NEW SOUTH WALES LAW REFORM COMMISSION

CONSULTATION PAPER NO. 14 – COMPENSATION TO RELATIVES

RESPONSE

Preliminary

The Consultation Paper understandably focuses its attention on the victims of dust diseases. However, I think a broader view of the relationship between estate actions, on the one hand, and dependency claims, on the other, should be taken. In particular, it seems to be assumed that a dependency claimant who is caught by the *Strikwerda* principle is worse off than a dependant who is not affected by the rule. On one level this is inexorably true, but the extent to which it does or may represent an anomaly needs to be understood.

On pg. 4 of the Consultation Paper, in para. 1.12, the first bullet point sets out a scenario which supposedly illustrates why a dependant is better off if a dust disease victim can complete or settle his or her action before death. As I understand it, this may be correct but not for reasons set out in the example. This is because (except in the case of multiple defendants), the completion or settlement of the action by the living plaintiff against the defendant will preclude a later action by the dependants in respect of the same tort. This follows from the wording of *Compensation to Relatives Act 1897* (NSW) s 3, which requires the deceased to have had an action against the defendant at the time of death. As sections of this kind have been interpreted, this will not be satisfied where the deceased prior to his or her death completed or settled the action against the defendant. The issue of whether the dependants will have any damages awarded to the deceased for non-economic loss deducted from any dependency claim will not arise as the dependants will have no action. Perhaps I have misunderstood the example in para. 1.12 but at the very least clarification is needed.

Two consequences follow from the point made above. The first is that the *Strikwerda* principle has a limited application – where the deceased had a cause of action against the defendant but has not settled or completed the action at the time of death, and where the deceased has dependants who can bring a claim under the *Compensation to Relatives Act 1897* (NSW). The second, and more important, is that the question of the 'fairness' of the amount of damages that any dependants receive is more complicated than portrayed in the Consultation Paper. There are a number of reasons for this. First, in the case of a living plaintiff, damages for loss of earning capacity are awarded for the 'lost years' – the period during which the plaintiff would have earned but now, as a result of the tort, he or she will not earn because their life expectancy has been reduced. The reason for awarding these damages – accepted in Australia since *Skelton v Collins* – is to provide for dependants. On one view, this benefit is less certain to dependants than a claim under fatal accidents legislation as the deceased can either dissipate the damages before death or direct the funds to go to other than his or her dependants by will (subject to testator family maintenance provisions). If the deceased dies before completing or settling the claim, any dependants (as defined under the legislation) will have a definite claim. But, assuming that the dependants are the primary beneficiaries under the will of the deceased, whether they are better off by

being compensated for loss of dependency overall either by the damages for loss of earning capacity during the lost years or through a dependency claim will depend, at least in cases where the financial dependency will last for some period, partly on the manner in which damages for loss of earning capacity during the lost years are calculated as opposed to the manner in which the value of a dependant's claim is calculated under the fatal accidents legislation. I am not aware of how these calculations take place in New South Wales but in England and Wales, for example, they are quite different (see Lunney & Oliphant, *Tort Law: Text and Materials* (OUP, 4th edn, 2010) p. 930) so that dependency claims are assessed more generously than claims for loss of earning capacity during the lost years. Although, as the Consultation Paper accurately points out, it is extremely difficult to assess overall levels of compensation because of the patchwork quilt of compensation sources, it is important that this different method of assessing damages within the tort system is considered when determining the wider question of reform of compensation for relatives more generally.

It seems to me that the point the example in para 1.12 was trying to make was that any claim for loss of earning capacity during the lost years – often if not invariably an award that ends up in the hands of dependants – is not subject to any kind of deduction, in the dependants' hands, because of other heads of damage recovered by the living plaintiff. This is not the case where there is an estate action. In my view, this is the gist of the inequitable treatment.

Although the Consultation Paper does ask questions in relation to reform of the law generally, it is clear that the primary driver is concerns over the particular case of mesothelioma victims. In this category of case, the points raised in the previous paragraphs are of less importance as the long latency period of the disease means that a living plaintiff will have little or no claim for loss of earning capacity during the lost years and there may be no financial dependants for a fatal accidents act claim. In this class of case, the treatment of non-pecuniary loss, either of the victim or of any family members, is the primary determinant in the value of the claim. This will not be the case for all claims where death results from the commission of a tort, and rationales that may support a particular position for mesothelioma cases are not necessarily appropriate for all wrongful death or estate claims.

Specific questions

6.1 Should the current law, which reduces the award of damages in dependants' actions by reference to the amount recovered by way of damages for non-economic loss in an estate claim, be retained in relation to dust disease cases?

I do not think that damages should be so reduced as, in my view, there should be no deduction in all dependency claims irrespective of whether they relate to dust diseases or not.

6.2 Are there reasons in addition to those that we have identified which support not changing the current law?

None that I think are relevant.

6.3 Should the *Strikwerda* principle be abolished in relation to dust disease cases?

Yes

6.4 Is it likely that the abolition of the *Strikwerda* principle will lead to an increase in filings in the Dust Diseases Tribunal or in the manner in which cases in that Tribunal are conducted?

I am unable to form an opinion on this question.

6.5 Is it likely that abolition of the *Strikwerda* principle will have significant financial consequences for defendants or insurers?

I cannot provide any opinion based on empirical evidence. However, given the relatively small number of claims that would be affected by the abolition of the *Strikwerda* principle it is difficult to see that it could have significant financial consequences for defendants or insurers.

6.6 Are there any reasons other than those mentioned in this chapter in favour of abolishing the *Strikwerda* principle?

In my view the *Strikwerda* principle ought to be abolished because I do not think that damages for non-economic loss ought to be a benefit for the purposes of a dependency action. In my view, the estate action and the dependency action compensate quite different losses. The estate action provides compensation for the period between the date of the tort and the date of the death, and the dependency action for the loss to the dependants' post-death. The fortuitous, if common, circumstance that the dependants are the beneficiaries under the will does not seem to me to be a good enough reason to reduce compensation paid for one purpose by reference to the amount of compensation paid for another quite different purpose. As the Consultation Paper points out, it is perfectly possible to arrange one's affairs so that the benefits paid to the dependants will fall within the exceptions in the *Compensation to Relatives Act 1897* (NSW). In the absence of a principled explanation of why benefits paid in one form should be excluded from the dependant's damages whereas benefits paid in another form are taken into account, the calculation of the dependant's claim should ignore all the benefits paid that represent the proceeds of the estate claim.

7.1 (1) Should the requirement of s 12B of the Dust Diseases Tribunal Act 1989 (NSW), that the victim commence an action in the Dust Diseases Tribunal before his or her death, as a pre-condition for recovery of damages for non-economic loss in an estate action, be repealed in relation to :

(a) all dust diseases; or
(b) asbestos-related diseases only?

There are no principled grounds for requiring the exception to apply to those who commence actions prior to death. This limitation should be abandoned.

(2) Should such amendments be limited so as to allow such proceedings to be commenced within the period of 12 months following the death, or otherwise made conditional upon the Dust Diseases Tribunal granting leave for filing proceedings after the victim's death

I see no principled reason why the claim for non-economic loss by the estate should be so limited. In many ways, to do so would seem to conflict with the reasons behind the abolition of limitation periods for dust diseases because in some cases (mesothelioma cases primarily) the main head of damages will be non-economic loss. However, if the only pragmatic option for reform is a limitation period of this kind I would support it over retaining the existing limitation.

8.1 Should NSW provide for the award of solatium in dependants' actions:

(a) generally; or
(b) only in dust disease cases and, in that respect, applicable to all such diseases, or only to a selected category of diseases?

I would support the general introduction of a limited right to solatium damages in dependants' actions. Such a reform has been in place in the England and Wales for over 30 years and solatium damages have in modern times always been available in Scotland. If a loved one's death has been caused wrongfully by another tort there is strong case for providing some recognition of the grief and sorrow the death causes.

8.2 If solatium were recoverable, which of the following approaches to its introduction would be preferable:

(a) the right to claim solatium is added to the existing heads of available damages; or
(b) solatium takes the place of the estate's entitlement to recover damages for non-economic loss in dust diseases cases?

As in England and Wales, the right to claim solatium should be added to the existing heads of available damages. Conceptually, it is a completely different loss from the deceased's non-economic loss.

8.3 If solatium is available, should it be an excluded benefit for the purpose of s 3 of the *Compensation to Relatives Act 1897* (NSW)?

I think this question is misconceived. An award of solatium is not a benefit that results from the deceased's death but part of the loss that the dependant suffers as a result of the deceased's death. It could not be deducted from the dependency award any more than the amount awarded for loss of financial dependency.

8.4 Which family members should be entitled to claim for solatium, were NSW to introduce such a head of damages?

I would suggest a small class of eligible claimants, along the lines of the English and South Australian legislation. Its impact on insurance costs can then be monitored and the class expanded in due course if thought appropriate.

8.5 In what circumstances, if any, and on what terms should the dependants or relatives of victims of a wrongful death be entitled to damages for awards of solatium?

The award should be made on proof of the necessary relationship between the dependant and the deceased. Under no circumstances should it be necessary for the dependant to prove that the actual relationship with the deceased passed some kind of threshold nor should it be possible for the defendant to adduce evidence that the relationship between the deceased and dependant was not close. As argued in the Consultation Paper, there are good reasons why this kind of evidence is both distasteful and of little value.

8.6 Should any legislation allowing for an award of solatium provide guidance to its assessment?

For the same reasons as in the answer to 8.5, the amount of an award of solatium should be set by statute, either as a maximum amount to be awarded to each eligible claimant or as a total amount to be divided equally amongst the claimants (with a cap on the amount that any individual claimant can claim).

9.1 Should damages for non-economic loss be available in an estate action in any of the following circumstances:

(a) in all cases of wrongful death regardless of cause; or
(b) in all cases of delayed wrongful death?

Damages for non-economic loss should be available in all estate actions. The existing law, which limits estate claims for non-economic loss to situations where the death was not the result of defendant's tort, is difficult to understand. If anything, the seriousness of the injury to P is greater when death results from the tort but it is in these very circumstances that the claim does not lie. Of course, extending estate claims for non-pecuniary loss more generally has the potential to increase liabilities but, although I cannot produce empirical evidence to support this, it seems unlikely to me that this would be a major increase. First, the most expensive claims would be in cases where there is a considerable gap between the tort and the death. In most such cases P will be alive when the claim is settled or compromised and non-economic damages will be awarded in any event. Secondly, the estate claim is only as good as the deceased's claim, and there are now quite significant limitations on when claims

for non-economic loss can be brought by living plaintiffs. So, for example, an estate claim relating to a tort covered by the *Civil Liability Act 2002* (NSW) Part 2 will have to overcome the thresholds set out in that Act. Given that the duration of the non-economic loss is one factor that determines the percentage that P's injury bears to a most extreme case, it is very likely that many estate claims will not meet the threshold. Similar limitations apply in employment and motor vehicle accidents. The result is that damages will only be awarded in respect of fairly serious injuries which continue over a fairly long period. There is a strong case for allowing the estate to claim non-economic loss in this category of case.

9.2 If damages for non-economic loss are made more generally available in estate actions, should they be taken into account when damages are assessed in dependant's actions?

For reasons previously explained I do not think that they should be taken into account.

9.3 Where a person has a cause of action for damages arising from a wrongful injury but dies of an unrelated cause before recovery of those damages, should damages for non-economic loss be excluded from the damages that may be recovered in an estate action in relation to the wrongful injury?

For reasons previously explained I think that damages for non-economic loss should be generally available in estate actions. If this reform is not accepted, then there seems little reason to allow the claim if the deceased dies of causes unrelated to the original tort. In these circumstances – that is, no introduction of a general right for the estate to claim non-economic loss – then I would favour abolition of the current s 2(2)(d) for the sake of equitable treatment of estate actions.

10.1 (1) Should the list of benefits which are to be disregarded when assessing damages in dependants' actions, in accordance with s 3 of the *Compensation to Relatives Act 1897* (NSW) be enlarged, and, if so, what additional benefits should be excluded?

For reasons explained earlier I think a case can be made for disregarding any award made in relation to an estate claim arising out of the same circumstances that allow a dependency claim under the *Compensation to Relatives Act 1897* (NSW). Conceptually, the awards are for different purposes and practical effect (subject to the preliminary point above about the different methods of calculating awards in claims by living plaintiffs and dependency claims) may be that the tortfeasor obtains something of a windfall. If a living plaintiff who knows his or her life expectancy has been dramatically cut short can complete his or her action before death the damages will include an amount for both non-economic loss up to the date of the completion of the action and for future non-economic loss (up to the date of the post-tort life expectancy). If the deceased so wishes, arrangements can be made prior to death to ensure that all of these benefits are passed on to his or her dependants. Rather than this non-economic loss detracting from the amount the dependant receives (as is the case for a dependency action under the current law), it actually increases the amount

available to dependants as the plaintiff may also have received an award for loss of earning capacity during the lost years. As the Consultation Paper notes, this places undue pressure on plaintiffs to complete prior to death. Such pressure could be removed if estate damages were excluded from the benefits to be taken into account in a claim under fatal accidents legislation.

(2) If such an amendment is made, should it apply generally or be confined to dust disease cases?

In my view, the amendment should apply generally.

(3) If such an amendment were to include benefits acquired through inheritance:
(a) should there be a monetary value cap on the excluded benefits and, if so, what should that cap be and should it be subject to indexation; or
(b) should some factor other than a monetary value cap be adopted as the criterion for exclusion, and if so, what should it be?

For reasons set out by the various English law reform bodies, there are sound reasons for excluding all benefits accruing to the deceased as a result of the death in a fatal accidents claim (I note that the Law Commission's suggestions in its 1999 report as to the possible reform of s 4 of the *Fatal Accidents Act 1976* (UK) has not been taken up). Assuming that this option is not available, I would favour the introduction of the Tasmanian model whereby benefits are excluded up to a set figure. This should ensure that dependency claims retain at least some meaning as an action that covers the dependant's personal loss and a cap will ensure that at least some compensation will be paid for this loss. To remain relevant any such cap should be indexed.

10.2 Are there any reasons for or against enlarging the list of excluded benefits that have not been mentioned in this chapter?

I have addressed this question in my answers above.

There are two other minor factual points in the Consultation Paper that are inaccurate. On pg. 43, para. 4.70, it is stated that in the UK (certainly in England and Wales, not sure myself about Scotland) the estate can claim for, amongst other things, loss of expectation of life. This is incorrect; there is no claim for damages for non pecuniary loss for loss of expectation of life as it was abolished by statute in 1982 (*Administration of Justice Act 1982* (UK) s 1(1)(a)). Secondly, on pg. 81, in para 8.39, the quote from Lord Pearce is clearly not from his speech in *Rose v Ford* as he did not sit (nor was he a member of the Appellate Committee at that date), as indicated in fn 56. I suspect it is from the 1964 decision, *West v Shepherd*.