

4 February 2011

## REVIEW OF COMPENSATION TO RELATIVES

### SUBMISSIONS OF THE AUSTRALIAN LAWYERS ALLIANCE

1. These submissions address the following:
  - a. Overcoming the problem created by the Court of Appeal in *Bi Contracting Pty Ltd –v- Strikwerda & Anor*<sup>1</sup> in respect to claims for compensation to relatives arising from the negligent death of a person as a result of a dust related condition.
  - b. Should that principle be applied more widely than only to deaths relating from dust related conditions?
  - c. Are there any other matters relating to compensation to relatives that need addressing?
2. The vast majority of asbestos-related deaths are caused by mesothelioma. It is a truly horrific disease. It kills slowly, painfully and almost inevitably. Those affected spend months experiencing debilitating pain and side effects from the palliative treatment. The pain and suffering is real and very substantial.
3. It is for this reason that dust related deaths were traditionally given differential treatment. The vast majority of negligently caused deaths are at least mercifully quick. In these relatively infrequent exceptions of a lingering negligently caused death, justice and consistency demands that the pain and suffering experienced be compensated.
4. Presently in NSW the majority of claims by dependants for wrongful death are dealt with under the *Compensation to Relatives Act 1897* and the *Law Reform (Miscellaneous Provisions) Act 1944* "(LRMP Act 1944)". However, different regimes apply to industrial deaths and dust related deaths.

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<sup>1</sup> [2005] NSWCA 288 (9 September 1955)

5. At common law a cause of action dies with the plaintiff. Section 2(1) of the *LRMP Act 1944* provides that an action survives for the benefit of the estate of a deceased person but only in respect to (a) medical, hospital and like expenses, (b) loss of earning capacity to date of death; and (c) funeral and headstone expenses. By reason of s(2)(2)(d) of the *LRMP Act 1944* a claim for general damages for pain and suffering and loss of enjoyment of life is not able to be made where the deceased dies as a result of the negligent conduct of others. However, the estate of a deceased person who had bought a claim for negligently caused injury can claim general damages, up to the date of death, where the deceased dies by reasons unrelated to the defendant's negligence.
6. In the case of death arising from a dust related condition s12B of the *Dust Diseases Tribunal Act 1989 NSW* ("DDT Act") provides that s2(2)(d) of the *LRMP Act 1944* does not apply in relation to proceedings commenced by a person before his or her death and pending before the Dust Diseases Tribunal ("DDT") at the time of death, where the cause of action is for damages in respect of a dust-related condition. S12B of the *DDT Act* enables the estate of a person whose death has been caused by a dust related condition to recover damages for the person's pain or suffering, or any bodily or mental harm suffered by the person, or for the curtailment of the person's expectation of life, provided proceedings commenced by the person were pending in the DDT at the time of the person's death.

#### **Overcoming the problem created in *Bi (Contracting) Pty Ltd***

7. The first point the Law Reform Commission ("LRC") is asked to examine concerns the merits of amending the legislation to overrule the principle<sup>2</sup> that compensation to a relative for pecuniary loss is reduced to the extent that general damages to the legal representative of the deceased have already increased the amount to be distributed to the relative from the deceased's estate. As the law currently stands in NSW, this situation can only arise in the context of a death arising from a dust related condition.
8. This is because, in NSW, compensation for general damages can only be claimed by the estate of a deceased's person, who died as a result of the negligent conduct of another, if the person has died because of a dust related disease. General damages are specifically excluded from any claim surviving for the purpose of the estate of a person who dies as a result of the negligent conduct of another by section 2(2)(d) of the *LRMP Act 1944*.
9. In *Bi (Contracting) Pty Ltd* the widow of Hans Strikwerda who died a painful death as a result of mesothelioma, essentially had two actions: (1)

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<sup>2</sup> As laid down in *Bi (Contracting) Pty Ltd -v- Strikwerda & Anor* [2005] NSWCA 288 (9 September 2005)

the action that survived for the benefit of her husband's estate for his pain and suffering up to date of death; and (2) a claim for the loss of benefit to her from her husband's earnings. Her damages in (2) were reduced by reason of the fact that as a widow she receives a financial benefit in the form of a distribution from the estate that included the general damages payable to the estate for her husband's painful death. The net effect of the decision is that Mr Strickwerda and his widow went effectively uncompensated for the agonizing pain and suffering endured up until death.

10. The ALA generally supports the private member's Bill introduced by Mr David Shoebridge, known as the *Dust Diseases Tribunal Amendment (Damages – Deceased's Dependants Bill 2010)* that would overcome the problem created in *Bi (Contracting) Pty Ltd* as the proposed amendments to the *Dust Diseases Tribunal Act 1989* would prevent a surviving dependant's damages for pecuniary loss being reduced so as to take into account the amount of general damages paid into the deceased's person estate.
11. The ALA is, however, of the view that the policy behind the Bill should extend to all wrongful death cases involving delayed death, not just those relating to dust diseases condition.
12. Damages paid to a widow for the loss of financial support she would have enjoyed but for her husband's death are distinct and different from the damages for the deceased's pain and suffering up to date of death, that survives for the benefit of his estate, and one should not be used to offset the other.
13. This is not "double-dipping" – they are two very distinct and different losses being compensated.
14. The fact that death occurs does not detract from the period of suffering. There is no logical or moral reason that the pain and suffering should go uncompensated because death occurs, or that the deceased should not be able to pass on such compensation to the benefit of a widow or dependants, who in all probability have suffered with them.
15. Further, it is not as if the widows and beneficiaries are properly compensated anyway. In NSW any damages paid for the loss of future financial support that would have been provided to the surviving dependant are reduced using a discount rate of 5%, whereas the real rate of return on investment is only about 2% (See appendix re; discount rate). Hence a widow is already being inadequately compensated for the loss of financial support she would have expected from her husband by reason of the discount rate. It is an injustice to further reduce the widow's damages

merely because she is a beneficiary of the deceased's estate that receives into the estate the damages for the pain and suffering of the deceased up to his death.

**Should this principle apply to wrongful deaths other than deaths arising from dust related conditions?**

16. In the ALA's submission the principle that general damages should survive for the benefit of the estate of a person killed by reason of someone's negligent conduct should be extended to all wrongful delayed deaths. We would accept there would need to be a more than a nominal period of survival past the infliction of injury.
17. The various compensation systems in NSW work on the basis that those injured as a result of the negligent conduct of others are entitled to compensation for those injuries (subject to thresholds depending on the cause of action). The idea that any claim for general damages dies with the plaintiff flies in the face of this maxim and means that it is generally cheaper for a defendant to cause a plaintiff's death than it is to cause an injury.
18. As the law in NSW currently stands a person can only make a claim arising from the negligent death of a dependant if there was a financial dependency upon the deceased or a surviving relative has suffered nervous shock which involves proving the surviving relative has suffered a recognisable psychiatric injury as a result of the death that is beyond a normal grief reaction. In the case of motor accidents, for instance, this requires an assessment of the person's level of impairment arising from the recognisable psychiatric injury to be assessed at greater than 10% whole person impairment, using the Motor Accidents Guidelines and the American Medical Association Guides Edition 4. This requires meeting certain high criteria such as being unable to hold down a job, ignoring personal hygiene and severe restrictions on personal relationships.
19. In the UK, where a victim of personal injury dies before his or her claim for damages is resolved the law allows the deceased's estate to recover the full value of any pain and suffering up to date of death whether or not the death was caused by the injury itself<sup>3</sup>. The UK Law Commission considered whether this should be changed in 1998<sup>4</sup>. The Law Commission determined that the law should be not be changed as if survival of a claim for damages were precluded then where it was known that a tort victim was fatally ill defendants might be encouraged to delay

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<sup>3</sup> *Law Reform (Miscellaneous Provisions) Act 1934, section 1*

<sup>4</sup> *The Law Commission, Law Com No 257, Damages for Personal Injury: Non-Pecuniary Loss*

settlements and victims would be placed under pressure as they were dying.

20. The Law Commission was of the view that the survival of damages for non-pecuniary loss was not unfair to defendants as it did not involve the grant of new rights, but the preservation of existing ones. In Scotland damages for non-pecuniary loss were excluded from survival actions between 1976 and 1992. This led to public disquiet and the law was changed back in 1993. The argument that it should not be cheaper to kill than to maim was made and was persuasive.
21. This objective of creating uniformity between claims arising from wrongful death could be achieved by the repeal of Section 2(2)(d) LRMP Act 1944 which prevents the damages recoverable for the benefit of the estate of a deceased person, who dies by the negligent conduct of another, from including damages for the pain and suffering of the deceased person or for any bodily or mental harm suffered by the person or for the curtailment of the person's expectation of life.
22. This would create equity between different categories of claimants, meaning that damages are recoverable by the estate of a person, who dies by the negligent conduct of another, for pain and suffering up to the date of the death, regardless of whether the death or initial injury was caused by a dust related condition, a motor accident, a work injury or in some other tortious manner.
23. In terms of fairness between defendants and claimants, had a deceased person been injured in the accident, rather than it resulting in their death, they would be entitled to compensation for pain and suffering (subject to various thresholds depending on the cause of the accident). Allowing damages for pain and suffering to be recovered by the estate of a deceased person does not create a new right, it only preserves an existing right. In those circumstances there is no unfairness to the defendant. It does however shift the current unfairness to claimants who can only claim general damages for injury, but injuries that ultimately prove fatal go uncompensated despite considerable pain and suffering to the time of death.
24. In practice, this is likely to only affect a small amount of claims as in many circumstances where a person dies as a result of negligent conduct, death occurs at the time of the accident. It would only be a small number of cases, that aren't related to dust related conditions, where death occurs some time after injury.

## Other Recommendations

### Introduction of a solatium or "death or bereavement benefit"

25. This is compensation for the mental harm caused by the negligent death of a loved one. If such a solatium is introduced consideration should be given as to whether the compensation payment is refundable from nervous shock damages received by a recipient of the solatium.
26. Currently in NSW a death benefit is payable to the dependants of a worker who dies at work<sup>5</sup>.
27. In South Australia a solatium is provided for in Part 5 of the *Civil Liability Act 1936* (formerly the *Wrongs Act*). Section 28 provides for the payment of a solatium to parents of a child wrongfully killed and section 29 provides for the payment of a solatium for the suffering caused to the spouse or domestic partner of a person wrongfully killed. The current payment is a maximum of \$10,000.00 which, in the ALA's submission, is too low.
28. Since 1982, in the UK, a bereavement benefit has been payable in relation to all negligently caused deaths pursuant to the *Fatal Accidents Act 1976*.
29. The UK scheme provides for the availability of a lump sum benefit for bereavement in s1A of the *Fatal Accidents Act 1976* (UK) and provides for damages for bereavement payable to the husband or wife or parents of the deceased. Where there is a claim made by both parents the bereavement payment is divided equally between them. Sections (3) and (5) of the *Fatal Accidents Act* provide for the sum that is awarded and its indexation. The bereavement benefit is currently £11,800.00.
30. The bereavement benefit has been available in the UK for over 30 years. To the ALA's knowledge it is not known to have caused any significant strain on insurance premiums, or any significant increase in claims or costs.
31. The Legislative Council's Standing Committee on Law and Justice has previously recommended that the Motor Accidents Authority (MAA) in NSW consider introducing a bereavement benefit for parents who lose children as a result of a motor vehicle accident.
32. The loss of a loved one in circumstances arising from the negligent conduct of another is a tragedy for any family. Whilst a bereavement benefit could never represent the value of a lost child or spouse, a fixed (and indexed) compensation payment would reassure a spouse or parent that their loss and grieving is acknowledged and recognised.

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<sup>5</sup> Section 25 *Workers Compensation Act 1987 NSW*

Should the solatium be deducted from damages for pecuniary loss?

33. Compensation for the grief and distress caused by death, involving the negligent conduct of another, is distinct and separate from compensation for the loss of the pecuniary advantages a surviving dependant could have expected to derive from the deceased had he or she not died.
34. This was addressed by the High Court of Australia in *Public Trustee –v- Zoanetti*<sup>6</sup> At that time, in South Australia, section 23c(1) of the *Wrongs Act*, as it was then known, provided that a solatium payable to a surviving spouse under s23b *Wrongs Act* is in addition to and not in derogation of the claimant's rights to damages for the pecuniary loss: it permitted both rights to be enforced, hence the damages by way of solatium was not taken into account in estimating or reducing pecuniary loss resulting in death.
35. As was said by Dixon J in *Zoanetti*<sup>7</sup> these are two different injurious consequences from the death. Dixon J quoted from *American Restatement of the Law Torts, vol Iv, s920* "Damages resulted from an invasion of one interest are not diminished by showing that another interest has been benefited". Dixon J described it as an untenable contention that the solatium must be taken into account in reduction of the pecuniary loss.
36. Presently s30 of the *Civil Liability Act 1936 (SA)* is in similar terms to s23c(1) of the former *Wrongs Act* and provides that the solatium is in addition to, and not in derogation of, any rights conferred on the parent, spouse or domestic partner by any other provision of the Act.
37. The ALA recommends that any payment by way of solatium should not be deducted from damages for pecuniary loss resulting from death.

Should the solatium be deducted from damages for nervous shock?

38. If a surviving spouse claims a solatium payment and also brings a claim for damages resulting from nervous shock then it is arguable the solatium should be deducted from the damages for nervous shock, as damages for nervous shock are damages for the personal injury arising from the death of a loved one.
39. This repayment could have the affect of preventing some small claims for nervous shock as the solatium would need to be repaid, hence some

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<sup>6</sup> [1945] HCA 26; (1945) 70 CLR 266 (18 October 1945)

<sup>7</sup> *Public Trustee –v- Zoanetti* [1945] HCA 26; (1945) 70 CLR 266 (18 October 1945)

claimants would apply only for the solatium, rather than bringing claims for nervous shock. The reduction in the cost of such nervous shock claims, with their medico-legal and legal expenses, is likely to substantially reduce the cost of the solatium.

40. The ALA would like to be heard further as to an appropriate maximum sum for any solatium payment.

### **Executive Summary**

Slow, painful and negligently caused deaths should not go uncompensated. Accordingly, the ALA makes the following recommendations:

1. The repeal of s2(2)(d) of the *Law Reform (Miscellaneous Provisions) Act 1944* to enable a claim for pain and suffering to survive for the benefit of a deceased's person's estate.
2. This would render s12B(2) of the *Dust Diseases Tribunal Act 1989* unnecessary;
3. A provision having the same effect as the amendment to the *Dust Diseases Act 1989* proposed by the *Dust Diseases Tribunal Amendment (Damages – Deceased's Dependants) Bill 2010* be inserted into s2 of the *LRMP Act 1944*.
4. The introduction of a solatium or bereavement benefit payable in relation to all negligently caused delayed deaths.
5. The inclusion in the provisions relating to payment of a solatium that the solatium is repayable from any damages for nervous shock but not to be deducted from damages for pecuniary loss.
6. In the event that the recommendation to repeal s2(2)(d) of the *LRMP Act 1944* is not followed, then the ALA supports the enactment of the *Dust Diseases Tribunal Amendment (Damages – Deceased's Dependants) 2010* .



## APPENDIX

The discount rate reduces compensation for future loss on the assumption that a lump sum can be invested so as to provide a guaranteed return after tax and inflation. This is termed the real rate of return on investment (interest less inflation less tax).

The Lifetime Care Scheme of the Motor Accidents Authority in NSW assumes a return on its investments of 2%. The common law rate is 3% (*Todorovic –v- Waller (1981) 150 CLR 402*). The Ipp Report and the Legislative Council all-party inquiry unanimously recommended 3%. In England the rate is 2.5% and the Lord Chancellor has just instituted a review to consider reducing the discount rate further.

In NSW the discount rate applied is 5%.