

By Andrea Tsalamandris and Linda Hanley

# The death of a legal claim



claim

**There is no logic or justice in the fact that the outcome of a person's legal action for compensation is affected by the timing of their death. If the death is caused by the negligent act or omission that is the subject of the claim (except when it is a dust-related condition), claims for pain and suffering damages die with the plaintiff.**

**W**e recently acted for a lovely lady who experienced extensive pain and suffering over a five-year period. Her pain and suffering were caused by the significant injuries she sustained at the hands of her treating doctor during a surgical procedure. She was a courageous woman who, despite her significant injuries, sought to live as ordinary a life as her physical impediments would allow. She was able to return to work, and continued working until her sudden death at the age of 72. She sadly passed away due to her medical condition, which was the subject matter of her damages claim.

Before her unexpected death, a writ had been issued against the doctor who had caused her injuries, and her matter had been scheduled for mediation. However, after

her death we had the very difficult task of explaining to her family that because she had died from one of the medical conditions that was the subject of her damages claim, her entitlements to pain and suffering damages had been buried with her; and consequently, that her estate was now barred from claiming what would have otherwise been significant pain and suffering damages.

There are few elements of the law that truly defy logic; this appears to be one of them. As plaintiff lawyers, we struggle to explain to clients and their families that a person's legal claim is significantly affected by the timing of their death. It seems unjust and counterintuitive. In Victoria, these unfair provisions are contained in s29 of the *Administration and Probate Act 1958* (Vic) and s16 of the *Wrongs Act 1958* (Vic). There are equivalent provisions in other states as noted in this table:



	Equivalent to s29 of <i>Administration and Probate Act 1958 (Vic)</i>	Equivalent to s16 of <i>Wrongs Act 1958 (Vic)</i>
<b>NSW</b>	Section 2 of <i>Law Reform (Miscellaneous Provisions) Act 1944</i>	Section 3 of <i>Compensation to Relatives Act 1897</i>
<b>Queensland</b>	Section 66 of <i>Succession Act 1981</i>	Section 64 of <i>Civil Proceedings Act 2011</i>
<b>South Australia</b>	Sections 2 and 3 of <i>Survival of Causes of Action Act 1940</i>	Section 23 of <i>Civil Liability Act 1936</i>
<b>Western Australia</b>	Section 4 of <i>Law Reform (Miscellaneous Provisions) Act 1941</i>	Section 4 of <i>Fatal Accidents Act 1959</i>
<b>Tasmania</b>	Section 27 of <i>Administration and Probate Act 1935</i>	Section 4 of <i>Fatal Accidents Act 1934</i>
<b>ACT</b>	Sections 15 and 16 of <i>Civil Law (Wrongs) Act 2002</i>	Section 24 of <i>Civil Law (Wrongs) Act 2002</i>
<b>Northern Territory</b>	Section 5 and 6 of <i>Law Reform (Miscellaneous Provisions) Act 1956</i>	Section 7 of <i>Compensation (Fatal Injuries) Act 2011</i>

To add to the peculiarity of the law in relation to this area, different limitations are placed on the damages accessible by the estate upon the death of the claimant depending on whether the death is related to the act or omission which gave rise to the cause of action.

**DEATHS RELATED TO THE CAUSE OF ACTION**

Under s29(2)(c) of the *Administration and Probate Act 1958 (Vic)*, the following damages are not available to the estate where the death of the claimant is related to the cause of action:

- Any loss (with the exception of funeral expenses) or gain to the deceased's estate upon his or her death (s29(2)(c)(i)).
- Any damages for the pain or suffering suffered by the deceased (s29(2)(c)(ii)).
- Any damages for any bodily or mental harm suffered by the deceased (s29(2)(c)(ii)).
- Any damages for the curtailment of the deceased's life (s29(2)(c)(ii)).
- The future probable earnings or loss of earning capacity of the deceased (s29(2)(c)(iii)).


Although Part III of the *Wrongs Act 1958 (Vic)* is generally read in conjunction with the *Administration and Probate Act 1958*, the damages that are available under the *Wrongs Act 1958* are restricted, too.

Under s17 of the *Wrongs Act 1958*, if a person's death has been caused by a wrongful act or neglect, damages actions must be for the benefit of the person's dependants. In practical terms, that means damages available under that Act are confined to the loss of financial and non-financial support previously provided by the deceased person to his or her dependants. The amount of damages awarded for the loss of financial support previously provided by the deceased person to his or her dependants is generally determined through a well-recognised methodology proposed by Harold Luntz in *Assessment of Damages for Personal Injury and Death*.<sup>1</sup> This methodology operates under the assumption that a portion of an individual's income will be used for their sole benefit (that is, for the purchasing of clothes, food and drinks, and

leisure expenses) and that the balance will be used for the benefit of his or her dependants. Luntz provides guidance on what portion of income should be distributed to a dependant based on whether or not the deceased person's spouse was earning an income, and the number of dependent children the deceased had. By way of an example, according to Luntz the non-income-earning widow of a deceased man with two dependent children would be entitled to claim 76 per cent >>

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	Equivalent to s29(2A) of <i>Administration and Probate Act 1958 (Vic)</i>
NSW	Section 12(B) of <i>Dust Diseases Tribunal Act 1989</i>
Queensland	Section 66(2A) of <i>Succession Act 1981</i>
South Australia	Section 3(2) of <i>Survival of Causes of Action Act 1940</i>
Western Australia	Section 4(2a) of <i>Law Reform (Miscellaneous Provisions) Act 1941</i>
Tasmania	Section 27(3A) of <i>Administration and Probate Act 1935</i>
ACT	Section 16(4) of <i>Civil Law (Wrongs) Act 2002</i>
Northern Territory	Section 6(2) of <i>Law Reform (Miscellaneous Provisions) Act 1956</i>

of his income, for the benefit of herself and her children in a damages claim.

In addition to financial support, a claim can be made by the deceased's estate for the value of non-financial support or services that would have been rendered by the deceased. This might entail a claim for the general household assistance, gardening and car maintenance services that were previously provided by the deceased. If the deceased was a parent of young children, a claim can also be made for the time the deceased spent each week caring for his or her children. This will include the time the deceased spent bathing and dressing the children, providing homework assistance to the children, and time spent driving the children to their respective activities.

**DEATHS UNRELATED TO THE CAUSE OF ACTION**

Ironically, however, where the death of the claimant is not caused by the act or omission which gives rise to the cause of action (provided the proceedings were issued at the time of death), there is no legislation that prohibits the estate from proceeding with a damages claim. In this instance, the estate can claim for the pain and suffering suffered by the deceased up to the time of death; and in addition to this, the loss of earnings experienced by the deceased from the time of the negligent act or omission through to the date of death.

The damages for pain and suffering will generally be rather limited, as the deceased is unable to give evidence as to the pain and suffering he or she has sustained as a result of the act or omission. Damages will generally be quantified based on the evidence provided by family and friends of the deceased of his or her pain and suffering.

**THE EXCEPTION: DUST-RELATED CONDITIONS**

An exception to the above principles are victims who die as a consequence of a dust-related condition. Provisions in the relevant laws make special allowances so that the estate of a deceased victim of a dust-related condition is able to recover damages that the estate would have otherwise been excluded from. These exceptions apply regardless of whether or not proceedings were issued at the time of death.

A dust-related condition under the *Administration and Probate Act 1958 (Vic)* is defined as:

- 'Aluminosis, Asbestosis, Asbestos induced carcinoma, Asbestos related pleural diseases, Bagossosis, Berylliosis,

Byssinosis, Coal dust pneumoconiosis, Farmers' lung, Hard metal pneumoconiosis, Mesothelioma, Silicosis, Silico-tuberculosis, Talcosis;' or

- 'Any other pathological condition of the lungs, pleura, peritoneum or sinus that is attributable to dust.'<sup>2</sup>

Provided it can be shown that the deceased is a victim of a dust-related condition, the damages that will be available to his or her estate under s29(2A) of the *Administration and Probate Act 1958 (Vic)*, will include damages for:

- any pain and suffering experienced by the deceased;
- any bodily or mental harm suffered by the deceased; and
- the curtailment of the deceased's expectation of life.

In addition to claiming pain and suffering damages, a claim can also be made for the financial and non-financial support provided by the deceased as discussed above.

The equivalent provisions in other states are set out in the table above.

**CONCLUSION**

It is illogical that a person's legal claim should be limited by their death. It is peculiar that different damages are available to a deceased's estate depending on whether the death is related to the cause of action. It is inequitable that only deaths caused by dust-related conditions are exempted from the limitations imposed by s29 of the *Administration and Probate Act 1958 (Vic)*. As our client's daughter said, 'the defendant is financially benefitting from having ultimately killed my mother'. ■

**Notes:** 1 Harold Luntz, *Assessment of Damages for Personal Injury and Death*, Australia, 4th edition, 2002. LexisNexis Butterworths.  
2 *Administration and Probate Act 1958 (Vic)*, s3, Schedule 1.

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