NEW SOUTH WALES BAR ASSOCIATION SUBMISSION IN RESPONSE TO NEW SOUTH WALES LAW REFORM COMMISSION CONSULTATION PAPER 14 "COMPENSATION TO RELATIVES"

1. The New South Wales Bar Association ("the Association") will respond briefly to the questions posed in the consultation paper. The Association is aware that the Commission has received substantial submissions from a number of sources and succinct responses are appropriate at this stage. It is not proposed to answer each question individually. Rather, the Association will attempt to address the general issues raised in each relevant chapter.

CHAPTER 6

2. The Association acknowledged in its preliminary submission that notwithstanding that the *Strikwerda* principle was soundly based on the compensatory principle informing the rules relating to quantum in tort cases, its continuing operation may undermine the legislative purpose behind s12B of the *Dust Diseases Tribunal Act 1989*. The Association adheres to its position, as will be made clear in relation to Chapter 9, that any reform should apply across the board. The Association is not equipped to provide an economic model of the financial consequences of the posited reform. Anecdotally, practising barristers would expect the reform to impact in a very limited number of cases. Accordingly, viewed broadly the financial consequences, one supposes, would be slight.

CHAPTER 7

3. There seems no reason in principle why the entitlement to damages for non-economic loss in estate actions should be limited to actions commenced before death. But the usual policy underpinning statutes of limitation suggest pursuit

of the right should not be unlimited. Pragmatically, a relatively short limitation period of 12 months from the date of death seems appropriate, particularly when one considers that the long latency period relating to many dust diseases, especially asbestos-related diseases, already exposes defendants and insurers to uncertainty when making financial provision for liabilities. There may be a question about whether there should be a flexible discretion for extension. However, the Association believes that, in the interests of relative certainty, a twelve month window of opportunity is fair.

4. The Association believes it does no injustice to the particular suffering of the victims of asbestos that any amendment to s12B should apply to all dust diseases. The compensatory principle itself will take account of particular pain and suffering in any given case.

CHAPTER 8

5. The Association supports a proposal to provide for the award of solatium in dependants' actions. Consistent with the views it has already expressed, the Association believes that such provision should be available generally and not only in a restricted category of case, like dust cases.

6. On balance, having considered the matters discussed by the Commission in the Consultation Paper, the Association has come to the view that the right to claim solatium should be added to the existing heads of available damages. In particular, despite the comments made in its original submission, the Association accepts, as the Commission has pointed out, that if a right to solatium is to be substituted for the estate's entitlement to recover damages for non-economic loss (either in dust cases, or generally, if such a reform is introduced) that substituted right would need to be of unlimited value lest existing rights be replaced by rights of a lesser value. Further, although pragmatically such a new right could possibly be offset against a claim for mental harm damages, as solatium addresses losses of a different nature there is no principled reason why this should be so. If provision is made for a right

of solatium, it ought to be additional to existing rights. Mental harm damages do not include an allowance for grief, even profound grief.

7. It follows from what has been said already that if solatium is available it should be an excluded benefit for the purpose of s.3 of the *Compensation to Relatives Act 1897.* To keep a proper check of solatium the class entitled should be relatively limited but there is no reason why dependency should be a touchstone of entitlement. The Association believes limiting availability to parents and children of the deceased is appropriate. The definition should extend this class to persons who stand in the place of parents or children, that is to say persons with whom the deceased has developed a like relationship during his or her lifetime.

8. Solatium should be available in all cases of wrongful death. It ought to be provided in respect of the loss of a loved one for non financial losses not otherwise provided for. Consistently with the assessment of damages for non-economic loss generally, there should be a statutory cap. However a threshold would be invidious. Even an estranged parent may suffer profound grief at the loss of a child. The fact of the estrangement may be a factor relevant to quantification. The cap needs to be adequate to address the loss, and, to justify a claim in the event of dispute. Too modest an amount would not be worth the candle.

9. It would be wrong to codify the relevant factors, but legislation providing guidance for assessment is appropriate, particularly if that legislation is informed by the considerations that have been identified in common law jurisdictions that provide for damages of this type.

CHAPTER 9

10. The Association submits that the damages for non economic loss should be available in estate actions in all cases of wrongful death regardless of cause. Once again, the compensatory principle itself will sort out entitlements in a given case. Limiting the availability of such damages to cases of delayed

wrongful death will introduce an unnecessary arbitrary dividing line. Cases on one side would qualify whilst cases on the other would not. Where death is instantaneous with injury ordinary principles of tort law would provide for no non-economic loss other than, perhaps, loss of expectation of life. In dust cases, where this allowance is common, a relatively modest "freight" is in vogue.

11. Consistently in view of what the Association has submitted in relation to the Chapter 6 questions, and for the same reasons, if damages for non-economic loss are made more generally available in estate actions, such damages should not be taken into account in reduction of the damages available in dependants' actions.

12. The answer to question 9.3 is no. There should be no change to the existing law in this regard. The purpose of any reform is to remove that which in modern terms is an anomaly. Excluding damages for non-economic loss in these cases whilst allowing recovery in the case of wrongful death, would merely reverse the anomaly. The Association acknowledges that in logic one way of removing the anomaly is to close the category of recovery of damages for non-economic loss where the victim dies of an unrelated cause before recovery. However, there is no reason why this should occur. Defendants and insurers are not groaning under the burden of this category.

CHAPTER 10

13. The Association is of the view that there is much to be said for the adoption of the "broad approach" of excluding all benefits accruing to dependents as a result of the wrongful death for the purpose of assessing damages in the dependants' action. On balance, it is the view of the Association, that the factors referred to at [10.15] of the consultation paper outweigh the arguments against set out at [10.16].

14. There is a possibility of double compensation where the deceased has settled a claim for damages for personal injury during his or her lifetime, the benefit of which has passed to the dependents through inheritance, but some degree of

anomaly is unavoidable. That example, drawn from [10.18] is likely to be a rarity.

15. The broad approach has the great advantage of ease of application. Any more limited enlargement is likely to create anomalies of its own, not all of which will be immediately apparent.

16. The Association agrees with the view expressed at [10.34] that the restriction of any enlargement to dust cases, or even asbestos cases, would be difficult to justify. It is inherent in the Association's approach that the exclusion of inherited benefits above a monetary cap or by reference to some other criterion should not be adopted. Any such approach is likely to be arbitrary leading to disparity of result astride the statutory line creating a perception of unfairness.

17. The Association considers that the reasons for and against enlarging the list of excluded benefits discussed in the consultation paper, with respect, fairly covers the field.

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