



The dying plaintiff

By Sarah Atkinson and Gerard Mullins

Historically, the approach that lawyers have taken to managing a claim for damages for personal injury of a person who has a dramatically shortened life expectancy ('the dying plaintiff') has been to take all steps possible to expedite the claim and bring it to completion during the remainder of the life of the plaintiff. However, developments in the law relating to dependency and the awards of damages for domestic care and assistance provided to others suggest that the plaintiff may well pass on to their family and others a much greater benefit if their claim is brought as a dependency claim as opposed to an estate claim for damages for personal injury. >>

This article examines aspects of the law relating to claims for damages for the dying plaintiff, including associated estate and dependency claims; some of the matters the lawyer should consider when advising the client about whether to proceed with the claim or otherwise; the evidence that should be obtained from the dying plaintiff to ensure that the capacity to bring the claim and the related evidence are protected; and observations on how such a claim should be managed.

LEGAL FRAMEWORK

Estate claims

Succession legislation in each Australian jurisdiction¹ provides for the survival of actions to the estate, thereby modifying the common law rule that a personal action dies with the individual. The legislation is similar in each jurisdiction but not identical. Generally, all causes of action (subject to limitations on damages) vested in the plaintiff before their death will survive for the benefit of his or her estate. The legislation in each jurisdiction broadly provides that the following damages can be recovered:

- past out-of-pocket expenses (medical, hospital, travel and pharmaceutical expenses incurred prior to death);
- past economic loss (loss of earning capacity between the date of injury to the date of death);
- past voluntary assistance (value of services voluntarily rendered to the plaintiff prior to death); and
- funeral expenses.

The succession legislation generally excludes damages recoverable for 'pain and suffering', 'any bodily or mental harm' and 'curtailment of expectation of life'. This is with the exception of Western Australia where recovery for general damages is allowed if the deceased has commenced litigation prior to their death.² Exemplary damages do not survive the estate. Damages are calculated without considering any losses or gains to the plaintiff's estate subsequent to the death.

Importantly, the succession legislation does not permit the recovery of future economic loss for the period after the plaintiff's death where the death is caused by the act that gives rise to the claim. The legislation was amended to ensure that the defendant was not exposed to double liability upon paying damages to the plaintiff's estate as well as damages to the dependants.

A claim for dependency might not succeed if the deceased settled the matter, obtained judgment or the limitation period expired prior to death,³ although it is arguable that the dependency claim might survive the settlement of the primary claim⁴ in the absence of specific legislation (for example, legislation relating to asbestos claims operates differently from that for other personal injury claims). Legislation in some jurisdictions specifically provides that the dependency claim may still be pursued after the settlement or determination of the primary personal injury claim.

Dependency claims

The Lord Campbell's legislation⁵ permits dependants to claim damages for wrongful death where the deceased's death was caused by the act that gives rise to the claim. An action can be brought for the benefit of the dependants of the deceased.⁶ Generally, damages can be claimed for:

- loss of past financial dependency;
- loss of future financial dependency;
- loss of past domestic services; and
- loss of future domestic services.

Damages are calculated by the actual loss up to the date of assessment as well as the support which would reasonably have been expected to be provided in the future. However, in most Australian jurisdictions, no damages are awarded for grief or suffering.⁷

No discount should be allowed for the prospect of the claimant remarrying or forming a new continuing relationship.⁸ In general, a separate and substantial discount for remarriage or relationship is warranted only where there is evidence that a new relationship has been formed or is proposed and that it will bring financial benefit to the claimant. At common law, a general discount for contingencies is the appropriate course. Some jurisdictions have introduced a statutory regime to reflect or extend the principle in *De Sales*.⁹

Legislation regulating the award of damages may apply to such claims. For example, in Queensland the court must disregard any earnings above the normal weekly earnings as published by the Australian Bureau of Statistics on a quarterly basis.¹⁰ In Victoria, limitations are placed upon awards for gratuitous care. However, in Western Australia there is no limit on recoverable compensation for a wrongful death.

Loss of consortium claims

Loss of consortium claims have been abolished in Tasmania, Western Australia and the Australian Capital Territory.¹¹

In the other Australian jurisdictions, the common law rule in *Baker v Bolton*¹² remains unchanged, allowing for loss of consortium claims to be brought while an injured spouse is unwell. However, upon the death of the spouse such a claim is extinguished.

This is with the exception of Queensland, where legislation specifically excludes such a claim unless the spouse has died as a result of their injuries and their general damages are above the amount specified in the Regulations.¹³ Where these requirements are met it is possible for a separate loss of consortium claim to be brought by their surviving spouse, subject to limitations on damages as set out in the legislation. The term 'spouse' for the purposes of these claims also includes *de facto* partners, including same-sex *de factos*.

In *Crabtree v Crabtree (No. 2)* 'consortium' was described as:

'... a partnership or association; but in the matrimonial sense it implies much more than these rather cold words suggest. It involves a sharing of two lives, a sharing of the joys and sorrows of each party, of their successes

and disappointments. In its fullest sense it implies a companionship between each of them, entertainment of mutual friends, sexual intercourse — all those elements which, when combined, justify the old common law dictum that a man and his wife are one person.¹⁴

A loss of consortium claim is therefore brought to compensate the plaintiff for the loss of the care, compassion, companionship and society provided by their injured spouse.

Asbestos claims

The majority of jurisdictions have a separate regime in respect of dust-related conditions. For example, NSW and Victorian legislation permit recovery of non-pecuniary loss in respect of a dust-related condition where proceedings have been commenced by the victim and were pending at the time of death.¹⁵ This article does not address the dust-related regimes.

Refunds legislation

Claims when the plaintiff is alive

When a claim is settled during a plaintiff's lifetime, statutory payments to the plaintiff are generally refundable.

If a plaintiff has been in receipt of a Centrelink benefit that is deemed to be a 'compensation-affected payment' and their settlement amount contains an award for, either wholly or in part, 'lost earnings or lost capacity to earn resulting from personal injury', they are required to refund some or all of their past compensation benefits to the Department of Human Services upon the resolution of their claim.¹⁶

A plaintiff is also required to refund Medicare the amount of all past Medicare benefits they have received for any services rendered in the course of treatment of, or as a result of, the injury for which the compensation has been paid.¹⁷

In most jurisdictions, if a plaintiff has received money under a claim for workers' compensation and successfully resolves a claim related to the injuries for which their workers' compensation benefits were paid, they are required to refund the amount of any such benefits.

If a plaintiff has received rehabilitation on behalf of the Department of Education, Employment and Workplace Relations (DEEWR) and receives compensation related to the injuries for which the rehabilitation has been provided, they will be required to refund the department in full for any such rehabilitation services.¹⁸

Payments made by private health funds for related services are also refundable.

Claims once the plaintiff has died – estate

As a claim that is brought on behalf of a deceased's estate is founded on a continuation of the cause of action to which the deceased was entitled the instant before they died, the same refunds required to be made out of a successful settlement when the plaintiff is alive are required to be made out of any successful claims settled on behalf of a deceased's estate.

To make this position clear with respect to the repayment

of past relevant Medicare benefits, the *Health and Other Services (Compensation) Act 1995 (Cth)* specifically defines a compensable person as being either 'an individual who is entitled to receive or has received a compensation payment in respect of an injury', or, if that individual has died, 'the individual's estate'.¹⁹

Related payments made by private health funds are generally also refundable, but will always be determined by the terms of the fund itself.

Claims once the plaintiff has died – dependency

Generally, there are no refunds due to be paid out of the settlement of a dependency claim other than sums received by the dependants.

As dependency claims do not contain an award for damages, either wholly or in part, to compensate the plaintiff for their 'lost earnings or lost capacity to earn resulting from personal injury', Centrelink will have no recoverable interest at the conclusion of these types of claims.²⁰

With respect to Medicare, as a plaintiff bringing a dependency claim will not personally have sought treatment for the injuries that resulted in the deceased's death, they will not be considered a 'compensable person' for the purposes of the *Health and Other Services (Compensation) Act 1995 (Cth)*. This means that a refund to Medicare will not be required to be paid from any amount settled on behalf of a deceased's dependants. >>



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Whether dying clients should pursue claims urgently themselves or allow them to be resolved by their dependants after their death requires careful analysis of the comparative value of each potential claim.

Similarly, as the only injury or disability suffered by a plaintiff in a dependency claim is their loss of reliance on the deceased, they will not have received worker's compensation benefits or rehabilitation on behalf of DEEWR that will be required to be refunded out of the settlement of the dependency claim.

However, if the deceased's death has caused a plaintiff to suffer a recognisable psychiatric injury for which a separate claim is made, they will be required to refund any statutory bodies in accordance with the principles set out above in 'Claims when the plaintiff is alive'. For example, Medicare will need to be refunded any amounts that have been paid for treatment of the psychiatric injury and a Centrelink refund will be required if the psychiatric injury has affected the plaintiff's ability to earn and this loss of income has formed part of their award of damages.

It is important to remember, however, that these refunds arise as a result of a separate personal injury claim and not as part of the dependency claim, though both claims arise from the same event – the death of the deceased as a result of negligence.

Case law principles

Lost years

At common law, a court may award damages for the plaintiff's loss of earning capacity beyond the date of expected death. However, the award for damages for the 'lost years' of earning will usually be significantly reduced. Damages are assessed by the years that an injured person would have earned income but for the shortening of their life, less the plaintiff's own living expenses and 'pleasures'.²¹ The damages are for the lost capacity to earn income, not for the loss of earnings.²² The plaintiff's capacity to earn money must be determined in assessing the loss of earning capacity.²³ Pre-accident earnings are relevant when calculating damages under this head.²⁴

Factors such as the availability of work and an individual's body and mind affect their earning capacity.²⁵ A person is entitled to damages even if at the time of their injury they are not working at full capacity or in the workforce.²⁶ Therefore, to claim damages for lost capacity it will be important to show that, but for the plaintiff's injuries, there was a chance they would have earned money in the future.

Loss of expectation of life

If the plaintiff's life expectancy has been shortened due to

the act that gives rise to the claim, they can be compensated at common law for the loss of expectation of life.²⁷ The damages are awarded as a component of general damages. The objective is to compensate the plaintiff for the deprivation of part of their life.²⁸ It is judged objectively, meaning that a plaintiff can still receive compensation even if they are not aware of the extent of their loss.²⁹

Assessing the monetary compensation is difficult, so courts usually award modest conventional sums under this head of damage.³⁰ The prospect of a predominantly happy life should be valued over the prospect of length of days.³¹ Therefore, a reasonable figure should be calculated for the loss of a measure of prospective happiness.³²

PROTECTING THE EVIDENCE

In *Cross on Evidence*, JD Heydon identifies that the common law recognises six types of statements by deceased persons that are admissible as evidence of the truth of their contents. These are declarations against interest, declarations in the course of duty, declarations as to public or general rights, pedigree declarations, dying declarations and statements by testators concerning the contents of their wills.³³

In most jurisdictions, statutory evidentiary rules provide that where direct oral evidence of a fact would be admissible, any statement contained in a document intending to establish that fact shall be admissible as evidence if the maker of the statement had personal knowledge of the matters dealt with by the statement and is called as a witness to the proceeding. The condition that the person should be called as a witness need not be satisfied where the person is dead.

Securing the evidence of a dying person is usually critical to ensuring the success of an estate claim or a dependency claim. A lawyer should, on becoming aware that there is a threat to a person's life, move quickly to prepare a comprehensive statement of the evidence that person could give if the matter proceeded to trial.

In the process of preparing such a statement, it is important to ensure that the evidence intended to be led is admissible. The *Evidence Act* legislation generally provides that the evidence in the statement will only be admissible if direct evidence of [the] fact would be admissible. So evidence about what the plaintiff observed, experienced and heard about the event will be directly relevant. Hearsay conclusions or opinion should be omitted. In a quantum case, it is essential that the dying plaintiff explain their intention about their future life and activities had they not died (for example, a 30-year-old mother who had left paid work to look after her two children and who had intended to return to work would need to expressly refer to the timeframe in which she would expect to return to work, the type of work she intended to obtain and her goals for the future in terms of employment).

In a case where the preparation of a statement is

problematic because of the advanced state of any illness, a video statement of the plaintiff may also be admissible. Again, in the preparation of the video, it is important to ensure that the questions that are asked and the material obtained is in a form that is admissible.

In each jurisdiction, provisions allow for the taking of bedside evidence. Consideration should be given as to whether this is necessary, and a court application made if appropriate.

ADVICE TO THE DYING PLAINTIFF

Where the cause of death is not a tort

If the shortened life expectancy has arisen from a cause unrelated to the personal injury action or any other tort, the decision must be to proceed as expeditiously as possible to obtain a resolution of the claim. This is because there will be no dependency claim, as the injury did not cause the death. Although the estate will have a claim pursuant to the succession legislation as described above, the value of that claim will invariably be less than the value of the personal injury action because of the absence of the pain and suffering component and the future economic loss component.

The ordinary approach would be to write to the defendants and advise them of the shortened life expectancy, undertake the required actions to obtain an expedited trial which would include, in the ordinary course, a mediation. The matter should be settled as soon as possible.

Where tort-related injury causes impending death

Where, however, the shortened life expectancy is caused by a tort-related injury which might or might not be the subject of the action, other matters will need to be considered.

Firstly, many clients, particularly parents with young children, will be more concerned to ensure that their children are protected after their death, rather than receiving a large sum of their own.

As a consequence, instructions should be sought from the client as to whether they wish to pursue a claim themselves through to settlement which might result in the finalisation of any claim (including a dependency claim) or to allow the claim to pass on to the dependants. This will require a careful analysis of the value of each claim. Moreover, it will require a careful consideration of the likely refunds. Recent awards for loss of dependency indicate that the courts are more inclined to place significant value on the services rendered by parents and others to their children, such that the value of a dependency claim may be significantly more than the value of a personal injuries claim, particularly in circumstances where there is limited allowance for future economic loss and other future losses.

A related consideration is that the funds that are awarded by the court for dependency will, in the ordinary course, be held by a trustee until the individual dependants reach 18 years of age. Conversely, an award of personal injury damages will simply form part of the estate of a deceased person and be distributed in accordance with the will or

other testamentary process. This may be an important consideration for the client.

When advising a client who is dying whether it is better to pursue a claim urgently in the hope that damages can be recovered before their death, or allow it to be resolved after their death as a claim on behalf of their estate, it is important to advise them about the differences in the heads of damages that can be awarded under each type of claim. A client needs to be made aware that in any claim settled on behalf of their estate, damages for pain and suffering as well as future economic loss will not be able to be recovered. However, any expenses related to their death, such as funeral and wake expenses, can be claimed. It is also important to compare statutory refunds that will be due under each scenario. ■

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Notes: **1** *Succession Act 1981* (Qld); *Administration and Probate Act 1958* (Vic); *Law Reform (Miscellaneous Provisions) Act 1941* (WA); *Law Reform (Miscellaneous Provisions) Act 1955* (ACT); *Law Reform (Miscellaneous Provisions) Act 1956* (NT); *Law Reform (Miscellaneous Provisions) Act 1944* (NSW); *Administration and Probate Act 1935* (Tas). **2** *Law Reform (Miscellaneous Provisions) Act 1941* (WA), s4(2a)(c). **3** *Read v Great Eastern Rail Way* (1868). **4** Luntz, *Torts Cases and Commentary*, Lexis Nexis, para 9.2.8. **5** *Fatal Accidents Act 1846* (UK). **6** *Civil Proceedings Act 2011* (Qld); *Wrongs Act 1936* (SA); *Fatal Accidents Act 1934* (Tas); *Wrongs Act 1958* (Vic); *Fatal Accidents Act 1959* (WA); *Compensation (Fatal Injuries) Act 1968* (ACT); *Compensation (Fatal Injuries) Act 1974* (NT); *Civil Aviation (Carrier's Liability) Act 1959* (Cth); *Compensation to Relatives Act 1897* (NSW). **7** *Mount Isa Mines Ltd v Pusey* (170) 125 CLR 383 at 394. **8** *De Sales v Ingrilli* (2003) 212 CLR 338. **9** *Ibid.* **10** *Civil Liability Act 2003*, s54. **11** *Common Law (Miscellaneous Actions) Act 1986* (Tas), s3; *Law Reform (Miscellaneous Provisions) Act 1941* (WA), s3; *Civil Law (Wrongs) Act 2002* (ACT), s218. **12** *Baker v Bolton* (1808) 1 Camp 493. **13** *Civil Liability Act 2003* (Qld), s58(1). **14** *Crabtree v Crabtree* (No. 2) [1964] ALR 820. **15** *Dust Diseases Tribunal Act 1989* (NSW), s12B; *Administration and Probate Act 1958* (Vic), s29(2A); *Law Reform (Miscellaneous Provisions) Act 1941* (WA), s4(2a)(b); Luntz *Assessment of Damages for Personal Injury and Death*, 4th edition, para [9.1.5]. **16** *Social Security Act 1991* (Cth) s17(1), (2) & Part 3.14. **17** *Health and Other Services (Compensation) Act 1995* (Cwlth) s8. **18** *Disability Services Act 1986* (Cth) s23. **19** *Health and Other Services (Compensation) Act 1995* (Cth) s3. **20** *Social Security Act 1991* (Cth) s17(1), (2) & Part 3.14. **21** See, generally, Luntz, *Assessment of Damages for Personal Injury and Death*, 4th edition, para [5.4.1 – 5.4.7]; *Skelton v Collins* (1996) 115 CLR 94. **22** *Paff v Speed* (1961) 105 CLR 549, 566. **23** *Cullen v Trappell* (1980) 146 CLR 1, 7. **24** *Paff v Speed* (1961) 105 CLR 549, 566. **25** *Medlin v State Government Insurance Commission* (1995) 182 CLR 1. **26** *Cf Campbell v Wilson* [1970] 1 NSWLR 333 (CA). **27** *Bruce v Rutherford* (1885) 1 WN (NSW) 102. **28** *Skelton v Collins* (1996) 115 CLR 94. **29** *Rose v Ford* (1937) 3 All ER 359. **30** *Sharman v Evans* [1977] HCA 8; *Cain v Wilcock* (1968) 3 All ER 817, 818. **31** *Benham v Gambling* (1941) AC 157, 167. **32** *Ibid.* **33** JD Heydon, *Cross on Evidence*, Lexis Nexis, eBook version, para [33,005].

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