

Submission

**Law Reform Commission of
Western Australia's Project 106:
Provisional Damages and
Damages for Gratuitous Services**

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Introduction

The Law Society of Western Australia (the Law Society) is the peak professional association for lawyers in Western Australia. Established in 1927, the Law Society is a not-for-profit association dedicated to the representation of its members and the enhancement of the legal profession through being a respected leader and advocate on law reform, access to justice and the rule of law.

The Law Society is pleased to provide the following submission to the Law Reform Commission of Western Australia in response to its Project 106: Provisional Damages and Damages for Gratuitous Services.

Executive Summary

The Law Society refers to the "Executive Summary" on page 5 of the Discussion Paper and provides a summary of the Law Society's submission on the Commission's preliminary assessment of the various reform options.

With respect to modifying the "once and for all" rule, the Law Society agrees with the Commission's preliminary assessment that the "once and for all" rule be modified in Western Australia as follows:

1. provisional damages be permitted where there is a chance that a different injury or disease (that is, a new condition) may arise after the initial judgment or settlement (but not in relation to the development of a more serious injury or disease, that is, a deterioration of the plaintiff's existing condition);
2. provisional damages be permitted in relation to all classes of personal injury or disease;
3. further damages be available only where the potential for the development of a different injury or disease was expressly identified at the time of the initial judgment or settlement;
4. plaintiffs not be restricted in the number of claims that can be made for further damages, provided that such claims relate to the development of a different injury or disease which was expressly identified at the time of the initial judgment or settlement;
5. when assessing further damages, courts be allowed to take into account the provisional damages initially awarded to the plaintiff;
6. there should be an additional time limit imposed for bringing a further claim after the initial judgment or settlement, with such time limit being 3 years from dates of "discoverability"¹; and
7. estate claims be allowed where the deceased victim had commenced, but not completed, an action for further damages prior to his/her death.

¹ The Law Society has taken a different approach to this point than that suggested by the Commission.

With respect to damages for gratuitous services, the Law Society considers that damages for the value of gratuitous services provided by the plaintiff to others ought to be introduced in Western Australia and should be available to all classes of personal injury, subject to the following restrictions:

1. they should only be available for gratuitous domestic services;
2. such damages should be restricted to services provided to persons of the same household or family as the plaintiff, which should align with the definition used in section 3D of the *Motor Vehicle (Third Party Insurance) Act 1927 (WA)*²;
3. the services must have been provided before the plaintiff's injury for a defined number of hours per week and consecutive period of time, or, there must be a reasonable expectation that, after development of the injury, the services would have been provided for a defined number of hours per week and consecutive period of time;
4. there be a reasonable need for the services to be provided for those hours per week and that consecutive period of time after the development of the injury;
5. the plaintiff should not need to prove expenditure incurred in consequence of his/her inability to continue providing the services; and
6. calculation of such damages should include the "lost years" after the plaintiff's death, the "lost years" being the years in which the services might have been provided after the plaintiff's actual death until the date to which he or she was expected to have lived had the injury or disease not occurred.

² The Law Society has taken a different approach to this point than that suggested by the Commission.

Issue 1: Modifying the ‘once and for all’ rule – ‘provisional’ damages

1. Should Western Australia keep the “once and for all” rule OR introduce provisional damages?

Provisional damages should be introduced in Western Australia.

Damages in Western Australia are currently awarded on a “once and for all” basis³. This is the common law rule arising out of the historic case of *Fitter v Veal*⁴, which is the authority for the principle that if a plaintiff receives an award of damages in respect of one cause of action, then that plaintiff may not obtain further damages based on the same cause of action if the injury worsens or if further injury related to the same negligence occurs. The plaintiff carries the onus of proving the present damages and the potential of future injury, loss and damage and the extent of the likelihood of their occurrence.⁵

The advantages of the “once and for all” rule include:

1. the award finalises litigation;
2. it would be unfair to have a defendant subjected to a series of claims arising out of the same action.

The disadvantages of the rule are:

1. An award, in light of subsequent events may be found to have undercompensated the plaintiff.

This is particularly the case in the situation of plaintiff’s who have suffered a “latent” injury; or who develop unforeseen and unforeseeable consequences of the initial injury. (See 3 below).

2. Should provisional damages be available where there is the chance that the plaintiff will:

3 *Johnson v Perez* (1988) 166 CLR 351 at 355

4 (1701) 12 MOD REP 542; 88 ER 1506; 1 LD RAYM 339, 692.

5 See *Malec v. J.C. Hutton Pty Ltd* [1990] HCA 20; (1990) 169 CLR 638).

(a) develop a different injury or disease (that is, a new condition) or more serious injury or disease (that is, a deterioration of an existing condition) in future (the UK approach);

(b) develop a different injury or disease in the future (the Australian approach);
or

(c) develop a more serious injury or disease in future?

The Australian approach or "Option 2" is preferred ie to introduce provisional damages for the development of a different injury or disease only.

The Law Society agrees with the Commission's preliminary assessment in this regard and notes the following major advantages of the Australian approach as being:

- Prevention of over or under compensation for a Plaintiff and affords greater accuracy, justice and fairness within the Western Australian legal system;
- Allows for clarity on rights and responsibilities as advancements in medicine and science which may reveal subsequent injuries or diseases caused by the same tort;
- Avoids the dilemma and agonising decision currently facing Plaintiffs (with asbestosis) in regards to when to claim;
- Reduces delay by encouraging plaintiffs to claim once initial injury or disease has stabilised;
- Lower increase in court congestion due to more claims compared to option 3;
- Lower potential increase in costs and insurance premiums compared to option 3; and
- Ensures consistency with other Australian jurisdictions including Victoria, New South Wales, South Australia and Tasmania.

3. Should provisional and further damages be available for all classes of personal injury or disease or only some personal classes of injury or disease?

Asbestos disease sufferers

Provisional damages are necessary in the claims of asbestos disease sufferers due to the unique nature of asbestos related diseases. Asbestos related diseases are unique, given the long latency periods between exposure and diagnosis and due to the fact that

exposure to asbestos increases a person's risk to contracting multiple, but separate, asbestos related diseases.

One class of plaintiff who is disadvantaged by the current situation are asbestos disease victims. Exposure to asbestos fibres and dust can cause a number of debilitating diseases (which include but are not limited to mesothelioma, lung cancer and asbestosis) all of which are latent and do not occur for many years after the exposure to asbestos;

Similarly, a significant period may elapse between an asbestos victim being diagnosed with asbestosis and then mesothelioma.

Therefore under current WA law, if a person successfully resolves a claim for asbestosis, they are unable to bring further proceedings in the unfortunate event that they later develop a fatal and often more serious asbestos-related malignancy such as mesothelioma. Under the traditional common law system prevailing in WA, once asbestosis is diagnosed, the sufferer must bring his or her claim within 3 years or lose the right to bring the claim for damages by reason of sections 14 and 56 of the *Limitation Act 2005 (WA)*.

Whilst the once and for all rule is appropriate in some circumstances, it works as an injustice for a person suffering from an asbestos related disease as that person may go on to develop a separate and more serious injury at a later date (attributable to the same exposure to asbestos). In such an instance, it is difficult for a court to assess the exact future needs of an asbestos victim who may be suffering from a mild disease but may go on to be diagnosed with a severe, malignant disease. Calculating an amount of compensation at the initial stage to cover the future possibility of a more serious disease developing is fraught and may lead to under compensation (or over compensation in instances where the more serious disease never results).

Provisional damages mean that a plaintiff's initial claim, for example for asbestosis, can be settled without excluding the possibility of a further claim being made in the future if a different asbestos-related disease, such as mesothelioma or lung cancer is diagnosed.

The Discussion Paper cites potential disadvantages regarding provisional damages as including court congestion due to an increase in claims and potential increase in costs and insurance premiums. However, the authors understand that statistics available from the Dust Disease Tribunal suggest that, since 2005, there have been 1173 claims for non-malignant diseases ("almost invariably claims for provisional damages").

There have been 1811 claims for malignant diseases ("almost invariably claims for full and final damages"). There have been 3 matters in which a claim for full and final damages has been made following an award of provisional damages (source: letter to Kate Doust from Dust Diseases Tribunal of NSW dated 2 April 2014).

Statistics from NSW show that provisional damages can be used as a successful method to adequately and fairly compensate those suffering from a non-malignant disease whilst at the same time giving them peace of mind that an option of further compensation is available in the event that the worst eventuates and they develop a malignancy. Statistics show that the numbers who do go on to pursue a claim for a malignancy are modest, which should put to rest any arguments about the financial impost of these law reforms.

Other classes of plaintiffs

In relation to all other personal injury claims, it is submitted that, provisional damages are appropriate for any injured person where there is a risk that a new condition (not an exacerbation or a progression of the initial injury) will occur in the future.

The Law Society is unable to identify any conditions other than asbestosis or industrial/chemical poisoning that could potentially result in a "new" injury.

We note the potential that an injured person can develop further injuries, for example:

1. from an orthopaedic injury – the development of degeneration or osteoarthritis;
2. from any physical injury – the development of a psychological condition, such as Major Depression;
3. from a fractured skull/head injury – the development of epilepsy.

However, these subsequent conditions are foreseeable, and with appropriate medical evidence being obtained, allowances can be made for these potential further injuries upon settlement.

4. If provisional and further damages should be available for only some classes of personal injury or disease, should they be restricted to asbestos related diseases or restricted in some other way?

See response 3 above.

5. Further to question 2, should further damages be available:

(a) Whenever a different and/or more serious injury or disease develops; or

(b) Only where the potential for the development of a different and/or more serious injury or disease was expressly identified at the time of the initial judgement?

In consideration of the Discussion Paper, the Law Society concurs with the Commission's preliminary assessment that further damages should only be available in WA where the potential of the development of a different or more serious injury or disease was expressly identified at the time of the initial judgement or settlement provisional damages ie Option 2.

This is consistent with the approach in other Australian jurisdictions including Victoria, NSW, South Australia, Tasmania and also the UK.

6. Should any restrictions be placed on the number of times that a plaintiff can seek further damages after provisional damages have been awarded (as in Victoria, for example, where only one subsequent award of damages is permitted).

"Option 2" is preferred to allow the plaintiff an unlimited number of times that he or she can seek further damages after provisional damages have been awarded.

The Law Society concurs with the Commission's preliminary assessment in this regard and notes the following major advantages of this approach as being:

- Prevention of over or under compensation for a Plaintiff and affords greater accuracy, justice and fairness within the Western Australian legal system;
- Allows for clarity on rights and responsibilities as advancements in medicine and science which may reveal subsequent injuries or diseases caused by the same tort;
- Avoids the dilemma and agonising decision currently facing Plaintiffs in regards to when to claim;
- Ensures consistency with other Australian jurisdictions including Victoria, New South Wales, South Australia and Tasmania and with the UK.

Although the author notes that potential disadvantages relating to Option 2 have been cited to include potential court congestion and potential increase in costs and

insurance premiums due to an increase in claims, we have been advised by some of our members who work regularly with asbestos disease sufferers that the number of plaintiffs who are likely to be unfortunate to have been diagnosed with more than 2 different asbestos (ie asbestosis then lung cancer then mesothelioma) is extremely rare (though not unheard of).

7. In providing for the calculation of further damages, should the legislation:

- (a) Confine the further assessment of damage to one or more specified heads of damage OR allow the further assessment to be unrestricted?**
- (b) Include a statutory power to have regard to the damages already awarded OR remain silent on the issue?**
- (c) Take a different approach where the initial award of damages was arrived at by consent?**

In providing for the calculation of further damages, the further assessment should be unrestricted and should not be confined to one or more specified head to damages. To confine the further assessment of damage to one or more specified heads of damages would be inconsistent with other Australian jurisdictions and would unduly place a pre-determined limit the types of losses which are further compensable.

The need for a Court to have regard to an earlier award of damages is inherent in the exercise of awarding "further damages". Therefore an express statutory requirement in legislation is not necessary to avoid over compensation or "double dipping" by a Plaintiff. That said, the Law Society has no objection to an express legislative provision to direct a Court to consider the earlier award of damages, notwithstanding such an express provision is superfluous.

With respect to how the assessment of provisional damages (and subsequent award of damages) should be approached, we refer to the following decisions where by the court had to do such an assessment

1. In *McGrath v Allianz Insurance*⁶ the court considered the question of the quantum of damages for a subsequent malignancy where damages had earlier

6 [2011] NSWDDT 1; [2011] NSWCA 157

been awarded for a non-malignant asbestos condition on a provisional damages basis.

Mr McGrath had contracted asbestos-related pleural disease and a claim in 2009 brought in respect of this condition resulted in a judgment by consent against the insurer of the responsible tortfeasor, in an amount of \$140,000, inclusive of costs "on a provisional basis". The parties agreed that \$71,000 of this first award was on account of general damages for pain and suffering arising from ARPD. The consent orders expressly reserved the respondent's rights in respect of other asbestos-related conditions which might arise in the future, including mesothelioma.

Mr McGrath subsequently developed mesothelioma and sought further damages in respect of that condition pursuant to s 11A of the Dust Diseases Tribunal Act 1989 (NSW).

Ultimately, the only matter requiring determination by the Dust Diseases Tribunal was the amount of general damages. O'Meally P., assessed that amount at \$215,000: *McGrath v Allianz Australia Insurance Ltd*⁷. The insurer appealed to the Court of Appeal and the plaintiff cross-appealed.

The issue for determination on appeal was: (i) whether the subsequent award of general damages should have been reduced by the allowance for general damages contained within the first award. The issue for determination on the cross-appeal was: (ii) whether the subsequent award of general damages should have been increased by excluding from consideration any provision made for general damages within the first award.

The Court held, dismissing the appeal and cross-appeal:

In relation to (i)

1. Section 11A does not prescribe how the Tribunal is to go about its task on the subsequent assessment. Nor do the rules provide any guidance. Accordingly, the relevant principles must arise under the

7

[2011] NSWDDT 1.

general law and will include the need to avoid double compensation for a particular disability, including pain and suffering:⁸

2. In order to avoid double compensation, it was necessary for the Tribunal to determine whether any amount had been allowed in the first award for further pain and suffering in respect of ARPD and how allowance should be made for that amount in assessing pain and suffering resulting from mesothelioma. This assessment is necessary because the concept of "further damages" at least by implication, if not in express terms, is inconsistent with an award of double compensation for a particular item of loss.⁹

In relation to (ii)

1. The cross-appeal could only succeed if the respondent demonstrated that, in reducing the amount payable by way of general damages to avoid double compensation, his Honour had been in error. The need to take that step was not erroneous but correct, and was implicitly required by the reference to awarding "further" damages:¹⁰
2. *Banton v Amaca*¹¹ and on appeal – *Amaca Pty Ltd v Banton*¹². Mr Banton had contracted asbestosis and pleural disease and brought a claim against Amaca for compensatory damages and exemplary and aggravated damages for those conditions. He settled that claim in 2000 for \$800,000 on a provisional basis. He developed mesothelioma and, in 2007, brought a further claim including a claim for aggravated and exemplary damages. Amaca unsuccessfully sought to strike out the claim for aggravated and exemplary damages and appealed to the Court of Appeal.

The NSW Court of appeal held that the claim for exemplary and aggravated damages earlier made had merged with the consent judgment then given. But such damages related only to the conditions asbestosis and pleural disease then

8 At [19]

9 At [32].

10 At [34]-[35].

11 [2007] NSWDDT 29

12 [2007] NSWCA 336

sued upon and only for conduct up to the judgment.¹³ Further there was no reason why “further damages” in the act could not include exemplary or aggravated damages. And no reason why further, more serious injury might not tell in greater exemplary damages.¹⁴

3. *Sim v Allianz Australia*¹⁵, Mr Sim was diagnosed with asbestosis and pleural disease in 1996 which progressed over the years. In January 2009 he was diagnosed with lung cancer with spinal metastases. He died in July 2009 aged 71. Because asbestosis was a divisible condition and there were multiple tortfeasors, Curtis J, having found liability proven, separately assessed damages for asbestosis and pleural disease and for the lung cancer. His Honour assessed damages for pain and suffering for asbestosis in the sum of \$75,000 plus interest of \$16,500. The Court found that from 2008 the asbestosis symptoms were consumed within his disease of lung cancer¹⁶. For lung cancer pain and suffering the Court awarded \$250,000 plus \$15,000 for interest. For loss of expectation of life, the Court awarded \$15,000 and \$37,561.85 for gratuitous care. The total damages for asbestosis was \$104,370.49 and for lung cancer, \$317,561.85.

When the second assessment of damages proceeds, it is important to note:

1. Where the heads of damages are agreed in the earlier settlement, all parties are bound by the terms of the agreement and the second assessment proceeds on the basis of the agreed figures as if they were heads of damages calculated by the Court. This can be specifically recited in the terms of settlement and/or can be specified by the Court making the order for preservation of the right to further damages.
2. In circumstances where there is a judgment by way of a lump sum (whether by consent or, as is invariably the case in jury verdicts and awards), there will

13 At [14]

14 At [16]

15 [2010] NSWDDT 19; on appeal though no challenge to assessment of damages; *Allianz v Sim* [2012] NSWCA 68

16 At [228]

generally be some evidence of the amounts claimed or sought for special damages, leaving the general damages for pain and suffering etc and the likely extent of any compromise reached between the parties, readily calculable in the later assessment.

3. The onus would remain on the plaintiff seeking the second award to adduce that material in evidence and demonstrate the matters compensated and the extent to which they had already been compensated, so as to justify the further award. The defendant could adduce any other material available which impugned that claim.

Legislation that sets out how the subsequent damages should be assessed is fraught with danger. There are many, many factors that impact on damages attempting to direct or confine the Court's discretion may result in injustice.

8. Should there be any time limit for bringing an application for further damages?

Yes.

No issue of prejudice arises as the defendant will have all the materials from the original claim available, and, on notice of the potential for a later claim, will no doubt have preserved the materials needed to defend it, even in the unlikely event that it wished to contest the liability issues in circumstances where they had necessarily already been determined adversely to it, or it had elected not to contest them, in the original claim. It will have the materials on which the damages were awarded or settled by agreement.

9. If your answer was "yes" to question 8, what should the time limit be? Please explain your reasons.

The time limits should be as set out in the *Limitation Act 2005*. This requires claims to be brought within 3 years from the date of "discoverability"¹⁷. For example: in the circumstance where an asbestos victim successfully resolves a claim for asbestosis and then later goes on to be diagnosed with mesothelioma, that claimant must bring the second claim for further damages within 3 years of the second diagnosis (subject to the provisions of the *Limitation Act 2005*).

¹⁷ See sections 55 and 56

Requiring an application for further damages to be brought within a timeframe after the "latent" injury was "discovered" will prevent claims being kept alive indefinitely.

10. Should it be open to the estate of a deceased victim to seek further damages which could have been sought by the victim during his or her lifetime?

Yes, it should be open to the estate of a deceased victim to seek further damages which could have been sought by the victim during his or her lifetime.

Since passage of legislation on 13 March 2002 (which commenced 21 March 2002)¹⁸, in the event that an asbestos disease sufferer commences an action but does not survive to trial and judgement (or settlement), a claim for pain and suffering (ie general damages) and for the curtailment of expectation of life remains claimable by the estate ("survivorship legislation").

To maintain consistency, the estate should be able to claim in a similar manner in the event the claimed (for example) resolves his claim for asbestosis, and then subsequently develops and dies from mesothelioma before the second claim for mesothelioma can be resolved.

11. If the answer was "yes" to question 10:

(a) Should such claims be allowed where the victim died due to any personal injury OR only a latent injury attributable to asbestos?

See response 3 above.

(b) Should such claims be allowed without limitation OR only where the victim commenced the proceedings for further damages prior to his/her death and were pending at the time of death?

Claims for further damages on behalf of the Estate should be allowed without limitation and not solely in circumstances where the victim commenced the proceedings for further damages prior to his or her death and were pending at the time of death.

¹⁸ *Law Reform (Miscellaneous Provisions (Asbestos Disease Act)) 2002 (WA)*

Reform should also occur to allow for the estate to make a claim for further damages (including general damages and the loss of expectation of life) even in the circumstances where a claim for further damages had not been commenced in the asbestos disease sufferer's lifetime.

As the law currently stands, if a Writ is not issued in an asbestos disease sufferer's lifetime, the estate is currently not able to pursue a claim for general damages and loss of expectation of life due to the operation of subsection 2a(c) of *Law Reform (Miscellaneous Provisions) Act 1941*. This is an unjust situation as there are circumstances where asbestos related injury is not diagnosed until after death (ie during the post mortem process) or where a person so rapidly deteriorates they are too unwell to seek legal advice in their lifetime.

No issue of prejudice arises as the defendant will have all the materials from the original claim available, and, on notice of the potential for a later claim, will no doubt have preserved the materials needed to defend it, even in the unlikely event that it wished to contest the liability issues in circumstances where they had necessarily already been determined adversely to it, or it had elected not to contest them, in the original claim. It will have the materials on which the damages were awarded or settled by agreement.

Issue 2: Damages for the value of services provided by the plaintiff to others

1. Should Western Australia introduce a specific head of damages for the incapacity of a plaintiff to provide gratuitous services, domestic or otherwise, to another person? Please explain your reasons.

Yes.

An injured person should be permitted to recover damages for loss of capacity to provide gratuitous or domestic services to another person (such as to a terminally ill spouse, a young child or to an elderly or disabled grandparent). These are a separate head of damages, often referred to as *Sullivan v Gordon* damages.

In *Sullivan v Gordon*¹⁹ the New South Wales Court of Appeal allowed an injured claimant to recover these types of damages. Courts in Western Australia have applied *Sullivan v Gordon* including in *Easther v Amaca Pty Ltd (formerly James Hardie & Coy Pty Ltd)*²⁰ and in *Thomas v Kula*.²¹

However, in *CSR Limited v Eddy*²², the High Court considered *Sullivan v Gordon* damages for the first time and held that it should be overruled. *CSR Limited v Eddy* is authority for the proposition that awards for a non-financial contribution are not recoverable by a plaintiff, as they are not considered to be losses a plaintiff has incurred, but rather, a loss incurred by a third party.

Almost all other Australia jurisdictions have recognised the need to allow an injured person to recover damages for loss of capacity to provide gratuitous or domestic services to a dependant and have introduced a legislative right to damages for the loss of capacity to perform domestic services for another including the Australian Capital Territory, South Australia, New South Wales, Queensland, Tasmania and Victoria.

19 (1999) 47 NSWLR 319

20 [2001] WASC 328

21 [2001] WASCA 362

22 [2005] HCA 64

There is no compelling policy reason why West Australian plaintiffs should be unjustly prevented from claiming these types of damages which are available in 6 other Australian states and territories.

Reasons supporting the need to recognise *Sullivan v Gordon* damages (including reasons espoused in both the case law and the Discussion Paper) include:

- It recognises that the true subject matter of the loss to be compensated is the plaintiff's "accident-created need", regardless if it is productive of financial loss. The exclusion of services performed for others from an award of damages discriminates against those who devote themselves to the care of others within the family household (usually women) to the benefit of the wrongdoer.

For example, take the case scenario of a 27 year old male full time worker as compared to his 39 yr old wife who is the full time carer for a baby. If the male was severely injured and unable to work, he would receive significantly more compensation for his injury as he would receive compensation for loss of earning capacity. If instead the wife sustained the same injury, she would receive no separate head of compensation for her inability to care for the baby, notwithstanding she would likely need to engage family or external carers to assist with the care of the child.

- Injured plaintiffs who can no longer provide services to others as fully as they did before the tort have suffered loss of or impairment to their capacity to provide those services to others. That loss of or impairment to capacity is capable of valuation by reference to the market value of the services. *Sullivan v Gordon* damages can be viewed as analogous to a loss or diminution of earning capacity and should ordinarily be measured by the replacement cost of the services which, by reason of her loss or diminution, the plaintiff is no longer able to provide. Hence such a loss should be recognised as compensable form of damage.
- Damages for loss of capacity to provide services to a dependant are of a character that is not properly characterised as general damages. It is a head of damage for which appropriate compensation is not to be found by relying only on recovery for loss of amenities as part of general damages, for commonly supply of the services does not generate the pleasurable feelings often connected with amenities which have been lost.

- Compensation should be permitted given if the work is not done, the health and safety of families will suffer, and if compensation is refused, the injured plaintiff's children and family will suffer severe hardship.

For example a mother will suffer severe hardship if no compensation is provided for her loss of ability to care for the baby if she is injured and cannot do so. The provision of paid external care and assistance can be beyond the reach of many families if compensation from the wrongdoer is not received. The role of compensation is to put the injured person in the same position as if the injury had not occurred. If compensation is not received, the injured person is not placed in that same position, as they suffer the financial burden of paying for the additional care and assistance.

- The inability to provide an award of damages for loss of capacity to provide services to a dependant unduly provides an advantage to the wrongdoer at the expense of the injured plaintiff or his or her family. The burden for services is not properly place on the injured person, family or taxpayer, it should be placed on the defendant held responsible for the injury,
- The law should recognise the economic value of the domestic contribution of a spouse and parent to his or her family and treat the loss or diminution of the capacity to make that contribution as the spouse's loss.
- In many instances, it is difficult to disentangle the services which the plaintiff formerly provided to his or her family from those which he or she provided for his or herself.
- An increased demand on available government services could result, notwithstanding that such government services are necessarily limited.
- Under the *Fatal Accidents Act* a claim can be made for loss of dependency on services the deceased would have provided around the home²³. This can cause an inequity in that compensation for such services can only be claimed once the plaintiff dies, as opposed to whilst they are living.

It should further be noted that the policy reasons put forward by the respondent were not rejected by the High Court in *Eddy*. Rather, [at 66] the High Court stated that they were reasons more properly considered by the legislature, "*The respondent's arguments then, are*

²³ De Salles v Ingrilli (2002)212 CLR 338 [18]

not necessarily to be rejected for flaws in the policy reasoning on which they rest; they are to be rejected because they rest on policy reasoning which is more appropriate for the legislature to weigh than for the Court."

The Law Society disagrees with the Commission's preliminary assessment that states, "*while six Australian jurisdictions have introduced reforms in this area, it is noted that the legislation is relatively new and therefore continues to be tested before the courts*".

The legislation has been successfully operating in New South Wales, South Australia and the Australian Capital Territory for over 10 years. Further, prior to the Eddy decisions, *Sullivan v Gordon* damages were awarded by West Australian courts. Courts in Western Australia applied *Sullivan v Gordon* including in *Easter v Amaca Pty Ltd (formerly James Hardie & Coy Pty Ltd)*²⁴ and in *Thomas v Kula*.²⁵

If Western Australia should introduce such a head of damages:

- 2. Should damages for gratuitous services be available for all claims OR only some claims? Please explain your reasons.**

Sullivan v Gordon damages should also be available in all personal injury claims where that personal injury prevents the plaintiff from providing gratuitous personal or domestic services for another person (unless specifically excluded by another Act).

The above mentioned reasons in support of the need for *Sullivan v Gordon* damages are universally applicable in all personal injury claims and are not unique to a particular personal injury class. Application to all personal injury claims would afford equal treatment and fairness to all personal injury sufferers.

- 3. If damages for gratuitous services should be available for only some claims, should they be related to asbestos related diseases?**

See response 2 above.

- 4. Should the legislation require the character of the services provided to the plaintiff to be:**

24 [2001] WASC 328

25 [2001] WASCA 362

- (a) Domestic or general services or care; or**
- (b) Of any other description?**

Please explain your reasons.

A plaintiff's entitlement to damages should be limited to gratuitous domestic services and care in order to be consistent with the principles espoused in *Sullivan and Gordon* and ensure those who receive damages are targeted at those where a special high level of care is needed (i.e. parental care for young children or to disabled or seriously ill family members).

Limiting damages to gratuitous domestic services will also align with the predominant number of other Australian jurisdictions and also be aligned with compensation that is available to relatives of a person who suffered a wrongful death under the *Fatal Accidents Act*.

5. In relation to the recipients of the plaintiff's services, should the legislation:

- (a) Require that they be relatives OR household/residence members;**
- (b) Include unborn children of the plaintiff at the time of injury who are subsequently born; and/or**
- (c) Include any other class of recipients?**

A plaintiff's entitlement to damages should require the recipients of the plaintiff's services to be relatives OR household members OR unborn children of the plaintiff who are subsequently born. The definition should align with that used in section 3D of the *Motor Vehicle (Third Party Insurance) Act 1927 (WA)*, namely services provided to persons of the same household or family as the plaintiff.

It is appropriate to include the unborn children of a given the strong legal, moral and ethical duty of a parent to support and care for their child. Note also that the plaintiff in *Sullivan v Gordon* received compensation for assistance required for children which were born after the motor vehicle accident in which she sustained extensive injuries. In *Palmer v RTA and Ors*²⁶ Wood CJ commented with respect to *Sullivan v Gordon*: "As Beazley JA, who delivered the leading judgment, noted, at 331, a claim of this type is based in the plaintiff's "loss of pre-accident capacity". Relevantly, it seems to me that this was the capacity reserved to any

²⁶ [2001] NSWSC 846

*fertile female to care for a child, in the event of her exercising the right she had to become pregnant and to have that child.*²⁷

Placing defined limits on the recipients of the plaintiff's services, would put to rest arguments against the introduction of *Sullivan v Gordon* damages including fears of increased insurance premiums and the introduction of broad ill-defined ambit claims.

6. Should regard be had to the likelihood that the services would have been provided by the plaintiff if they had not been injured?

Yes.

7. If you answered "yes" to question 6, should the legislation require the plaintiff to prove that:

- (a) The services were provided before the injury;**
- (b) There is a reasonable expectation that the services would have continued if they had not been injured; and/or**
- (c) There will be a reasonable need for the services to continue after the plaintiff's injury?**

A plaintiff's entitlement to damages should require the court to have regard to the likelihood that the plaintiff would have provided the services had they not been injured.

To this regard, Option 1 (as outlined in Table 11) is preferred which requires the plaintiff to establish the following:

- Only require that services were provided before the injury (no minimum) or, in the case of an unborn child, there is a reasonable expectation that, after the injury, the services would have been provided for a defined number of hours per week and consecutive period of time;
- There is a reasonable expectation that, after the injury, the services would have been provided for a defined number of hours per week and consecutive period of time; and
- There will be reasonable need for the services to be provided for those hours per week and that consecutive period of time.

²⁷ At [497]

Further in regards to post injury services, it is appropriate to prescribe a demonstration that the services would have been provided at least 6 hours per week for at least 6 consecutive months.

This is a balanced approach and is consistent with the approach taken in NSW, Victoria and Queensland.

As set out in Table 11 of the Discussion Paper, the advantages of Option 1 include:

- It ensures that damages are restricted to claims where there is the greatest need, ie where the plaintiff's dependents have an ongoing need for significant services previously provided by the plaintiff.
- It ensures greater fairness to defendants to establish the services were provided before the injury and would have continued but for the injury due to the ongoing needs of the dependent.
- It is easier for plaintiff's to establish claim if no requirements regarding minimum services provided before the injury.
- It focuses on future need which is the objective of *Sullivan v Gordon* damages.
- It provides potential for more consistent results (compared with options 3 and 4) and affords fairness to both plaintiff and defendant.
- Avoids frivolous or speculative claims.
- Is consistent with other jurisdictions in Australia.

8. If you answered "yes" to question 7(a), should the legislation require the plaintiff to prove that the services were provided before the injury for a minimum period of time and duration (for example, at least 6 hours per week for 6 consecutive months)?

Yes. (See response 7 above).

9. If you answered "yes" to question 7(b), should the legislation require the plaintiff to prove that there is a reasonable expectation that the services would have continued after the injury for a minimum period of time and duration (for example, at least 6 hours per week for 6 consecutive months)?

Yes. (See response 7 above).

10. If you answered “yes” to question 7(c), should the legislation require the plaintiff to prove that there will be a reasonable need for the services to continue after the plaintiff’s injury for a minimum period of time and duration (for example, at least 6 hours per week for 6 consecutive months)?

Yes. (See response 7 above).

11. Are there any other criteria that should be applied when assessing such head of damages? Please explain your reasons.

No other criteria should be applied when assessing *Sullivan v Gordon* damages.

In particular, there should be NO requirement that the Plaintiff must prove expenditure incurred in consequence of the plaintiff being prevented from providing a particular service.

To impose such a burden on the Plaintiff would be inconsistent with both the underlying policy reasons supporting *Sullivan v Gordon* damages and would not recognise the gratuitous and domestic/familial nature of the services provided which are likely to be picked up by another family member if the plaintiff is rendered incapable due to injury. Further, it would be inconsistent with the other Australian jurisdictions including Tasmania, South Australia, Australian Capital Territory, Queensland, New South Wales and Victoria.

12. Should legislation permitting damages for gratuitous services:

(a) Prescribe that damages be awarded for services which the plaintiff was prevented from providing during his or her lifetime only OR should such damages include the “lost years” after death; or

(b) Be silent on whether damages may be awarded for the “lost years”?

Legislations allowing an injured person to recover damages for loss of capacity to provide gratuitous or domestic services to a dependant should expressly prescribe that damages include the “lost years” after death.

An express provision would ensure support for the people who would have continued receiving the plaintiff’s services but for his or her death and would be consistent with how damages are calculated for economic loss (which include “the lost years”). It would further provide courts with greater certainty about how to calculate damages.

As outlined above at Answer 1, if a person passes away, their dependant relative (as defined in Schedule 2 of the *Fatal Accidents Act 1959*), is able to bring a claim for loss of financial support and also loss of services. As part of the loss of services claims, the relative is able to claim for the services the deceased person provided to them in their lifetime including for the "lost years" ie the years in which the services would have likely been provided after the plaintiff's actual death until the date to which he or she was expected to have lived had the injury or disease not occurred.

If, when making an award for *Sullivan v Gordon* damages, the Courts are limited to making an award in respect of services which the plaintiff was prevented from providing during his or her lifetime, it would leave a position where a claim could possibly be worth more if made by a plaintiff's dependant after the plaintiff's death than if awarded in the plaintiff's lifetime. This cannot be just and is an undesirable position.

Therefore, *Sullivan v Gordon* damages should be awarded for the "lost years" or in other words for the years in which the services might have been provided after the plaintiff's actual death until the date to which he or she was expected to have lived had the injury or disease not occurred.



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