoting Dixon J in *Zoanetti* (at 287) Mason P, with whom Santow JA and Bell J agreed, said that the damages for the deceased’s pain and suffering of which the widow was the beneficiary “cannot be regarded as more than an increment of the deceased’s estate in which she takes her distributable share” [25].
7. In *Zoanetti*, although the widow’s damages in the dependency claim were very substantially reduced because of the benefit she received from the general damages in the estate of her late husband, they were not entirely

⁶ [2005] NSWCA 288

⁷ The corresponding provision to s 2(7) of the *Law Reform (Miscellaneous Provisions) Act (NSW)* in conjunction with s 12B of the *Dust Diseases Tribunal Act (NSW)*

eliminated. However in many cases of asbestos-related dust diseases, such as mesothelioma and asbestos-related lung cancer, where the latency period between exposure and manifestation of the illness can be measured in decades, both the deceased at the time of his or her death and the widow or widower are in the latter part of their life where the dependency claim of the surviving spouse is relatively small, but the damages for the horrific pain and suffering of the deceased are relatively large. In such circumstances not uncommonly the surviving spouse's entitlement to such general damages under the estate completely extinguishes his or her entitlements under the *Compensation to Relatives Act*.

8. When legislation permitting *Lord Campbell's Act* claims was originally introduced there were no requirements that particular benefits should be excluded from consideration. As a result of statutory amendments in the various jurisdictions where a *Lord Campbell's Act* claim is permitted the number of benefits to the dependants which are immune from consideration in a dependency claim has progressively increased. In New South Wales s(3)(3) of the *Compensation to Relatives Act 1897* presently provides for the benefits which may not be taken into account. These are:

- “(a) Any sum paid or payable on the death of the deceased under any contract of insurance, or
- (b) Any sum paid or payable out of any superannuation, provident, or like fund, or by way of benefit from a friendly society, benefit society or trade union, or
- (c) Any sum paid or payable by way of pension under:
 - (i) the *Widows' Pension Act 1925-1942*,
 - (ii) the *Coal and Oil Shale Mine Workers (Pensions) Act 1941-1942*,
 - (iii) the *Australian Soldiers' Repatriation Act 1920-1943* of the Parliament of the Commonwealth,
 - (iv) the *Widows' Pension Act 1942-1945* of the Parliament of the Commonwealth,

(v) the *Invalid and Old Age Pension Act 1908-1945* of the Parliament of the Commonwealth

or under any Act (Commonwealth or State) amending or replacing any such Act.”

9. The rationale for the exclusion of the abovementioned sums or benefits from the assessment of damages in *Compensation to Relatives Act* claims is opaque. However the reason why damages for pain and suffering leading to a dust-related death should be excluded is patent. The fatal dust-related illnesses such as mesothelioma and asbestos-related lung cancer cause what has been described by many medical practitioners in the field as one of the most painful deaths known to humanity. The enormous suffering of the deceased is witnessed and shared by the family, who are usually also dependants.

10. There is an important difference in the character of the benefit bestowed by an award of general damages for pain and suffering on the one hand and “pure” pecuniary benefits such as investments or real estate, other than the family home, bequeathed by the deceased to his dependants on the other. The latter category of benefits are traditionally, and for good reason, taken into account in the assessment of a claim by the dependants. True it is that in one sense damages awarded for pain and suffering are simply “an asset of [the deceased’s] estate to which, in an unliquidated form, he was entitled at the time of his death.”⁸ However money paid as compensation for pain and suffering in the exceptional case of dust diseases is, in a larger sense, of an entirely different nature, and has been generated for an entirely different purpose, than “pure” pecuniary assets of the estate. The conventional description of general damages as “non-economic loss” is apposite; the money is paid for a non-pecuniary loss of the deceased, a loss of an entirely different kind from the kind of loss for which damages may be awarded in a *Lord Campbell’s Act* action, namely loss of economic benefits. Simply

⁸ Dixon J in *Zoanetti* at 286-287

because, by reason of the death of the deceased, damages for that non-economic loss are transmitted to the estate and in turn to the dependants does not change the quality or character of the payment. The receipt of such damages should not be taken into account so as to reduce the losses which may be recouped under the *Compensation to Relatives Act* of an entirely different character.

11. The injustice effected by the *Zoanetti* and *Strikwerda* decisions, applying as it does to the special case of general damages in dust diseases cases, has already been remedied by the legislatures of South Australia, Western Australia and Victoria. In South Australia, Part 5 of the *Civil Liability Act 1936* contains that state's *Lord Campbell's Act* provision, under the heading "Wrongful acts or neglect causing death". In his second reading speech in the House of Assembly for the Dust Diseases Bill which contained the relevant amendments, on 30 November 2005, the Hon. M J Atkinson, Attorney-General for South Australia, said (Hansard 4279):

"Another change to substantive rights and liabilities is that the Civil Liability Act 1936 would be amended to reverse the effect of *Public Trustee v Zoanetti* in dust diseases cases. This case, which was decided by the High Court in 1945, requires the Courts in relatives' wrongful death claims to set off the benefits against the detriments accruing to the relatives as a consequence of the death of the injured person. There are some statutory exceptions. The Bill would add another one."

12. The South Australian parliament added to the conventional list of items which cannot be taken into account in the assessment of the dependant's damages (such as sums payable by way of insurance or superannuation benefits) the following:

"(f) Any sum recovered or recoverable for the benefit of the estate of the deceased under s 3(2) of the *Survival of Causes of Action Act 1940* (which

permits the recovery of damages for certain kinds of non-economic loss where the deceased dies of a dust-related condition)."⁹

13. In Western Australia s 4(2a) of the *Law Reform (Miscellaneous Provisions) Act 1941 (WA)* provides an exception to the general rule¹⁰ laid down by s 4(1)(d), that damages for pain and suffering of the deceased are not recoverable for the benefit of that person's estate. It provides that that general rule does not apply where the death results from a latent injury that is attributable to the inhalation of asbestos which has been caused by the act or omission giving rise to the cause of action; and proceedings in respect to the cause of action had been instituted by the deceased before his or her death and were pending at the time of death.

14. Remedial legislation in Western Australia to overcome the *Zoanetti/Strikwerda* unfairness incorporated a new sub-section (d) into s 5(2) of the Fatal Accidents Act 1959 whereby:

“(2) In assessing damages in an action brought under this Act, there shall not be taken into account -...

(d) Any damages for the pain or suffering of the deceased person or for any bodily or mental harm suffered by the deceased person or for the curtailment of the deceased person's expectation of life that, because of the *Law Reform (Miscellaneous Provisions) Act 1941* section 4(2a), are recovered or recoverable for the benefit of the deceased person's estate.”

15. In like manner, the relevant Victorian legislation has been amended to remedy the injustice caused by *Zoanetti/Strikwerda*. Section 29(2A) of the *Administration and Probate Act 1958 (Vic)* provides that where the death of a person from a dust-related condition which has been caused by the act or omission which gives rise to the cause of action survives for the benefit of

⁹ s 24(2aa)(f)

¹⁰ Analogous to s 2(7) of the *Law Reform (Miscellaneous Provisions Act 1944 (NSW)* in conjunction with s 12B of the *Dust Diseases Tribunal Act (NSW)*

the estate the damages recoverable are to include damages for pain and suffering, bodily or mental harm and the curtailment of expectation of life.

16. Dependency claims in Victoria are brought under the *Wrongs Act 1958*. Section 19(1A) of that Act now provides:

“In assessing damages in any action under this Part, there shall not be taken into account –

- (a) Any damages under section 29(2A) of the *Administration and Probate Act 1958* recovered or recoverable for the benefit of the estate of the deceased person.”

17. In England the legislature has gone even further than South Australia, Western Australia and Victoria, to exclude from consideration in the assessment of damages in a dependency claim not only that part of the estate to which a dependant has become entitled which represents the deceased's entitlement to damages, but any benefit at all to the dependants from the estate. Section 4 of the *Fatal Accidents Act 1976* provides as follows:

“In assessing damages in respect of a person's death in an action under this Act, benefits which have accrued or will or may accrue to any person from his estate or otherwise as a result of his death shall be disregarded.”

18. There is no reason in principle why the law in New South Wales should not be changed so that it is consistent with the relevant provisions of comparable legislation in South Australia, Western Australia and Victoria. In practice the change could be effected easily by simply inserting into s 3 of the *Compensation to Relatives Act* a new sub-section as follows:

- (d) Any damages for the pain or suffering of the deceased or for any bodily or mental harm suffered by the deceased or for the curtailment of the deceased's expectation of life which, because of s 12(B) of the *Dust Diseases Tribunal Act 1989* and s 2 of the *Law Reform (Miscellaneous*

Provisions) Act 1944, are recovered or recoverable for the benefit of the deceased's estate.

Liabilities are unlikely to be materially affected by the proposed changes

19. Under its Terms of Reference, if the Commission recommends such an amendment it is required to advise as to whether other legislative changes should be made or further economic modelling undertaken, but only if it appears that, on a global basis, liabilities may be materially affected. There is no evidence that on a global basis liabilities will be materially affected. No further economic modelling is necessary and the legislative change should be effected forthwith.
20. Given its past market share of asbestos products in Australia and judging by the volume of the litigation conducted against James Hardie companies to date, it is the extent of the liability of the James Hardie Asbestos Injury Compensation Fund (the James Hardie fund) which will be most affected by the proposed legislative changes. The *James Hardie Former Subsidiaries (Winding up and Administration) Act 2005* was assented to on 2 December 2005. The Act created the framework under which the James Hardie fund operates to satisfy claims which arise from exposure to asbestos dust generated by products manufactured by the former James Hardie subsidiaries.
21. The remedial legislation introduced by each of the South Australian, Western Australian and Victorian governments referred to above took effect after the James Hardie fund was created by New South Wales legislation in December 2005. It is to be assumed that the governments of those other states took into account the potential impact upon the fund of the proposed remedial legislation.
22. Furthermore since 2006 hundreds of asbestos-related dust diseases claims have been filed in South Australia, Western Australia and Victoria against

James Hardie subsidiaries. Yet no concern has been raised by the James Hardie fund to the effect that the abolition of the *Zoanetti/Strikwerda* principle in relation to general damages in dust diseases cases has materially affected its viability.

The equity implications of the current law and the proposed changes

23. In considering any amendment to the relevant legislation the Commission is required by its Terms of Reference to have regard to the equity implications, including in terms of fairness as between defendants and claimants and as between categories of claimants. Considerations of equity and social responsibility compel the conclusion that not only the victims of asbestos diseases but also their dependants should be treated as a special case so far as the determination of the extent to which they should be compensated under the *Compensation to Relatives Act* is concerned.
24. There can be no doubt that Australian society in the twenty-first century is acutely aware of the prolonged and painful suffering endured by asbestos victims and their families prior to the victim's death. Overwhelmingly the victims of asbestos dust in this country and their dependants are in no respect either morally or legally culpable. Although death from mesothelioma and asbestos-related lung cancer can occur relatively quickly (within a year of the first onset of symptoms in some cases) the death is exquisitely painful, 24 hour nursing and palliative care is usually required in the terminal stages, and the suffering endured not only by the victim but by the victim's dependants is unspeakable.
25. The timing of the death from a disease such as mesothelioma is completely unpredictable. A person diagnosed with mesothelioma can be relatively well one day but suffer a spike in symptoms and an unanticipated acceleration of the disease the next. Urgent admission to hospital thereafter is frequently followed by death within hours or days. If that plaintiff has a significant claim for loss of earnings during the "lost years" but has been unable to

obtain judgment in his or her lifetime because of a sudden deterioration followed by death, the future economic loss claim dies¹¹ with the victim but re-emerges as a compensation to relatives action by the dependants. However as the law currently stands it is a lottery whether the victim will be able to obtain judgment in his or her claim before death and thus recover the full future economic loss for the benefit of his or her dependants, a lottery the outcome of which depends upon the entirely unpredictable course of the illness. Those who do not survive long enough for the entry of judgment in their own case are unable to pass on the full fruits of their future economic loss to their dependants. The entitlement of their dependants to damages representing the dependants' expectation of benefit from the deceased's loss of earnings is reduced to the extent of their share of the general damages which survive to the estate.

26. The existing law thus creates two classes of claim for future loss of earnings; those in which a judgment is entered in the lifetime of the victim and those in which death occurs too quickly for this result to be achieved. The financial implications for the dependants in the latter class of claim are very significant. What determines whether the dependants of the victim who are also beneficiaries under his will recover all or only part of their loss is the unpredictable progress of the disease itself. This is a capricious and inequitable basis for determining the quantum of damages for the same tort.


27. The public outcry at, and enormous publicity generated by, the arrangements originally made by the James Hardie group for funding their asbestos-related liabilities are a measure of the extent of the community's concern for the victims of asbestos-related illnesses and their families. That such dependants require special treatment has already been acknowledged by legislatures in other states.

¹¹ See s 2(2)(a)(ii) of the *Law Reform (Miscellaneous Provisions) Act 1944*

28. The current law in New South Wales which requires that the beneficiaries of damages recovered by the deceased's estate in respect of pain and suffering who are also dependant upon the deceased must have their dependency damages reduced to the extent that they benefit from the general damages is riddled with inequities and anomalies. Presently the total liability of the tortfeasor to pay both general damages for the deceased's pain and suffering combined with compensation to those of his dependants who were also beneficiaries under the deceased's will, ultimately depends upon the chance circumstance of how the deceased arranged his affairs.
29. In the case of a deceased who has left his whole estate to his wife who is his only dependant, the damages recoverable by his widow in her dependency claim will be significantly eroded or extinguished simply because she was the sole beneficiary under the will. Correspondingly the liability of the tortfeasor to pay damages in that claim will be significantly reduced or eliminated. Yet if the deceased leaves the whole estate to persons other than the dependants, under the law as it currently stands the tortfeasor will be liable not only for the deceased's general damages but also for the full measure of the loss of expectation of pecuniary benefits of the dependants. In a hypothetical case where the extent of the widow's dependence on the earnings of the deceased was exactly the same as in the case of the widow who was the sole dependant referred to above, but where the deceased has left his whole estate to his non-dependant children, the amount recoverable by the widow will be unaffected by the general damages recovered by the estate. The liability of the tortfeasor to pay damages for the loss of dependency to the second widow will be significantly more than to the first, even though the extent of their dependency was the same.
30. These anomalies could lead to a situation where in the last months of life, if the progress of the illness permits it, the victim whose dependants are also beneficiaries under his or her will may change the will to ensure that the estate is left to someone other than the dependants, such as a discretionary

trust, in order to circumvent the effect of *Zoanetti* and *Strikwerda*. The law should not countenance such contrivances. Nor should the tortfeasor's overall liability to pay compensation be less simply because the dying victim leaves the whole of his or her estate to those closest to him or her, who are usually the dependants.

31. There can be no suggestion of any "double-dipping" by the dependants who are also beneficiaries of the deceased's general damages from his estate, in a *Fitch v Hyde-Cates*¹² sense. This is because the character of the benefit received by the estate by way of general damages for pain and suffering and loss of expectation of life is different from the pecuniary benefits in respect of the deceased's loss of future earning capacity which were awarded in *Fitch*, the response to which was quick legislative action to prevent the possibility of double compensation.¹³
32. It is submitted that the Commission should recommend that s 3(3) of the *Compensation to Relatives Act 1897 (NSW)* be amended by the addition of a sub-section as set out at paragraph 18 above. This would bring the law in New South Wales into line with that of South Australia, Western Australia and Victoria. It will eliminate the unfairness to the dependents of a person who has died of an asbestos-related disease who have also received benefits from the deceased's estate.



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¹² (1982) 150 CLR 482

¹³ See the *Law Reform (Miscellaneous Provisions) Act 1944 (NSW)*, s 2(2)(2)(a)(ii) (as amended in 1982)