

FATAL ACCIDENTS AMENDMENT BILL 2008

Receipt and First Reading

Bill received from the Assembly; and, on motion by **Hon Sue Ellery (Minister for Child Protection)**, read a first time.

Second Reading

HON SUE ELLERY (South Metropolitan — Minister for Child Protection) [5.06 pm]: I move —

That the bill be now read a second time.

Persons suffering the pain and indignity of an asbestos-related disease deserve our compassion, as do the families of asbestos victims. Significant legislative recognition of the special nature of claims arising out of asbestos exposure has been accorded by this government in its asbestos-specific limitations legislation in 1983 and 2005, and in its landmark 2002 legislation amending the Law Reform (Miscellaneous Provisions) Act 1941, preserving for the estates of the victims of asbestos-related diseases the general damages for pain and suffering and loss of enjoyment of life that would otherwise have been extinguished with the death of the victim. The intention was that no longer would persons stricken with mesothelioma or some other asbestos-related disease be fearful, out of concern for their family's future security, that their common law claims would not be finalised during their lifetimes.

Unfortunately, an anomaly, exemplified in the New South Wales decision of *BI Contracting Pty Ltd v Strikwerda* [2005] NSWCA 288, has come to light in the interaction between claims by victims' estates under the Law Reform (Miscellaneous Provisions) Act 1941 and claims by victims' dependants under the Fatal Accidents Act 1959. That anomaly, drawn recently to the government's attention by the Asbestos Diseases Society of Australia Inc, results in general damages awards inherited by the dependants of asbestos victims being deducted in the calculation of dependants' damages claims. This unfair deduction clearly undermines the beneficial intention of the 2002 amendment. It will be addressed by this bill.

When the victim of a tort dies, claims for damages may be made against the wrongdoer by the victim's estate—for the deceased's economic loss, and, in the case of asbestos claims, general damages—under the Law Reform (Miscellaneous Provisions) Act 1941, and by the deceased's dependants, under the Fatal Accidents Act 1959, for their economic loss consequential upon the victim's death.

In assessing the dependants' damages entitlements, account is to be taken not only of their pecuniary losses, but also of any pecuniary gains—unless excluded by legislation—consequential upon the relative's death. The *Strikwerda* principle holds that those gains include, in the case of dependants of asbestos disease victims, any general damages awarded to the victims' estates that are inherited by those dependants. Those damages are typically of the order of \$165 000. Thus a widow who is \$500 000 worse off financially as a consequence of her husband's death by reason of lost wages and the absence of his assistance around the house and who inherits her husband's estate, inclusive of \$165 000 general damages, will be awarded only \$335 000 under the Fatal Accidents Act. A widow whose economic loss was \$20 000 would receive no award. By contrast, if the victim bequeathed the \$165 000 to a third party, the widows would receive awards of \$500 000 and \$20 000 respectively.

The consequence is that, again, asbestos disease victims feel pressured at an emotionally and physically harrowing time to resolve damages claims during their lifetime so that they can ensure that any award of general damages is inherited by their dependants. Moreover, asbestos disease victims are, in effect, discouraged from leaving the anticipated general damages component of their estates to their spouses and children; or, alternatively, obliged to seek to put in place expensive, complex and perhaps uncertain inheritance arrangements or to rely upon other beneficiaries voluntarily gifting their bequests to those dependants.

This bill amends the Fatal Accidents Act 1959 so that damages for pain and suffering and loss of enjoyment of life received by the estate of a victim of an asbestos-related disease under the Law Reform (Miscellaneous Provisions) Act 1941 are not taken into account when calculating the value of the benefits lost by the victim's dependants for the purposes of a claim by those dependants under the Fatal Accidents Act 1959. Such inherited damages will be added to the act's other exclusions, including insurance and superannuation proceeds. The bill will operate retrospectively, meaning that dependants' damages entitlements will be calculated in accordance with the bill irrespective of whether the asbestos victim died before or after the bill comes into operation. Dependants' claims that have been resolved, by judgement or settlement, will not be affected by the bill.

The bill also contains an amendment to repeal section 10 of the Fatal Accidents Act that relates to limitation periods. Section 10 is now redundant, given the introduction of the Limitations Act 2005 and is to be repealed. I urge that the bill be passed without delay.

The Leader of the House has asked me to indicate—I understand he has discussed this with the Leader of the Opposition and with the Greens (WA)—that his preference would be for this bill to be dealt with on Wednesday of next week. I commend the bill to the house.

Debate adjourned, pursuant to standing orders.