

For non-pecuniary cases:

- Damages assessed by reference to % of 'most extreme case'. This is where court looks at P's harm and decides what worse condition P could be in
- Court constructs what the worst kind of injury P can get and comes up with a %. i.e. this is a 20% of an extreme case
- CLA s16- unless severity of non-economic loss is at least 15% of a most extreme case, cannot make claim
- S16(2) max amount is \$350,000
- (3) threshold of 15% must be exceeded before any damages for non-economic loss can be awarded
- S17: max amount of damages is currently \$594,000. If 100% most extreme case- P will recover \$594,000.
- Subjective e.g. teen has paid for life v 70yr old having pain for life- teen gets higher loss/damage due to having pain longer: if fully aware life is shortened, get higher reward
Manning v state of NSW 2005
- Inter-relationship of common law to statutory provisions
- Said s16 changes common law approach- creates a more objective component to the award

TOPIC FOUR: WRONGFUL DEATH:

- Do not refer to the deceased as the P
- In the first action ('survivorship action') the P is the executor or personal representative for the deceased
- In the second action (Lord Campbell's Act claim) the P's are the dependants of the deceased

Damages and death

- Affects claims in tort in 2 ways
 - 1) effect of death on existing tort of action (before bringing a claim, either you die, or D dies)
 - 2) Death as a cause of action- sue someone due to them causing the death of another

1) effect of death on existing actions

- Death not necessarily a wrongful act, this act of tort occurred prior to the death
- Common law: personal actions died when one of the potential parties to the action died
- If P dies, D cant be sued, if D dies, P cannot get claim. The estate however, gets remains of what deceased had.
- Basis of aus law- statutory change in England in 1934- If P died, role of this claim is to give P ability to claim for damages between date of accident and date of death

Law Reform (Miscellaneous provisions) Act 1944 (NSW)

S2: effect of death on certain causes of action

(1) subject to acts provisions, all causes of action subsisting against or vested in the person shall survive for the benefit of, the person's estate

S2(2) damages recoverable for the benefit of the estate of that person

2(2)(a) shall not include

(i) any exemplary damages- punishment damages

(ii) any damages for the loss of earning capacity in the lost years

(c) where P receives an injury that after a period of time causes their death. Not covered if person later dies from a completely unrelated event- estate can also claim funeral expenses

(d) where death of that person has been caused by an act/omission which gives rise to the cause of action= where person dies as a result of tort- estate cannot claim for non-pecuniary loss

- If P living would have had to overcome threshold of 15%- if aim is for estate to be in a position of P when alive, non-pecuniary loss must meet threshold- condition not improved because you die. Yet two fold as difficult to satisfy threshold as pain and suffering ends when you die

- Key elements of the above act (especially s2)
- Provides for the survival of the majority of causes of action subsisting against or vesting in the deceased at the time of the death
- Allows for recovery of certain kinds of damages

Hicks v Chief Constable of South Yorkshire Police (1992) Hillsborough disaster case

- People crushed in crowd on live television
- Hicks had 2 daughters who were killed- sued police for negligence in crowd control
- What losses had been incurred from time of accident to time of death? Pain and suffering- girls died 20minutes after being crushed

Fatal Accidents Legislation

- Death as a cause of action- death of deceased has caused a loss to an individual
- At common law, death of a person created no right of action in anyone else to sue the person responsible for the death of that person
- (baker v Bolton 1808) affirmed Barclay v Penberthy (2012)

Barclay:

- Negligence killed 3 employees- company sued for loss of employees
- E.g. what kind of loss does wife suffer from death of husband in 1800s? pure economic interest
- Statutory change to rule introduced and lead to the Lord Campbell's Acts
- Basic structure of the legislation was that of derivative action- dependant can only sue if deceased would have been able to sue the defendant
- In Aus context, some dispute over whether the D's wrongful act needs only to have been the cause of the death for the act to come into play
- Despite the Haber case (deceased committed suicide from D's negligence- held it to not be reasonable foreseeable), there is a better view- the act of death of the D must not only have been the cause of the death but it must also have been such as the death was wrongful
- If dependants are going to claim, the deceased needed to be able to make a claim for damages

Compensation to Relatives Act 1897 (derived out of Lord Campbell's Act)

- Three parts: Wrongful act caused death, derivative component and D is liable

- S4 provides compensation to dependants: 'dependants' = spouse, brother, sister. Half-brother, half-sister, parent and child of the person killed
- If so called dependant is not defined in the act, there is no claim

Interpreting the CTRA

- Harding v Lithgow (1937): whether deceased bringing claim during lifetime bars claim of the dependants
- What if injured as result of tort, bring claim and get damages then die? Dependents cannot still have a claim as action already brought in relation to same tort
- Contributory negligence? As far as dependants claims are concerned, since it is a derivative claim, award reduced in same way as deceased's award would have been if able to make a claim

CLA s5T

Kars v Kars

- Dependant as defendant
- Tortfeasor provided care
- Generally if defendant the dependant, cannot make a claim
- Principle: If any dependant guilty of contributory negligence, award reduced as well

Franklin v South Eastern Railway company

- No real guidance for what dependants can claim
- Can dependants claim for non-pure economic loss? No- case says only reasonable expectation for pecuniary loss
- Cant compensate for bereavement

Parker v cth (1965)

- Assessing value of dependency
- Calculating claim structure
- 3 steps:
 - 1) work out value of dependency- how much would deceased provide to dependency
 - 2) What benefits has dependant gained from deceased? i.e. monetary benefits may come in a pension, life insurance and what deductions/discounts should be made for the award net present loss/discounts

Collateral benefits:

S3(3) of CTRA: common payments made to dependants from death of deceased usually not included in assessing damages

(a) life insurance disregarded

(b) kin to life insurance such as trade union not taken into account

2) In same way living P has capped earning capacity, so is deceased- this section is only for claimants

Taylor case adds 'claimants and deceased' not just claimants to this section

No cap for loss of dependency claims as a result of Taylor case

De sales v Ingrilli

- Effect of remarriage
- If remarried- no longer have any losses
- Argued not likely to remarry
- Kirby said shouldn't be a deduction due to prospects of remarriage- more correct due to uncertainty
- Callinan and McHugh said there should be a deduction unless remarriage is less than a remote chance
- Majority: remarriage only taken into account if there was a financial benefiting relationship at time of trial

Carroll v Purcell:

- Earnings of survival spouse ignored
- If surviving spouse goes back to work- are these earnings taken into account as it would reduce the loss suffered? No, these earnings ignored

Nguyen v Nguyen:

- Services deceased provided at others
- Deceased had children- young dependants
- Under CTRA- children as dependants always have a claim for the services the deceased provided. Especially if these services aren't given by surviving spouse/parent
- S15B: consistency where these claims/services provided