

SUBMISSION TO THE NEW SOUTH WALES LAW REFORM COMMISSION INQUIRY INTO AMENDMENTS TO THE COMPENSATION TO RELATIVES ACT

This submission has been prepared by Eileen Sylvia Strikwerda, being the Legal Personal Representative of the Estate of the Late Hans Jurgen Strikwerda in the Eileen Sylvia Strikwerda v BI (Contracting) Pty Ltd and Anor (for PHR Pty Ltd),¹ 2004, Wrongs Act dispute out of which has come this discussion. I am responding to what has always appeared to me to be an unfair law regarding reduction in damages in a Wrongs Act claim for a deceased's pain and suffering, because there has already been a damages claim against the estate of a person who died from an asbestos-related illness.

Please take into account when reading my submission, that I am a layperson, and not skilled in the use of legal terms. I am writing as a person who has experienced the difficulties that the New South Wales Law Reform Commission are hoping to correct in the Compensation To Relatives Act.

I thank you for taking your time to consider my comments.

I will give you a brief history in order for you to understand my interest in this proposed amendment to the Dust Diseases Act.

My name is Eileen Sylvia Strikwerda. My husband was Hans Jurgen Strikwerda who died from Mesothelioma in April 2004.

For the 32 years of our marriage, I was totally dependent on my husband for financial support.

After what began as 'a pinched nerve' on the left side of his back in May 2003, and was diagnosed as Pleural Plaques in October, Hans was diagnosed with Mesothelioma on 21 December, 2003.

When Hans was diagnosed with an Asbestos disease, he immediately found a Solicitor to begin proceedings in the Dust Diseases Tribunal as he wanted to make sure I was well provided for should he not survive. If he did live for a time, he did not want to be solely dependent on Centrelink for the rest of his life.

For such a strong man, in every area of his life, it was sad to see him fade before my eyes. In the last few weeks, he lost all dignity as his body succumbed to the ravages of the disease.

Hans' died on 5th April 2004 from the effects of Mesothelioma; a horribly painful, debilitating and deadly disease. My husband was 59 ½ years old and I was nearly 53 years old when he died!

A court hearing had been convened in his hospital room shortly before his death because it was evident he was not going to live for long, but he died before the Action was able to be finalised, so after his death, I had to begin the process all over again, as his Action was no longer relevant.

My Action, Eileen Sylvia Strikwerda v BI (Contracting) Pty Ltd and Anor (PHR Pty Ltd)², was heard before His Honour Judge O'Malley in the Dust Diseases Tribunal of New South Wales in Adelaide, South Australia on 30 September 2004.

Damages were awarded and agreed to by all parties, then, BI (Contracting) Pty Ltd argued that the Wrongs Act claim should be offset by the claim on behalf of the Estate. The judge entered a verdict but allowed the BI (Contracting) Pty Ltd time to apply for reconsideration.

BI (Contracting) Pty Ltd took the case to the NSW Appeal Court and the Appeal was upheld, so the damages figure in the Wrongs Act claim was reduced by \$105,000, split between BI (Contracting) Pty Ltd 80% responsibility, and Anor's (PHR Pty Ltd) 20% responsibility.

¹ DDT no: 7 of 2004 and 118 of 2004

² Anor represented the firm PHR Pty Ltd which was the employer at the time of exposure to Asbestos,²

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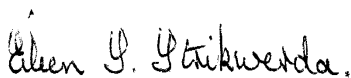
- a. The current law, which reduces the award of damages in dependants' Actions by reference to the amount recovered by way of damages for non-economic loss in an estate Action, in relation to Dust Disease should be abolished.
 - Because of this law, my Wrongs Action for the loss of my husband, Hans Jurgen Strikwerda, as a result of Mesothelioma, was reduced by \$105,000.00,
 - Of which \$84,000.00 was the reduction in BI(Contracting) Pty Ltd share of responsibility and,
 - \$21,000.00 was the reduction in Anor's (PHR Pty Ltd) share of the responsibility
 - As a result, I received \$81,050.00 in relation to the Wrongs Act claim

- b. It is important that, regardless of whether the victim commenced Action in the Dust Diseases Tribunal before death, or the Action was commenced by Dependents after death, recovery of damages for non-economic loss should be standard procedure in all Dust Diseases Actions.
 - My Husband, Hans Jurgen Strikwerda, had already had a bedside court hearing a short time before death but no arguments for compensation were presented and no decision handed down.
 - Although my husband, Hans Jurgen Strikwerda, had begun court proceedings immediately after the Asbestos Disease diagnosis, upon his death that Action was set aside.
 - I, Eileen Sylvia Strikwerda, as the deceased's Dependent, was advised by my solicitor that the whole process had to be restarted by me, as his Action was no longer active.

- c. If a victim of Dust Diseases has commenced proceedings in the Dust Diseases Tribunal dies before judgement is made, then the Action should not be set aside
 - When the Dependent, of necessity, takes up the Action, it is on behalf of the deceased, so the previous Action needs to be incorporated into the Dependent's Action
 - This Action by the Dependent, should be a Compensation Action and needs to combine ALL factors that would have been taken into account if the deceased person had not died
 - The Wrongful Death Action should be totally separate from the Estate/ Compensation Action and neither Action have any affect on the other

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- The Action presented to the courts AFTER the death of a Dust Diseases victim should be decided on the requirements of the victims claim, plus compensate the Dependent left behind for the negligent wrongful death of the person closest to them
- d. There can be no such thing as 'over-compensation'. When a company or companies deliberately continue in the production and/or installation of a product that kills,
- one of its own or someone else's employees, or
 - someone who has had contact with a person/clothes etc who has been exposed to that product, or
 - a person who has come into passive contact with that product,
- then, that pain and suffering, and loss of life MUST be compensated for.
- e. The compensation for both the Estate and Wrongs Acts payment should be decided before considering all costs.
- Costs should be considered as a separate payment to the Compensation payment,
 - Costs should not be included in the Compensation figure and then taken to be an 'adequate' compensation for the Dependent's loss
 - By the time all expenses and commitments are paid out of the eventual figure there is a further reduction in the 'adequate' compensation payout.
 - In my case, the payment of commitments relating to my husband's medical, hospital, preparation of litigation and funeral costs, were in excess of a further \$110,000.00 reduction to the eventual figure received and I was expected to rely on for the rest of my life.
- f. As to the likelihood that abolition of the current law will have significant financial consequences for defendants or insurers, it will possibly be so, but the salient point is, that it is the Dependent/s, of the person who has died from a Dust Disease, who will suffer significant financial consequences if the law is *not* abolished!
- g. As for more claims being filed as a result of the abolition of the current law, that is the end result of a negligent industry who did not protect their workforce, or take measures to protect those who would come in contact with their product, either actively or inactively.
- It is not the concern of those who are suffering because of their inevitable loss of life, or those who are suffering the loss of a loved one, that those who caused their pain will 'suffer' litigation.



Eileen Sylvia Strikwerda

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Intestate or partially intestate Dust Disease victims.

There is a separate issue, from the one under discussion, that I feel needs to be addressed, and it is that of Dust Disease victims dying intestate or partially intestate. Because of the nature of Mesothelioma, which has a very immediate and swift outcome in most cases, the victim and/or family do not consider the adequacy of the will or in some cases if there even is a will. In most cases there is no understanding of the impact on the outcome of a Court Action should the victim die without a will or one that does not cover all contingencies should death result.

- All solicitors acting on behalf of Dust Diseases victims should instruct the client as soon as possible, to have an adequate will to alleviate issues that may arise because of a Court Action, and advise the best options to cover all contingencies.
- There needs to be some protection set in place, so that the primary Dependents are the ones who benefit from the Estate Action, and are not left in financial difficulties, because those who are no longer Dependents, as in the case of adult children, receive benefit because of an inadequate will.



Eileen Sylvia Strikwerda