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The Honourable James Wood AO QC  
Chairperson  
New South Wales Law Reform Commission  
Level 13  
Swire House  
10 Spring St  
Sydney NSW 2000

Dear Mr Wood,

**CONSULTATION PAPER 14 - COMPENSATION TO RELATIVES**

CSR Limited (**CSR**) welcomes the opportunity to make submissions regarding legislation governing damages in personal injury claims.

CSR was a manufacturer and supplier of asbestos-containing products and is a regular defendant in the Dust Disease Tribunal of New South Wales (**DDT**) as well as in other courts. CSR manages its asbestos-related liabilities conscientiously and ethically. Over the last 25 years CSR has consistently and responsibly met all its obligations in relation to asbestos claims.

These submissions focus upon the important issues referred to in the Consultation Paper. CSR also makes some general observations regarding the need for uniformity in the calculation of damages and the appropriateness of an adversarial court system being used to deliver compensation to those who suffer from asbestos-related illnesses.

In particular, CSR makes submissions regarding the High Court's decision in *Public Trustee v Zoanetti*<sup>1</sup> (**Zoanetti**) and the application of that decision in cases such as *BI (Contracting) Pty Limited v Strikwerda*<sup>2</sup> (**Strikwerda**).

<sup>1</sup> (1945) 70 CLR 266.

<sup>2</sup> [2005] NSWCA 288. The successful appellant in that case is a subsidiary of CSR.



## 1. Executive Summary

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1. CSR makes the following submissions:
  - (a) The present system, which provides for an off-set for the pecuniary benefit received by a dependant from the tort-caused death of a claimant, works to ensure fair compensation. This principle was adopted by the High Court in *Zoanetti* and has consistently been followed by other Australian courts.
  - (b) The funds available to satisfy asbestos related claims come from a finite pool. Any payment of excessive compensation depletes funds available to satisfy future asbestos claims.
  - (c) If any recommendation is made to overturn *Zoanetti*, it should be accompanied by a recommendation to confine the operation of the amending legislation so that other benefits accruing to the beneficiaries of the estate from the death of the original plaintiff continue to be subject to the *Zoanetti* principle. Amendments should also be recommended precluding the possibility of duplicate awards under s15B of the *Civil Liability Act 2002* (loss of capacity) and the *Compensation to Relatives Act 1897* (loss of dependency).
  - (d) The existing requirement under s12B of the *Dust Diseases Tribunal Act 1989* that for general damages to survive a claim must be commenced within the lifetime of the exposed individual should be retained.
  - (e) So long as s12B permits general damages to survive to benefit the estate of an original plaintiff, no separate award of solatium is justified.
  - (f) Changing the ground rules for assessing damages under the *Compensation to Relatives Act* so that post-death benefits are not taken into consideration would, contrary to the principle of fair compensation, create a significant financial burden for defendants and insurers. No such recommendation should be made.
  - (g) Consideration should be given to better regulate *Griffiths v Kerkemeyer* and s15B *Civil Liability Act* damages in asbestos-related claims.
  - (h) Consideration should also be given to establishing a no-fault administrative scheme for the payment of compensation to those suffering asbestos-related illnesses.

## 2. The Underlying Rule for proper Compensation

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2. Fair compensation is the fundamental principle for the award of damages in tort. Damages should put the plaintiff, as nearly as possible, in the same position he or she would have been in had the tort not been committed:



*The one principle that is absolutely firm, and which must control all else, is that damages for the consequences of mere negligence are compensatory.*<sup>3</sup>

3. This principle remains the cornerstone in the awarding of damages for negligence. Some of the possibilities outlined in the Consultation Paper would skew damages from their true purpose.
4. CSR believes that damages awarded by the DDT in asbestos related claims are out of kilter with other personal injury matters.<sup>4</sup> The principle of fair compensation has been undermined. The unfairness would be compounded if the principle in *Zoanetti* was overturned without appropriate consideration being given to possible inconsistencies in the awarding of damages - particularly under s15B of the *Civil Liability Act* and the *Compensation to Relatives Act*.

### 3. Survival of causes of action

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5. Under the common law, a cause of action in tort died with the person in whom it was vested. The rationale for the rule was explained by Professor Ames in 1913 on the basis that a right of action based on a duty of care could not survive the death of one of the parties.<sup>5</sup> That position has been modified by statute.
6. Before discussing *Zoanetti*, it is appropriate to consider the general circumstances where a claim survives to benefit either the estate of the original plaintiff or his/her dependants.
7. Upon the death of the plaintiff, the dependants of the deceased may bring proceedings against the tortfeasor for damages in a *Compensation to Relatives Act* claim. The estate of the plaintiff can also continue proceedings in its own right.

#### An Estate Claim

8. Section 2 of the *Law Reform (Miscellaneous Provisions) Act 1944*<sup>6</sup> (NSW) provides:
  - (1) *Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in the person shall survive against, or, as the case may be, for the benefit of, the person's estate...*
  - (2) *Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person:*
    - (a) *shall not include:*
      - (i) *any exemplary damages, or*
      - (ii) *any damages for the loss of the capacity of the person to earn, or for the loss of future probable earnings of the person, during such time after the person's death as the person would have survived but for the act or omission which gives rise to the cause of action,*

<sup>3</sup> *Skelton v Collins* (1966) 115 CLR 94, 128 (Windeyer J).

<sup>4</sup> See the discussion in Section 8 of this submission.

<sup>5</sup> See the discussion in *WorkCover Queensland v Amaca Pty Limited* [2010] HCA 34, [34-36] (French CJ, Gummow, Crennan, Kiefel and Bell JJ).

<sup>6</sup> Similar legislation providing for the survival of causes of action can be found in various other states at: s16 and 17 of the *Wrongs Act 1958* (Vic), s3 *Survival of Causes of Action Act 1940* (SA), s6 *Fatal Accidents Act 1959* (WA).



(b) ...

(c) *where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to the person's estate consequent on the person's death, except that a sum in respect of funeral expenses may be included,*

(d) *where the death of that person has been caused by the act or omission which gives rise to the cause of action, 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. [This limitation has been abolished in asbestos-related claims by s12B of the *Dust Diseases Tribunal Act*.]*

(4) *Where damage has been suffered by reason of any act or omission in respect of which a cause of action would have subsisted against any person if that person had not died before or at the same time as the damage was suffered, there shall be deemed, for the purposes of this Part, to have been subsisting against the person before the person's death such cause of action in respect of that act or omission as would have subsisted if the person had died after the damage was suffered.*

(5) *The rights conferred by this Part for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Compensation to Relatives Act 1897...*

9. Any recovery by the estate will be restricted. The estate will not be able to recover exemplary damages or the loss of earning capacity of the deceased for the period after death. This is not, however, "unfair" to the estate. The dependants of the deceased will be able to pursue any loss of pecuniary support in a *Compensation to Relatives Act* claim. And exemplary damages have always been seen as personal to a plaintiff and are now excluded in personal injury claims in New South Wales.<sup>7</sup>
10. Importantly if the estate of a deceased plaintiff is entitled to s15B *Civil Liability Act* damages for loss of capacity after death (the lost years), then it appears that such rights may be in addition to and duplicate the right of dependants to claim under the *Compensation to Relatives Act*.<sup>8</sup> This anomaly is discussed below and a suggestion is made which would clarify the interaction between the *Civil Liability Act* and the *Compensation to Relatives Act*.

### ***Compensation to Relatives Act***

11. Dependants of a person killed through negligence can bring separate proceedings pursuant to s3 of the *Compensation to Relatives Act* against the tortfeasor.
12. The *Compensation to Relatives Act* derives from the 1846 *Fatal Accidents Act* (UK) (*Lord Campbell's Act*) which conferred a right of action on certain family members of a person whose death resulted from the wrongful act or omission of a tortfeasor. The statutory cause of action permits a dependant to recover compensation for the pecuniary loss sustained by that dependant by reason of the death.
13. The basis of a claim under the legislation is:

*... for injuriously affecting the family of the deceased. It is not a claim which the deceased could have pursued in his own lifetime, because it is for damages suffered not by himself, but*

<sup>7</sup> s21 of the *Civil Liability Act*

<sup>8</sup> The alleged entitlement to s15B damages for the lost years is regularly pressed by plaintiffs in the DDT.



*by his family after his death ... [and] the jury (or judge) are to give such damages as may be thought proportioned to the injury resulting to such parties from the death.*<sup>9</sup>  
[Emphasis Added]

14. Section 4 of the *Compensation to Relatives Act* provides:

*Every such action shall be for the benefit of the spouse, brother, sister, half-brother, half-sister, parent, and child of the person whose death has been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased, and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action is brought, and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict find and direct.* [Emphasis Added]

15. The proper assessment of "proportioned" damages involves consideration of the loss of pecuniary benefit weighted against the pecuniary advantage by reason of the death.<sup>10</sup> This long-standing principle has been confirmed by subsequent case law including the decision in *Strikwerda*. As pointed out in *Davies*, the damages are awarded to compensate the dependant - true to the principle enunciated by Windeyer J in *Skelton v Collins*.
16. The nature of the loss for which damages are claimed is the pecuniary loss of the dependants arising from the wrongful death.<sup>11</sup>

*The basis (of the action) is not what has been called solatium, that is to say, damages given for injured feelings or on the ground of sentiment, but damages based on compensation for a pecuniary loss.*<sup>12</sup>

17. But pecuniary loss extends beyond mere monetary gifts. It includes the loss of services provided by the deceased such as domestic services (housekeeping, gardening etc), irrespective of whether the relative intends to employ someone to replace the services.<sup>13</sup>

*...domestic services have a pecuniary value which is capable of assessment and ... the deprivation of services is just as much a pecuniary loss as the deprivation of income ...*

18. The introduction of the dependants' right to recover pecuniary loss after the death of a claimant creates a risk of double liability.<sup>14</sup> This risk underlies the principle in *Zoanetti*.

<sup>9</sup> *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601, 611 (Lord Wright)

<sup>10</sup> *Public Trustee v Zoanetti* (1945) 70 CLR 266, 272 (Latham CJ).

<sup>11</sup> *Blake v The Midland Railway Company* (1852) 18 QB 93; 118 ER 35 per Coleridge J at 41 and *Taff Vale Railway Company v Jenkins* [1913] AC 1 per Lord Haldane at 4, followed by Australian jurisdiction - see *Woolworths Ltd v Crotty* (1942) 66 CLR 603 per Latham CJ at 618 with some exceptions in NT and SA: *Compensation (Fatal Injuries) Act* (NT) s 10(3)(f); *Wrongs Act* 1936 (SA) s 23A(1).

<sup>12</sup> *Taff Vale Railway Company v Jenkins* [1913] AC 1, 4 (Lord Haldane).

<sup>13</sup> *Nguyen v Nguyen* (1990) 169 CLR 245, 260 (Dawson, Toohey and McHugh J quoting Gibbs J in *Seymour v British Paints (Australia) Pty Limited* [1967] Qd R 227).

<sup>14</sup> *Rose v Ford* [1936] 1 KB 90 and *Fitch v Hyde-Cates* (1982) 150 CLR 482.

**Public Trustee v Zoanetti**

19. *Zoanetti* applied the principle that compensation to a dependant for pecuniary loss is reduced/off-set if an award of damages has enlarged an estate and thereby increased the amount to be distributed to the dependant from the estate.

*It has long been established that in the assessment of damages ... an account is taken of pecuniary losses and also of pecuniary gains accruing to a particular dependant by reason of the death of a person caused by a wrongful act, neglect or default of a defendant. Any benefit, whatever its source (whether from the defendant or from some other source), provided that it results from the death of the deceased, must be taken into account. What can be awarded under the Act is pecuniary loss, that is, net loss, on a balance of losses and gains...*<sup>15</sup>

20. Fair compensation is thus calculated by:
- (a) off-setting pecuniary advantage accruing to the dependants as a result of the death;
  - (b) including contingencies that:
    - (i) may have occurred in the future if the deceased had lived such as the possibility that the financial support provided by the deceased may have been less than anticipated; or
    - (ii) that may take place after the damages have been calculated.
21. *Zoanetti* was considered by the New South Wales Court of Appeal in *BI (Contracting) Pty Ltd v Strikwerda*.<sup>16</sup> In that case, the amount awarded to the plaintiff was reduced because of pecuniary benefits passing to the plaintiff as beneficiary under an intestacy.

22. As succinctly put by Mason P in *Strikwerda*:

*It is no injustice to the dependant to bring account such benefit as accrues in consequence of being entitled to share in an estate that is swollen by the payment of damages recoverable under the survival of causes of action legislation.*<sup>17</sup>

23. If the principles were to be overturned, the dependants of the original plaintiff could recover damages in accordance with the *Compensation to Relatives Act* with no reference to the damages already paid to the estate and any benefit derived by the dependant from the estate. Such a situation would unfairly enrich the dependants and place unfair and inappropriate pressure on funds which come from a finite source.
24. In short, overturning *Zoanetti* raises the risk of double liability - with defendants paying damages to the estate of a deceased plaintiff which then flow to dependants with their own statutory cause of action against the same defendants.

<sup>15</sup> *Public Trustee v Zoanetti* (1945) 70 CLR 266, 271 (Latham CJ).

<sup>16</sup> [2005] NSWCA 288.

<sup>17</sup> *Ibid* [25]. Santow and Bell JJA agreed with Mason P.

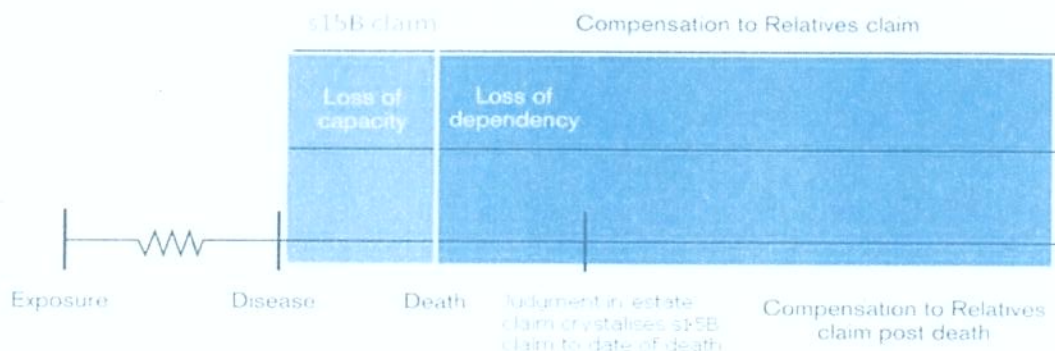


25. Any recommendation for the overturning of *Zoanetti* should be accompanied by explicit recognition that the reversal is not intended to apply to other benefits accruing to dependants because of the death of the original claimant.

#### Section 15B - Civil Liability Act

26. Section 15B of the *Civil Liability Act* permits a plaintiff to recover damages for the loss of capacity to provide domestic services to a dependant. The recipients of the domestic services for which s15B was designed correspond, in large measure, with the dependants who can make a claim under the *Compensation to Relatives Act*.
27. The interaction between s15B damages and damages under the *Compensation to Relatives Act* remain the subject of confusion. That confusion arises because the separate notions of loss of capacity and loss of dependency are conflated.
28. As the diagram below shows, damages for the plaintiff's loss of capacity are caught within s15B and crystallise at the death of the plaintiff. After the death of the plaintiff, relatives can recover damages under the *Compensation to Relatives Act* for their loss of dependency for the period which post-dates the claimant's death.

Interaction between s15B of CLA and Compensation to Relatives Act



29. CSR contends that this suggested interaction is consistent with the policy behind both Acts and the overriding principle that damages in negligence claims should be compensatory. The reading avoids a significant risk of double-dipping and/or double liability. An amendment to provide certainty would only require adding the following underlined words to s2(a)(ii) of the *Law Reform (Miscellaneous Provisions) Act*:

(2) Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person:

(a) shall not include:

(i) any exemplary damages, or

(ii) *any damages for the loss of the capacity of the person to provide domestic services or for the loss of capacity of the person to earn, or for the loss of future probable earnings of the person, during such time after the person's death as the person would have survived but for the act or omission which gives rise to the cause of action,*

### Summary

30. It is CSR's position that the present system works to ensure that:
- (a) the plaintiff receives fair compensation;
  - (b) the plaintiff's cause of action survives for the benefit of the estate;
  - (c) that the dependants are entitled to recover for their loss of dependency; and
  - (d) that, by taking into consideration any increase in the estate or financial benefit, the dependants' recovery is fair and avoids the possible creation of 'double liability'. Avoiding that risk would be clarified by changes to the relevant legislation as suggested.

## 4. Extension of entitlement to general damages

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31. Options 3 and 5 raised in the Consultation Paper deal with the availability of damages for non-economic loss after the death of the person who suffered the tort.
32. First, the special circumstances created by s12B of the *Dust Diseases Tribunal Act* must be clearly recognised. The survival of damages under the legislation was described in the Attorney-General's Second Reading Speech as "intended to avoid arbitrariness".
33. Paradoxically, the survival of such damages is confined to asbestos cases. It is difficult to understand why a sufferer of mesothelioma should have his or her damages for pain and suffering survive to benefit an estate (passing to persons perhaps completely unrelated to the claimant) but the victim of a medical misdiagnosis leading to a terminal cancer does not.
34. If such an exception to the general rule is maintained, CSR believes the current requirement for an action be commenced within the claimant's lifetime strikes an appropriate balance. This is especially the case when evidence as to exposure would, if not gathered for the purpose of the action, evaporate on the death of the person who suffered illness.
35. The fair hearing of any asbestos-related claim requires that as much evidence as possible be provided to a defendant. The events which form the basis of a claim usually occurred over 30 years ago. Often the only evidence as to the nature of relevant exposures will be from the plaintiff. In those circumstances, it would create a manifest unfairness if a claim could be commenced after the death of the person who suffered exposure - probative evidence regarding the fact, nature and extent of the exposure may have disappeared. In such a case, a Court would confront an application for a permanent stay of proceedings because of the unfairness so created.<sup>18</sup> The law should not

<sup>18</sup> See for example *Walton v Gardiner* (1993) 177 CLR 398.



countenance such an unfortunate situation and can avoid such possibilities by maintaining the currently well understood rule.

36. In *Brisbane South Regional Health Authority v Taylor*<sup>19</sup> McHugh J pointed out that one rationale for limitation periods was to protect against the potential loss of evidence.<sup>20</sup> The imposition of a de facto limitation period for the survival of general damages in asbestos cases (being the lifetime of the plaintiff) provides some limited safeguard. Abolishing the requirement under s12B would expose defendants to the risk of "the disruptive effect to unsettled claims on commercial intercourse" that the New South Wales Law Reform Commission recognised in its report on limitation periods.<sup>21</sup>

## 5. Solatium

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37. One rationale for the introduction of s12B to the *Dust Diseases Tribunal Act* was said to be the survival of general damages "for the benefit of [the claimant's] family." It is clear the legislature intended the survival of these damages to represent some recompense for the suffering experienced by a family who witnessed a loved one suffer an asbestos related illness.
38. Assuming that rationale, there seems little need for an award of solatium to be made - especially as a family member's right to damages for any recognised psychiatric illness which is caused by the death of the claimant remains available.
39. Conversely, if an award of solatium was to be made available then s12B might lead to double compensation.
40. While an award of solatium may be "purer" from a doctrinal point of view, the operation of s12B seems entrenched. Any change now would add to inconsistencies in the assessment of damages in these claims.
41. If a change was to be recommended then s12B should be repealed and a statutory right to solatium introduced as a replacement. Any award for that entitlement should be moderate.

## 6. Post Death Benefits in Dependants Claims

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42. As stated, the current system providing for certain payments to be taken into account when assessing damages under the *Compensation to Relatives Act* conforms with principles of just compensation. No rational basis is advanced in the Consultation Paper as to why any change is either necessary or desirable.
43. Conversely, it seems obvious that an amendment in the terms referred to would increase liabilities to defendants and insurers in a large number of personal injury cases. The Commission should not recommend any such "significant departure" without detailed actuarial analysis taking place. In this

<sup>19</sup> (1996) 186 CLR 541.

<sup>20</sup> Ibid 552-3.

<sup>21</sup> *Limitation of Actions for Personal Injury Claims* (1986) LRC 50, 3.

regard, recent doubts in the United Kingdom regarding the operation of s4 of the *Fatal Accidents Act* 1976 (Eng) are illuminating.

## 7. Certain Heads of Damage

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44. Some heads of damage need specific examination in the context of asbestos-related claims. Substantial awards under these heads have been made in asbestos related claims - adding to the inequities in proper compensation across the range of negligently inflicted injuries.

### *Griffiths v Kerkemeyer* damages

45. In *Griffiths v Kerkemeyer*<sup>22</sup> the High Court held that the plaintiff may recover in his or her own action damages representing the value of certain services provided gratuitously by third parties to the plaintiff, the need for which is caused by a tort.
46. *Griffiths v Kerkemeyer* damages were considered a novelty. They provoked comments such as those in *Nguyen v Nguyen*.<sup>23</sup>

*The plaintiff's loss in Griffiths v Kerkemeyer was caused by his physical disability. It was in accordance with accepted principles to assess part of that loss by reference to the cost of the services which were required to satisfy the need to which the disability gave rise. What was novel about the decision was the application of that principle even though the plaintiff had not borne and would not bear the cost of the services. The novelty was not in valuing the necessary services, both retrospectively and prospectively; there was nothing new in that. The novelty lay in giving the plaintiff the cost of those services even though he had not paid, and would not pay, for them, in order that he, and not the defendant, should reap the benefit.*

47. More recently, the High Court has raised concerns<sup>24</sup> regarding the theoretical underpinning of awards under *Griffiths v Kerkemeyer*. McHugh J described the damages as an "anomaly".
48. *Griffiths v Kerkemeyer* damages are frequently awarded in Dust Disease matters. Sometimes the awards are substantial.<sup>25</sup> It is CSR's view that these damages, along with other heads of damage such as general damages, should be the subject of greater regulation.
49. In New South Wales, the recovery of *Griffiths v Kerkemeyer* damages has been restricted by statutory provisions, such as section 72 of the *Motor Accidents Act* and section 128 of the *Motor Accidents Compensation Act* 1999. Section 15 of the *Civil Liability Act*.

...

- (b) *limits the maximum amount of damages that may be awarded to a weekly amount equal to the average weekly total earnings of all employees in New South Wales (where the*

<sup>22</sup> (1977) 139 CLR 161 following the English Court of Appeal decision of *Donnelly v Joyce* [1974] 1 QB 454.

<sup>23</sup> *Nguyen v Nguyen* (1990) 91 ALR 161, 173.

<sup>24</sup> *CSR Limited v Eddy* (2005) 226 CLR 1, 39 (McHugh J).

<sup>25</sup> *Hicks v Amaca Pty Limited* [2010] NSWDDT 16 where *Griffiths v Kerkemeyer* damages were 53% of total damages awarded; *Latz v Hansen Family Investments* [2005] NSWDDT 22 where *Griffiths v Kerkemeyer* was 37% of total damages; *Parker v Amaca Pty Ltd* [2003] NSWDDT 5 where *Griffiths v Kerkemeyer* was 42% of total damages; *Ghaleb v Seltam Pty Limited & Anor* [2004] NSWDDT 21 where *Griffiths v Kerkemeyer* was 38% of total damages.



*services are provided for 40 hours or more per week), with an hourly rate of one-fortieth of the average weekly total earnings of all employees in New South Wales (where services are provided for less than 40 hours per week).*

50. While s15A of the *Civil Liability Act* prescribes an upper limit for *Griffiths v Kerkemeyer* damages in DDT claims, the rate to be used is not so prescribed. As a matter of consistency, the same statutory calculated rate as used in other personal injuries claims should apply in the DDT.

#### **s15B Civil Liability Act damages**

51. Although similar in concept, *Griffiths v Kerkemeyer* damages are distinguishable from compensation paid for the plaintiff's loss of capacity to provide services to third parties, still commonly referred to as *Sullivan v Gordon*<sup>26</sup> damages:

<b><i>Griffiths v Kerkemeyer</i></b>	<b><i>Sullivan v Gordon</i></b>
value of services provided gratuitously by third parties to the plaintiff	loss of plaintiff's capacity to provide services to third parties

52. In *Sullivan v Gordon* the New South Wales Court of Appeal held that a woman who was injured and consequently unable to care for her children was entitled to damages equivalent to the value of that care. *Sullivan v Gordon* damages were short lived. The decision in *CSR Limited v Eddy*<sup>27</sup> established that *Sullivan v Gordon* damages were not part of the common law of Australia.
53. Following the judgment of *CSR Limited v Eddy*, s15B of the *Civil Liability Act* was enacted allowing these damages as a separate head.
54. Section 15B damages are frequently awarded in the DDT.<sup>28</sup>
55. It should be noted that to the extent a dependant suffers pecuniary loss because of the tort-caused death of a person, then compensation for that loss (including for loss of domestic services) can be awarded under the *Compensation to Relatives Act*.
56. There does not appear to be any limitation which prevents an award of s15B damages for loss of capacity being made to a claimant and his or her dependants seeking damages after death for loss of dependency.
57. For the reasons discussed above, this potential anomaly should be removed by clarifying legislation.

<sup>26</sup> [1999] NSWCA 338.

<sup>27</sup> [2005] HCA 64, (2005) 226 CLR 1.

<sup>28</sup> *Novek v Amaca Pty Ltd* [2008] NSWDDT 12 - \$193,307 of total damages of \$547,137 (35%); *Routley v Bridgestone Australia Limited* [2004] NSWDDT 4 - \$141,232 of total damages of \$483,331 (29%); *Bricis v Amaca Pty Ltd* [2005] NSWDDT 35 - \$110,112 of total damages of \$369,317 (30%).



## 8. Some general comments

58. The application of common law rules "sometimes results in imperfect justice."<sup>29</sup> This "rough justice"<sup>30</sup> in asbestos related claims has been highlighted in recent judgments in the United Kingdom. Any changes to legislation in respect of damages in this category of claims might be seen as "adding yet further anomalies in an area of law which benefits perhaps above all from clarity, consistency and certainty in its application."<sup>31</sup>
59. It is time to consider whether the application of tort-based notions of justice are truly the best way to deliver compensation in these cases.

### **Asbestos cases are not suitable to Common Law adjudication**

60. Asbestos-related illnesses exact an extraordinary physical and economic toll in Australia. Those costs have been mentioned in the Consultation Paper. However, the present adversarial common law system compounds rather than alleviates the burden.
61. Liability is not disputed by defendants in the vast majority of asbestos-related personal injury claims. The principal question is usually the amount of compensation to be paid and the funding of such payment by defendants.
62. CSR believes that a more appropriate way to ensure the just, quick, and cheap resolution of asbestos-related claims is for a no-fault compensation scheme to be administered in conjunction with existing mechanisms such as the Dust Diseases Board.
63. The current system which requires asbestos victims to prove their claims through a sometimes lengthy, adversarial court process is not, in CSR's opinion, the best way to deliver compensation especially when a large part of funds available is eroded by transaction costs.
64. Concern surrounding any drawing down by the Asbestos Injuries Compensation Fund (AICF) on a government backed loan highlights the strong public interest regarding the cost of future claims and adequate provision for future victims.
65. In December 2008 the New South Wales Government released an Issues Paper dealing with the operation of the NSW system for dealing with asbestos claims in that state.<sup>32</sup> The Paper showed that up to 16.3% of all costs associated with the resolution of claims were legal and transaction costs. Costs vary between states but the New South Wales Government paper appears to be the only public data on the issue of compensation and legal costs in Australian asbestos claims.
66. The former James Hardie subsidiaries estimate that the present cost of their long-term asbestos liabilities is \$1,478 million while CSR's actuarial assessment of the value of current and future Australian claims amounts to \$180 million. Applying the 16.3% estimate, up to \$241 million of James Hardie's asbestos claim costs and around \$29 million of CSR's Australian claims estimates will be diverted to meeting transaction costs.

<sup>29</sup> *Frost v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, 491 (Lord Steyn).

<sup>30</sup> *Sienkiewicz v Greif (UK) Limited* [2011] UKSC 10, [187] (Lord Brown).

<sup>31</sup> *Ibid.*

<sup>32</sup> NSW Government, *Review of the Dust Diseases Claims Resolution Process, Issues Paper October 2006*.



67. And it may be that the transaction costs are being **underestimated**. A recent DDT case<sup>33</sup> disclosed that 35% of one plaintiff's settlement ended up being diverted to his own legal costs and disbursements. No account was made in that case to the costs incurred by the defendant.
68. Asbestos compensation comes from a finite pool. To avoid the possibility that future claimants might be left without payment (as is occurring in the United States because of a substantial number of asbestos-related bankruptcies) consideration should be given to whether a system of adversarial justice based in the Courts is the best method for delivering compensation.
69. All stakeholders have much to gain by attempting to ensure that as great a proportion of asbestos related costs as possible goes directly to claimants. Funding for a no-fault administrative system could be drawn from the existing payments made by companies, insurers and government instrumentalities - all of whom are required to estimate the long terms financial impact of asbestos claims. A centralised compensating authority would take responsibility for making pre-set payments once essential criteria had been met - exposure to asbestos and a resulting illness. The level of benefits would not fall and transaction costs could be substantially reduced.
70. The suggestion is not without precedent. Legislators in the United States were close to introducing such a scheme in 2006 (the *Fairness in Asbestos Injury Resolution Act* (FAIR Act)).

#### **Disparities in damages**

71. Common law damages have been significantly modified by legislation. Various States and Territories now have separate rules governing the recovery of damages in personal injury claims.
72. Statutory caps do not exist in the assessment of damages in the DDT. As a result, there is an alarming disparity in entitlement to damages between the dust disease claims and other personal injury claims. The lack of a uniform compensation system results in inconsistent awards which raise questions as to the fair and equitable operation of the legal system.
73. The table below shows the differences in damages for pain and suffering available in different contexts where a 25% whole person impairment has been suffered by an individual injured by negligence:

<b>Workers Compensation Act</b>	<b>Motor Accidents Act</b>	<b>Civil Liability Act</b>	<b>Dust Diseases Tribunal</b>
\$27,500 <sup>34</sup>	\$26,500 <sup>35</sup>	\$22,750 <sup>36</sup>	\$150,000 <sup>37</sup>

<sup>33</sup> *McGrath v Allianz Australia Insurance Limited* [2011] NSWDDT 1 at [20].

<sup>34</sup> s66 *Workers Compensation Act* 1987 (NSW)

<sup>35</sup> s79A *Motor Accidents Act* 1988 (NSW)

<sup>36</sup> s16 *Civil Liability Act* 2002 (NSW)

<sup>37</sup> *Hicks v Amaca Pty Limited* [2010] NSWDDT 16 (30 Nov 2010). Judge Kearns awarded \$150,000 general damages for 10-25% whole person impairment.



74. In restricting the recovery of general damages, the *Civil Liability Act* provides that no damages may be awarded for economic or non-economic loss unless the claimant suffers from at least a 15% whole person impairment.<sup>38</sup> In the *Motor Accident Compensation Act*, the minimum level of impairment for non-economic loss damages must be 10% whole person impairment.<sup>39</sup> No such thresholds exist in asbestos related claims - giving rise to substantial questions of equity between different categories of injured people.
75. At the extreme end of the scale, damages for pain and suffering become comparable:

Workers Compensation	Motor Accident Compensation Act	Civil Liability Act	Dust Disease Tribunal
\$220,000 <sup>40</sup>	\$284,000 <sup>41</sup>	\$350,000 <sup>42</sup>	\$290,000 <sup>43</sup>
Statutory Maximum Allowed	Statutory Maximum Allowed	Statutory Maximum Allowed " only in a most extreme case"	No Statutory Maximum

76. What is significant to note, particularly when looking at the 25% level of impairment, is the age of the plaintiffs. In the DDT example noted in paragraph 73 above, the plaintiff was 66 years old.
77. *Planet Fisheries v La Rosa*<sup>44</sup> has long been regarded as the authority that trial courts are prohibited from comparing awards for general damages in other cases. Despite critical comments such as those of Mason P in *Hunter Area Health Service v Marchlewski*,<sup>45</sup> *Planet Fisheries* is still referred to as a basis for not comparing the award for pain and suffering.<sup>46</sup> That prohibition has resulted in DDT awards which are clearly out of kilter with awards in other courts in New South Wales and elsewhere in Australia.
78. It is difficult to justify such disparate awards. There is no legal reason for a person with a 25% whole person impairment caused by the negligence of a motor vehicle driver being entitled to less than one-fifth of the damages awarded to a person suffering asbestosis. In such circumstances, the principle of fair compensation is distorted.

<sup>38</sup> s16(1) *Civil Liability Act* 2002 (NSW)

<sup>39</sup> s131 *Motor Accident Compensation Act* 1999 (NSW)

<sup>40</sup> s66(2)(e) *Workers Compensation Act* 1987 (NSW), statutory maximum for whole person impairment above 75%

<sup>41</sup> s134 *Motor Accident Compensation Act* 1999 (NSW) the maximum amount of damages for non-economic loss that a court may award is \$284,000. Note that the *Motor Accidents Compensation (Determination Of Non Economic Loss) Order* 2009 provides that the maximum is \$432,000.

<sup>42</sup> s16 *Civil Liability Act*, The maximum amount of damages that may be awarded for non-economic loss is \$350,000, but the maximum amount is to be awarded only in a most extreme case. A most extreme case was held to be "cases of quadriplegia, some cases of extremely serious scarring and disfigurement, may fall in this category," per Sheller JA and Gzell J in *Owners Strata Plan 156 v Gray* [2004] NSWCA 304.

<sup>43</sup> *Mooney v Amaca Pty Ltd* [2009] NSWDDT 23.

<sup>44</sup> (1968) 119 CLR 118.

<sup>45</sup> [2000] NSWCA 294, [73-74].

<sup>46</sup> In the context of the DDT see *Hicks v Amaca Pty Limited* [2010] NSWDDT 16.



79. It appears that the only way to ensure a consistent and proportioned level of damages for pain and suffering in DDT cases is to have a scale of general damages based upon the level of whole body impairment, like that found in the *Civil Liability Act*, *Workers Compensation Act*, and *Motor Accident Compensation Act*. And, if CSR's suggestion as to a no-fault scheme is adopted, such compensation could be quickly awarded by a statutory authority with little leakage in transaction costs.
80. The higher awards made in the DDT has seen forum shopping become an accepted feature of dust disease litigation. While the High Court's decision in *BHP Billiton Limited v Schultz*<sup>47</sup> went some way to address this problem, it remains common for interstate residents to bring claims in the DDT.
81. In CSR's submission legislative amendments which further discriminate in favour of those suffering asbestos related disease would tend to entrench current inequities and add to inconsistency and uncertainty.

## 9. Summary

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- (a) The principle of fair compensation must strike a balance between the rights of plaintiffs and defendants. Defendants should not be required to pay liability for loss more than once.
  - (b) *Zoanetti* is an example of fair compensation at work - the defendant compensates the relevant plaintiff for loss suffered by that plaintiff.
  - (c) Statutory protections exist for an estate and dependants of a deceased plaintiff. Those protections ensure fair compensation.
  - (d) Further modifications which single out asbestos-related claims for special treatment should be avoided - they confuse an area crying out for "clarity, consistency and certainty."
  - (e) Any recommended changes should be accompanied by appropriate suggestions to avoid situations of double liability.
  - (f) Consideration should be given as to the long term mechanism for compensating those suffering asbestos-related illness.
82. CSR would be happy to discuss these issues and our submission with the Commission in greater detail.

Yours faithfully

*Debbie Schroeder*

Debbie Schroeder  
Legal Counsel and Company Secretary

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<sup>47</sup> (2004) 221 CLR 400.

