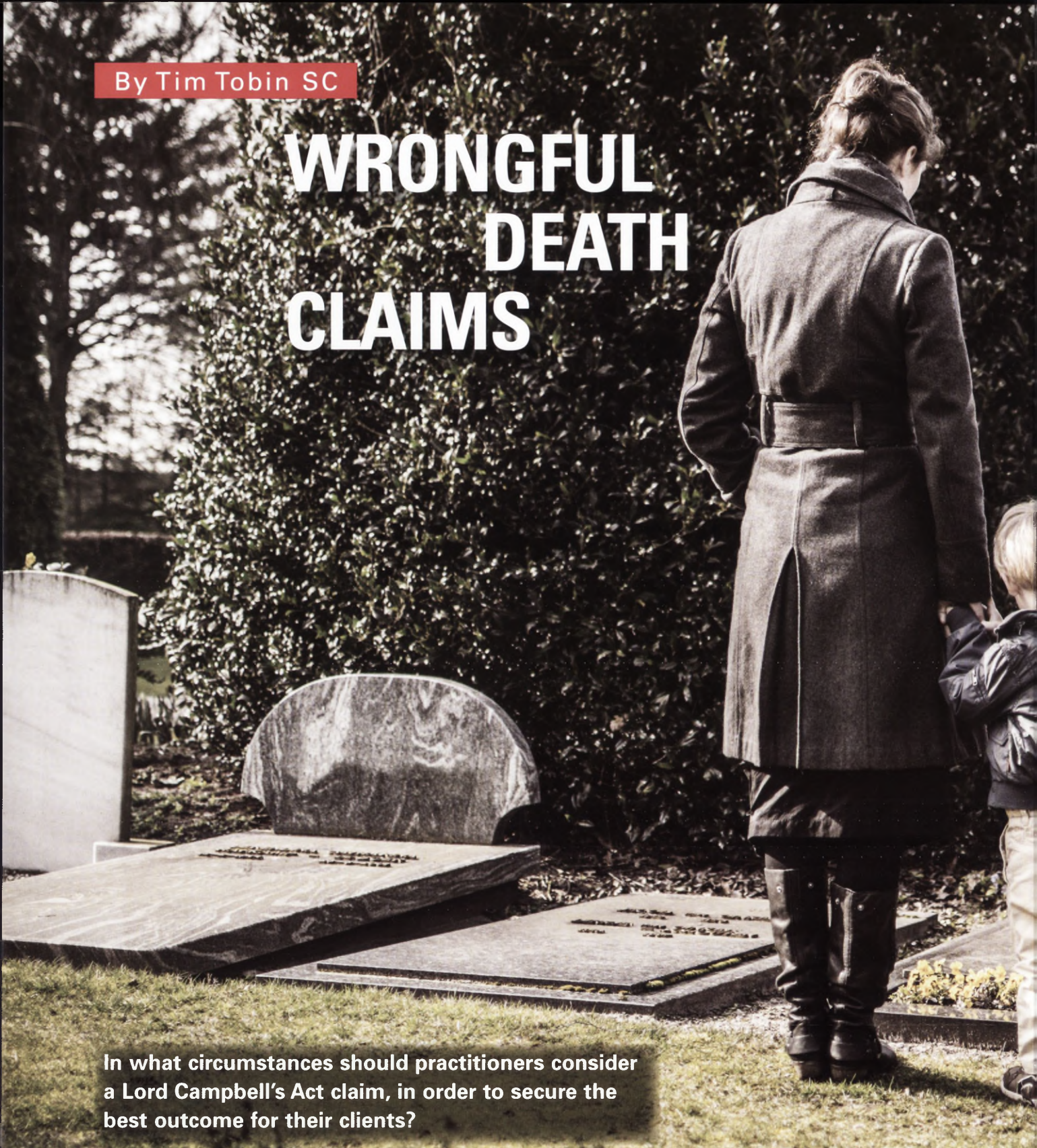


By Tim Tobin SC

WRONGFUL DEATH CLAIMS



In what circumstances should practitioners consider a Lord Campbell's Act claim, in order to secure the best outcome for their clients?

The common law has never permitted an action for damages by dependants of a person killed in a tort.¹ In 1846, inspired principally by deaths in railway accidents, Lord Campbell championed the introduction of legislative reform of this situation. The *Fatal Accidents Act 1846* (UK), which he introduced, was the genus of similar legislation throughout

common law countries. As this legislation is known by different names in different jurisdictions, it is referred to here as 'Lord Campbell's Act'.

The common law damages that may be recovered under the various forms of Lord Campbell's Act vary from country to country and between the various states and territories, although the variations are minimal. There is great similarity

between jurisdictions in the assessment of damages, with all jurisdictions adopting what was said by Lord Wright in *Davies v Powell Duffryn Associated Collieries Ltd*:²

'There is no question here of what may be called sentimental damage, bereavement or pain and suffering. It is a hard matter of pounds, shillings and pence.' There are two limited exceptions to this, in South Australia and Scotland, where damages for *solatium*³ are awarded.⁴

This article does not endeavour to deal with the evolution of the legislation, however, or to analyse generally the methods of assessing damages for wrongful deaths. These are superbly explained in Chapter 9 of Professor Luntz's book, *Assessment of Damages for Personal Injury and Death*.⁵

It should, however, be remembered that Luntz's 4th edition preceded *De Sales v Ingrill*,⁶ which considered the deductions to be made for remarriage or prospects of remarriage.⁷ This judgment led to various states introducing legislative clarification of this issue. See, for example, s19(2) of the *Wrongs Act 1958* (Vic):

'In assessing damages in an action under this Part... no separate reduction may be made on account of:

- (a) the remarriage or formation of a domestic partnership; or
- (b) the prospects of remarriage or formation of a domestic partnership – of the surviving spouse or domestic partner, or of a surviving former spouse or former domestic partner, of the deceased person.'

Further, since the publication of the 4th edition, various limitations on damages that may be recoverable⁸ have been introduced in various jurisdictions following implementation of Justice Ipp's report.⁹

When assessing damages in a Lord Campbell's Act claim, it must be remembered that this cannot be done precisely due to the many assumptions or predictions that must be made. Some of these are mentioned by McHugh J in *De Sales v Ingrill*.¹⁰ The inexactitude of the assessment of damages and the sympathy that usually exists for the dependants means that Lord Campbell's Act cases seldom run to judgment. Like all litigation, however, the quality of the preparation is usually reflected in the magnitude of the damages.

This article deals with four main issues that practitioners should take into account when considering a Lord Campbell's Act claim:

1. On whose behalf the claim is being brought;
2. The need to compare certain common law damages and damages under Lord Campbell's Act (should we let her die?);
3. The need to compare damages under Lord Campbell's Act with potential statutory benefits (statutory benefits); and
4. What claim by an estate survives the death of the victim (estate claims).

1. ON WHOSE BEHALF IS THE CLAIM BEING BROUGHT?

In every jurisdiction in Australia, one action is brought for all dependants: there is no separate right of action for each dependant. The court shall award damages to the parties in

the action respectively as are proportioned to the injury and resulting from death.

Thus, one action is brought for all dependants, even though in certain circumstances there may be separate representation, such as between two widows. A practitioner, in bringing an action, usually on the instruction of the executor, administrator or principal dependant, must consider the entitlement of all persons who are dependants.

Dependency is not limited to spouses or children. Parents may often be substantially dependent, particularly in situations where the deceased has been providing services to the family farm or caring for elderly or incapacitated parents, for example.

The defendant is liable for only one lump sum, which is then to be apportioned between the dependants.

Accordingly, care should not only be taken to determine who the dependants are, but also to determine the consequences of bringing an action. In this regard, a person (usually the dependent spouse) may have a significant statutory benefit, which will be lost if an action is brought. This problem is most acute where there are two dependent spouses, one of whom is entitled to the statutory benefit.

2. SHOULD WE LET HER DIE?

Occasionally, instructions are received from a client who is terminally ill who wishes to recover damages, usually for the benefit of their dependants. While the immediate urge might be to issue proceedings, to arrange for evidence to be taken *de bene esse* and do all that is necessary to complete the proceedings within that person's remaining life, practitioners should first consider whether this is the best course to adopt.

This consideration, of course, need only be given where there are dependants.

Where negligence is established in a common law proceeding, a person who is about to die will have an entitlement to damages for:

- (a) pain and suffering;
- (b) loss of expectation of life;
- (c) medical and like expenses;
- (d) the care being the actual or notional cost of care they are to receive under the principles in *Griffiths v Kerkemeyer*;¹¹
- (e) loss of earnings; and
- (f) loss of earnings capacity which, where premature death is expected, is calculated by deducting the notional living expenses that would have been incurred while undertaking such employment after the date of death.

When comparing the entitlement to common law damages with what would be recovered under Lord Campbell's Act, the only two heads of damages that expire with the client's death are:

- (a) Pain and suffering damages, which are not recoverable in most jurisdictions if the person dies from injury or illness caused by the tort (aside for some special exemptions relating to dust diseases and asbestos-related conditions); and
- (b) Loss of expectation of life. This head of damage is, however, traditionally very modest (in the magnitude of \$30,000 to \$40,000).

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Only *one* proceeding is brought on behalf of *all* dependants, which can create conflict if certain dependants consequently lose statutory benefits.

Relevant to a comparison between common law damages awarded prior to death and the assessment of a Lord Campbell's Act claim are two High Court decisions:

- (a) *CSR Ltd v Eddy* (2005) 226 CLR 1;¹² and
- (b) *Taylor v Strata Plan No. 11564* [2014] HCA 9 (20 April 2014).¹³

In *CSR Ltd v Eddy*, the High Court disallowed a claim for the loss of services that, if it hadn't been for his injury, the plaintiff would have provided his disabled wife. These services were gratuitous and to be assessed under similar principles to damages in *Griffiths v Kerkemeyer*¹⁴ and *Sullivan v Gordon*.¹⁵

The value of these services may, however, form a significant component of a Lord Campbell's Act claim (*Nguyen & Ors v Nguyen*).¹⁶ Even with the introduction of the Ipp amendments into most jurisdictions, which limited the claim for gratuitous services to 40 hours per week (assessed at the rate of average weekly total earnings under ss19A and 19B of the *Wrongs Act* 1958, Victoria),¹⁷ such a claim can be substantial. For example, a mother who was providing services to her spouse and children (particularly where there was a child with special needs), and who would have been likely to do so for a further period of, say, 20 years, could have such damages assessed on her death in a Lord Campbell's Act claim in excess of \$600,000 [\$1,331 (being the average weekly earnings) x 664 (5 per cent multiplier for 20 years) x 0.85 (discount for vicissitudes)]. Such Lord Campbell's Act damages would certainly exceed any damages awarded for pain and suffering and loss of expectation of life.

Further, the High Court in *Taylor v Strata Plan No. 11564*¹⁸ further increased the need (at least in New South Wales) to compare common law damages with damages under Lord Campbell's Act.

The High Court in *Taylor* held that the limitation imposed by s12 of the *Civil Liability Act* 2002 (NSW) which instructs the court in assessing loss of earning capacity 'to disregard the amount (if any) by which the claimant's gross earnings would...have exceeded an amount that is three times the average weekly earnings at the date of the award' did not apply to the *Compensation of Relatives Act* 1897 (NSW), being the Lord Campbell's legislation in New South Wales.

Taylor related to a surveyor who, it was agreed by the parties, had earnings greater than three times the average weekly earning: so the question of whether the restrictions imposed by s12 of the *Civil Liability Act* 2002 NSW was the only issue being determined by the court.

In light of this decision, if a person was earning, say, \$300,000 net per year, his common law damages by reason of s12 would be restricted in assessment to gross earnings of approximately \$200,000 gross per year, or \$135,000 net per year. His living expenses are to be deducted from this sum.¹⁹ The damages likely to be awarded to that person for his loss of earnings capacity if he were suffering a terminal illness would, of course – leaving aside the issue of *CSR v Eddy* – be much less than what a dependent spouse and children would be likely to receive under a Lord Campbell's Act claim.

In claims where common law damages as compared with Lord Campbell's Act claims are significantly affected by *CSR v Eddy* or *Taylor v Strata Plan No. 11564*, it should be recognised that the Lord Campbell's Act claim may have a greater potential, and the client should be so advised.

In advising the client, care should be taken to check that the circumstances of the death do not attract a cap on the Lord Campbell's Act damages, such as applies under some workers' compensation and transport accident legislation.²⁰

Further, while an assessment of potential damages may require a practitioner to inform a client that their dependants may receive a larger sum in an action subsequent to their death rather than while they are still alive, it must be remembered that there are other reasons why a damages claim should be brought quickly for such a client, including:

1. the client may be a very important witness in establishing the liability of the tortfeasor, particularly in medical negligence actions;
2. fulfilling the client's desire to see this tortfeasor found liable and the certainty associated with that (again, especially where medical negligence is a cause of death); and
3. the client may prefer to be able to direct the proceeds of his or her claim in a way that s/he thinks best, rather than have a court do so, as between the dependants under a Lord Campbell's Act claim.

3. STATUTORY BENEFITS

While the potential of a Lord Campbell's Act claim may be significant, care must be taken to investigate whether or not continuing to receive a statutory benefit would be a better course.

In most states, transport accident or workers' compensation legislation provides for a lump sum death benefit and ongoing weekly payments for a period of time. In Victoria, the weekly benefit under the *Transport Accident Act* 1986 (Vic) continues while there is a dependent child (any full-time student under the age of 25 is defined as a dependent child). Accordingly, the benefit to a widow with children is frequently greater if they continue to receive the statutory benefit rather than taking a proceeding under Lord Campbell's Act, especially where there is a cap of just under \$800,000.

Further care must be exercised in making this assessment given that transport accident or workers' compensation legislation often restricts matters that may be taken into account when assessing a Lord Campbell's Act claim. For example, s93(12A) of the *Transport Accident Act* 1986 (Vic)

precludes damages 'in respect of services of the nature of housekeeping or the care of a child which would have been provided by the deceased person' while preserving some access to those benefits for a period of five years under statute.

4. ESTATE CLAIMS

At common law, a person's right of action for personal injury dies with them. This has been modified by statute in all states and territories, particularly to preserve damages for non-pecuniary loss in dust disease and asbestosis cases.

Claims that persist for the estate of a deceased person include:

- (a) loss of earnings to date of death;
- (b) medical and like expenses to date of death;
- (c) care expenses to date of death; and
- (d) funeral and like expenses.

Care must be taken when proceeding with a Lord Campbell's Act claim to recognise the separate entitlements of the estate and to pursue those entitlements. These entitlements, although not part of the Lord Campbell's Act claim, may (and often are) included in the same proceeding, as there is great commonality of issues, especially regarding negligence and causation.

CONCLUSION

The assessment of damages under Lord Campbell's Act is a creature of statute. Care must be taken in determining what statute applies, as the tort may often have occurred in other states. While the principle of assessing damages is similar in a common law action, it is often subject to caps and in many circumstances any statutory benefit created by the circumstances of the death ceases upon completion of the Lord Campbell's Act claim. Therefore, comparative benefits must be determined before issuing proceedings.

It must also be remembered in bringing a proceeding that one proceeding is brought on behalf of *all* dependants. This can create conflict, particularly where certain dependants have statutory benefits that will be lost. In circumstances where there may be two dependent wives, for example, bringing a Lord Campbell's Act proceeding will be to the detriment of the one who is receiving the statutory benefit. She will certainly be worse off and yet has no capacity to stop the proceeding being brought.

When assessing whether a Lord Campbell's Act claim should be issued, it should further be borne in mind that parents frequently have a level of dependency upon their children, especially in the conduct of a family farm and other small businesses, or where domestic help is provided and is likely to be provided. Dependency runs not always down the line but sometimes up the line.

While most Lord Campbell's Act claims are relatively straightforward, particular care needs to be taken in bringing such actions, as they often involve children and the method of assessing damages is different, particularly in light of the decisions in *CSR Ltd v Eddy* and *Taylor v Strata Plan No. 11564*. ■

Notes: **1** *Baker v Bolton* (1808) 1 Camp.493. **2** 1942 AC 601. **3** Damages for the feeling of grief as a pain and suffering damage. **4** A comprehensive history of the development of legislation and comparative rights as between jurisdictions is usefully set out in articles by Professor PQR Boberg, 'A Comparative Study of the Laws of England, Scotland, Canada, Australia, New Zealand and South Africa, with occasional references to the law of the United States', 81 *S African LJ* III 1964, 194 and 346. **5** Professor Harold Luntz, *Assessment of Damages for Personal Injury and Death*, 4th edn, 2002, LexisNexis Butterworths, Chapter 9. **6** *De Sales v Ingrill* (2002) 212 CLR 338. **7** In the circumstances of that widow's case, the court applied a 5% reduction in her damages for the prospects of remarriage. **8** For example, s19A and B *Wrongs Act* (Vic) 1958 created a limitation on the damages recoverable for gratuitous care. **9** Justice Ipp, *Review of the Law of Negligence*, September 2002. **10** (2002) 212 CLR 338, at 373. **11** *Griffiths re Kerkemeyer* (1977) 139 CLR 161. **12** *CSR Ltd v Eddy* (2005) 226 CLR 1. **13** *Taylor v Strata Plan No. 11564* [2014] HCA 9 (20 April 2014). **14** See note 12 above. **15** (1999) 47 NSW LR 331. **16** *Nguyen & Ors v Nguyen* (1989) 169 CLR 245. **17** Sections 19A and 19B of the *Wrongs Act* 1958 (Vic). **18** See note 14 above. **19** Although income in excess of \$200,000 must be ignored, should the projected notional or actual living expenses of a deceased who would have earned – and spent – more be taken into account? Whether the deduction should be the actual expenditure or a notional, scaled-down figure is a point that has yet to be decided by any court. **20** For example, s93(9) of the *Transport Accident Act* 1986 (Vic); s135C, *Accident Compensation Act* 1985 (Vic).

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