NEW SOUTH WALES BAR ASSOCIATION

PRELIMINARY SUBMISSION TO THE NSW LAW REFORM COMMISSION REVIEW OF COMPENSATION TO RELATIVES

1. The common law did not recognise either damages for wrongful death or survivorship after death of personal causes of action accrued as of the date of the plaintiff's death. The modern law in respect of both is the creature of statute. In New South Wales damages for wrongful death are payable under the *Compensation to Relatives Act 1897* ("Relatives Act"). Survivorship of causes of action and liabilities, accrued or incurred as at the date of death, is provided for by section 2 of the *Law Reform (Miscellaneous Provisions) Act 1944* ("Law Reform Act"). An additional special provision is made in respect of the latter category by section 12B of the *Dust Diseases Tribunal Act 1989* ("Dust Tribunal Act").

2. The right to compensation for wrongful death is conferred by section 3 of the Relatives Act. The legislation is *taken*[1] from *Lord Campbell's Act* (the *Fatal Accidents Act 1846*). In *Zoanetti* Dixon J pointed out that *[i]n estimating the damages to be recovered .... two rules are clearly settled. One is that what is recoverable for the benefit of the widow or other relative of the deceased is the pecuniary loss resulting from his death and that nothing may be recovered by way of solatium for the suffering that his death caused to his widow or relative. The other is that in ascertaining the pecuniary loss resulting from his death it must be taken into consideration, on the one side the reasonable expectations of benefit upon which the claimant would have been entitled to rely, had his life not been brought to an end, and, on the other side, the pecuniary benefits, arising on his death, to which the claimant had a reasonable expectation, whether as of right or otherwise.*[2]

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[1] *Public Trustee v Zoanetti* (1945) 70 CLR 266 at 276 per Dixon J

[2] *Zoanetti* Page 276 - 277

3. The restriction of damages under the Relatives Act to pecuniary losses, and the specific exclusion of a solatium, is usually traced to the interpretation given in *Blake v Midland Ry. Co.* (1852) 18 QB 93: See *Barnett v Cohen* (1921) 2 KB 461 at p. 469 per McCardie J; *Zoanetti* at p. 279 per Dixon J and 290 per McTiernan J.

4. The second of Dixon J's *clearly settled* rules may require damages payable in an action surviving under s.2 of the Law Reform Act to be brought to account if relatives eligible under the Relatives Act benefit from the Estate. At p. 281 his Honour said:

> *In jurisdictions where the survival of causes of action for civil wrongs has been provided for by statute ... the damages recoverable by the legal personal representative of the deceased go to swell the estate in which the widow or other relatives may share, whether under his will or on intestacy. 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.* (This is because the widow, widower or other relative does not get any right under the Law Reform Act.) *His or her interest in the Estate must necessarily arise outside the Law Reform Act and depends on the application of the law with regard to administration of estates as well as the law relating to testate or intestate succession*[3].

5. The damages recoverable in respect of a cause of action which survives because of section 2 of the Law Reform Act is limited by the provisions of s.2(2). By paragraph (d) of that subsection, that which is now generally referred to as damages for non-economic loss is excluded from the surviving action *where the death of that person has been caused by the act or omission*

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[3] *Yelland v Powell Duffryn Associated Collieries Limited (No. 2)* (1941) 1 KB 59 at p. 539 per Luxmorre L.J.

which gives rise to the cause of action. By application of the maligned and seldom employed *expressio unius* canon, where the death was due to independent causes, damages for non economic loss up to the date of death are included. The policy behind this distinction is obscure and is beyond the corporate memory of the Bar.

6. Section 12B of the Dust Tribunal Act creates an exception to section 2(2)(d) Law Reform Act (see section 2(7) Law Reform Act). S.12B enables *the estate... of a person whose death has been caused by a dust-related condition to recover damages for the person's non-economic loss provided proceedings commenced by the person were pending before the Tribunal at the person's death*[4]. Although it has not yet been so held, it seems highly likely, indeed inevitable, that damages for non-economic loss recovered by the Estate in a surviving action under section 12B will be brought to account in an action under the Relatives Act, at least where the relatives, or some of them, have benefited from the estate swollen by those damages. An identical question arose in a slightly different legislative context in *B. I. (Contracting) Pty Ltd v Strikwerda*[5]. The decision concerned an appeal from the Dust Diseases Tribunal. The legislative context was section 3(2) of *Survival of Causes of Action Act 1940* (SA). That provision, unlike the Law Reform Act, permits the recovery of damages for non-economic loss in the surviving action. Such damages were recovered by the estate. The Trial Judge took the surviving action damages which passed to the estate from which the widow benefited into account in assessing the widow's damages under the Relatives Act by application, inter alia, of *Zoanetti*[6]. The Court of Appeal dismissed an appeal holding that the Trial Judge was correct. The same reasoning must apply to section 12B. *B. & I. (Contracting)* and the inevitability of its application to s.12B form an important part of the context of the Commission's terms of reference.

7. It is notable that this first particular matter for consideration focuses upon Dixon J's second *clearly settled* rule only to the extent that the general

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[4] *Amaca Pty Ltd v Cremer* (2006) 66 NSW LR 400
[5] [2005] NSW CA 288.
[6] *B I. Contracting* at [20].

damages in a surviving action *have already increased the amount to be distributed to the relative from the deceased's estate.* As has been pointed out, the receipt of damages of that kind by the estate is generally excluded. It occurs only in a surviving action to which section 12B applies. Given the special provision made for certain dust cases, it may be easy to conclude that the application of the second rule to the assessment of damages in a Relatives Act cases is likely to defeat the clearly enough expressed parliamentary intention that the relatives of dust victims should obtain those damages as a benefit additional to that recoverable by others. No doubt the position could be reversed by simple amendment. However, the New South Wales Bar Association ("the Association") believes that if one has regard to the "equity implications" referred to in the third particular to the terms of reference, identification of the proper approach is not so easy.

8. The Association submits that to consider the merits of amending the relevant legislation, it is important to first bear firmly in mind two matters of great significance. The first is fundamental. That is, Dixon J's second *clearly settled* rule is but a manifestation of *the settled principle governing the assessment of compensatory damages.* [7] Omitting citations, the plurality in *Haines* at p. 63 said:

> *... [W]hether in actions of tort or contract, ... the injured party should receive compensation in a sum which, so far as money can do, will put that party in the same position as he or she would have been in if the contract had been performed or the tort had not been committed .... Compensation is the cardinal concept. It is the "one principle that is absolutely firm, and which must control all else" ... cognate with this concept is the rule, described by Lord Reid ... as universal, that a plaintiff cannot recover more than he or she has lost.*

9. The second matter is that the question involving the interrelationship of the Relatives Act and the Law Reform Act necessarily is concerned only with what practising lawyers refer to as personal injuries law. And, no single policy

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[7] *Haines v Bendall* (1991) 172 CLR 60 at page 63

or approach underpins the statute law which affects or modifies this law. That is to say there is no single personal injuries law in New South Wales. Ipp JA commented on this *Landon v Ferguson* (2005) 64 NSW LR 131. At [135] his Honour said:

> *The statutes in this state relating to workers' compensation and common law damages claims by workers against their employers and others can be described as a hodge-podge. No consistent thread of principle can be detected. For example, the caps on damages under* the Workers' Compensation Act *are lower than the caps under the* Motor Accidents Compensation Act. *Some workers' injuries occur in circumstances where the workers are required to bring their claims under the* Workers' Compensation Act. *In other circumstances workers are required to bring their claims for damages under the* Motor Accidents Compensation Act. *In yet other circumstances neither Act applies, but other legislation governs the claims. No detectable rational reason explains the difference in categories. In some cases it is difficult to discern under which particular statute the case falls, and difficult and sometimes illogical distinction have to be drawn.* (Emphasis added)

It is the Association's position that there should be a single personal injuries law based upon a detectable *consistent thread of principle*. All members of the community should be equal before the law. A corollary of this principle, in the Association's view, is that like injuries tortiously inflicted should attract like compensation regardless of the context of the occurrence giving rise to the injury.

10. However currently, there are four categories of personal injury law:

(a) Work injury damages covered by Part 5 *Workers' Compensation Act 1987* ("Workers Compensation Act");

(b) Motor accident matters which are subject to Chapter 5 *Motor Accidents Compensation Act 1999* ("Motor Accidents Compensation Act");

(c) An exceptional and miscellaneous category to which unmodified common law applies consisting of civil liability[8] for:

(i) Certain intentional torts extending to sexual misconduct;
(ii) Dust diseases;
(iii) Injury or death resulting from smoking or other use of tobacco products.

(d) Civil liability for personal injuries generally, not falling into categories (a) – (c) is dealt with under Part 2 *Civil Liability Act 2002*.

There is a subcategory to category (a). By dint of Schedule 6 Part 18 Clause 3 Workers' Compensation Act, the provisions of Part 5 of that Act as amended with effect from 27th November 2001 do not apply in respect of coal miners. Work injury damages for coal miners continue to be regulated by the provisions of Part 5 previously in force.

11. It must be said, however, that in each category damages for wrongful death are governed by the Relatives Act. In respect of each statutory damages regime, the contributory negligence of the deceased is a partial defence reducing the damages payable and future pecuniary losses are assessed on the basis of a 5 per cent discount rate. The exceptional continuing common law category continues to be governed by section 13 of the *Law Reform (Miscellaneous Provisions) Act 1965* and the damages are not reduced by reason of the contributory negligence or breach of statutory duty of the deceased person. In this category the 3 per cent discount rate continues to apply. Under all regimes, for surviving actions, the Law Reform Act, and in dust cases, section12B of the Dust Tribunal Act, continues to apply.

12. In considering the merits of amending the legislation, and the equity implications of any amendment, one must weigh the consideration that other than in the exceptional continuing common law category, the right damages

[8] S.3B(a) – (c) *Civil Liability Act 2002*

for non-economic loss are regulated differently by the provisions of each statutory regime:

(a) In the work injury damages general category no damages may be awarded unless the injury results in the death of a worker or in a degree of permanent impairment that is at least 15 per cent.[9] Even then the only damages that may be awarded are damages for past and future economic loss.[10] However, the injured worker retains the amount of permanent loss compensation paid as a statutory benefit under ss. 66 and 67 Workers' Compensation Act, which benefits must be claimed before or at the same time as the claim for work injury damages.[11] Vested rights under the workers' compensation legislation are transmissible on death: *Schlenert v H.G. Watson Contracting Co. Pty Ltd* [1979] 1 NSW LR 140. This does not depend upon the operation of the Law Reform Act;

(b) In the sub-category of coal miners work injury damages, damages for non-economic loss are regulated by the provisions of section 151G in its previous form. The amount of them is a proportion, determined according to the severity of the non-economic loss, of the maximum amount which may be awarded. There is a stepped threshold. Under an amount equivalent to about 18 per cent no damages are to be awarded. Between that amount and approximately 23 per cent of the maximum amount, a diminishing reduction is effected by a formula set out in section 151G(5). No damages for economic loss are awarded unless the injury is serious. A serious injury is defined by s.151H in terms that need not be set out.

(c) By section 131 of the Motor Accidents Compensation Act, no damages may be awarded for non-economic loss unless the degree of permanent impairment of the injured person as a result of the injury caused by the motor accident is greater than 10 per cent.

(d) Under section16 of the *Civil Liability Act 2002*, no damages may be awarded for non-economic loss unless the severity of the non-economic

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[9] S.151H Workers' Compensation Act 1987
[10] S.151G Workers' Compensation Act 1987
[11] S.280A Workplace Injury Management and Workers' Compensation Act 1998

loss is at least 15 per cent of a most extreme case. A table to the Section provides for a diminishing deductible from these damages between 15 per cent and 33 per cent. After 33 per cent there is no deduction;

(e) In the exceptional category general damages are calculated in accordance with the common law.

The purpose of this review of the provisions is to point out that the entitlement to damages for non-economic loss is not equal. Indeed the entitlement is uneven. Each of the statutory regimes which make provision for damages for non-economic loss provides for a cap as well as a threshold. The purpose of this statutory approach is perhaps most clearly expressed in section 5(e) of the Motor Accidents Compensation Act:

> *To keep premiums affordable, in particular, by limiting the amount of compensation payable for non-economic loss in cases of relatively minor injuries, while preserving principles of full compensation for those with severe injuries involving ongoing impairment and disabilities.*

13. The differences in the entitlement to damages for non-economic loss, and the amount available in that regard from regime to regime may be explained by differences in the funding arrangements for each scheme. Work injury damages are payable out of compulsory workers' compensation insurance funds. Coal miner damages are paid out of a fund separate from the general Workcover fund. Motor accident damages are payable out of compulsory green slip insurance collected by private insurers licensed to write that category of business. Typically, general civil liability will be underwritten by non-compulsory insurance policies issued by general or liability insurers, or government self insurance in respect of the liability of statutory authorities. Often commercial enterprises carry insurance subject to a large self-funded deductible. Many private individuals are uninsured. Dust diseases cases involve a small class of defendants and damages are payable out of a quasi-

statutory compensation fund in the case of the former James Hardie companies[12].

14. Against this background of concurrent, but separate, regimes, to a large extent separately funded, the Association makes the following submissions:

(a) Leaving aside the question of separate funding, and acknowledging the particular suffering experienced by the victims of asbestos induced dust diseases, there is no reason in principle, if the compensatory principle continues to be taken as fundamental to the assessment of damages for personal injury, why the second *clearly settled* rule expressed by Dixon J in *Zoanetti* should be abrogated by statute for any of the separate regimes. Damages for the pain and suffering of the deceased claimant not recovered by him or her to be enjoyed in his or her lifetime are in the nature of a windfall in the hands of the relatives, even a widow or widower;

(b) To the extent to which this may be seen as indirectly undermining the evident purpose behind the enactment of section 12B of the Dust Tribunal Act, the question might be whether that purpose was well conceived in the first place;

(c) If to better implement the evident purpose behind section 12B, the second rule in *Zoanetti* is to be abrogated, there is no reason in principle why the abrogation of the rule should apply to one sub-category of case only rather than across the board for all regimes. That is, there should be no discrimination. If the policy underpinning section 12B is valid, it is valid equally in all categories. This could be achieved simply by:

i. Repealing paragraph (d) of subsection 2 of section 2 Law Reform Act; and
ii. Adding an additional paragraph to subsection (3) of s.3 of the Relatives Act referring to damages for non-economic loss recovered in a surviving action brought pursuant to s.2 Law Reform Act.

[12] e.g. section 22 *James Hardie (Civil Liability) Act 2005*

(d) Presumably where statutory permanent loss compensation is transmitted to the Estate of a deceased worker, the second rule in *Zoanetti* applies. Given that these benefits stand in the place of damages for non-economic loss, consideration should be given to including those benefits in any amendment to s.3 (3) Relatives Act.

15. The Association submits that these alternative or cascading proposals deal with the merits, and the equity implications, referred to in the Terms of Reference.

16. The Association is not able of its own expertise to advance meaningful submissions concerning the economic implications of the recommendations. However, anecdotally the Association can say that it is unlikely that liabilities will be materially affected, which the Association takes to mean materially increased, even if an across-the- board amendment of the type suggested by the Association in the alternative is adopted.

17. There is a related matter which the Association wishes to address. It may be that the compassionate motive justifying the survival of damages for non-economic loss and their exemption from the second rule in *Zoanetti* would be better served by the provision in each damages regime of a solatium of the type the subject of the ratio in *Zoanetti,* as is currently provided for by ss 28, 29 and 30 *Civil Liability Act 1936* (SA).

18. Given that the intended recipient can never enjoy them, the idea behind a proposal to make provision for the survival of damages for non-economic loss, in addition to damages for wrongful death, must be to assuage the grief and sense of loss of near relatives, better policy, and fairer law, would require that so-far legally unrequited need to be addressed direct. This is what the South Australian legislation seeks to do.

19. The South Australian legislation is restricted to parents and spouses. That seems an appropriate restriction as to class. Difficult questions arise as to the appropriate amount. As *Zoanetti* demonstrates when first enacted in 1940 the South Australian Act capped the damages at 500*l*,a substantial amount for the times. Now the cap stands at $10,000, not having been increased since 1974.

This amount is certainly wholly inadequate solace for the injured feelings of parents and spouses. The proper amount should be much higher but its cap perhaps needs to be the subject of mature consideration taking into account any necessary economic modelling on an actuarial basis as this suggested reform would increase tort liabilities. Whether this would prove material in the relevant sense is no doubt a question requiring information from properly qualified experts.

20. The ratio of *Zoanetti* is that the solatium provided under the South Australian legislation is not deductible under the second *clearly settled* rule as it is a benefit of a non-pecuniary kind addressing losses of a different nature from the Relatives Act. Whether such an allowance should affect claims for pure mental harm such as under Part 3 *Civil Liability Act 2002* is a different question. But as normal, even profound, grief is not compensable in nervous shock claims there would seem no reason in principle to suggest that double compensation would be involved. However courts would need to be astute to ensure that blurring of the distinction did not occur. Doubtless many would argue that this is too difficult a task and that any solatium should be deducted from damages for non-economic loss in a claim for damages for pure mental harm by the same relative. By section 30 of the South Australian legislation the solatium is in addition to other rights conferred by the Act including, presumably, damages for mental harm the subject of section 53. The solatium does not survive for the benefit of the relative's estate. The Association believes that the South Australian position accords with principle and any solatium, addressing as it does loss of a different nature, should not affect or be affected by the receipt of pure mental harm damages.

21. In the alternative, if the Commission formed the view on appropriate advice that the introduction of a solatium would materially affect liabilities in an unacceptable way, provision could be made to the effect that any solatium should be deducted from the proceeds of any action for damages for pure mental harm subsequently brought by a recipient and that the prior receipt of damages for pure mental harm should be a bar to maintaining a claim for the solatium. Such an accommodation could be justified on pragmatic, rather than principled, grounds. First, this would reduce the material affect of the

suggested new provision. Secondly, although in principle entitlement to the solatium would not depend upon proof of a recognised psychiatric illness as is required in claims for pure mental harm, the practical difficulty of separating profound grief from psychiatric illness and the potential for public misconception that both rights addressed the same thing leading to double compensation could be avoided by setting the former off against the latter.

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