



THE LAW REFORM COMMISSION  
*of*  
WESTERN AUSTRALIA

# Discussion Paper Project 109

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***CLAIMS FOR NON-ECONOMIC LOSS FOR WRONGFUL DEATH  
UNDER THE FATAL ACCIDENTS ACT 1959 (WA)***

December 2019

## THE LAW REFORM COMMISSION OF WESTERN AUSTRALIA

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## 1. Introduction

Historically, if a person were killed as a result of the wrongful act or negligence of another, the law did not recognise that death as an injury and did not permit damages to be recovered by either the estate of the deceased, or the dependents of the deceased.

This changed in 1846, when, in response to increasing and widespread criticism of dependents' plight, the English Parliament enacted the *Fatal Accidents Act 1846* (UK) (commonly referred to as Lord Campbell's Act) granting close relatives of a deceased the right to recover financial compensation from those who caused or contributed to the deceased's death.

While the impetus for the implementation of Lord Campbell's Act arose primarily in the context of a period of increasingly frequent deaths on railways in England, the mainstay of Lord Campbell's Act remains relevant and enshrined in one form or another in all Australian jurisdictions today.

In Western Australia, Lord Campbell's Act was adopted in 1849 and has subsequently been repealed and replaced by the *Fatal Accidents Act 1959* (WA).

While the *Fatal Accidents Act 1959* (WA) provides protection to those who were dependent on the deceased for financial support, the legislation does not permit the recovery of compensation for grief, mental anguish or sorrow suffered by those same dependents as a result of the deceased's death.

The ability to recover damages for non-economic (i.e. non-financial) losses, sometimes referred to as bereavement damages or solatium, is not foreign to the common law. England, Scotland and Ireland all permit recovery of damages for non-economic losses in wrongful death claims. In Australia, the ability to recover damages for non-economic loss in wrongful death claims is permitted only in the Northern Territory and South Australia.

However, notwithstanding the ability to recover damages for non-economic losses in other comparable common law jurisdictions, Western Australian law has not, to date, permitted awards of damages of this kind.

This issue was considered by the Law Reform Commission of Western Australia ('the Commission') at the request of the Attorney General in 1978. At that time, the Commission recommended the *Fatal Accidents Act 1959* (WA) be amended to permit awards for 'loss of assistance and guidance' in addition to already recoverable financial losses. This recommendation was not taken up by Parliament.

While, as with any legislative reform, there are undoubtedly arguments for and against the implementation of provisions permitting the recovery of non-economic losses, the fact remains that the inability of surviving relatives to obtain compensation that recognises and acknowledges their pain and grief can often be a source of considerable confusion and anger for those affected.

Since the publication of the Commission's 1978 report and Parliament's 1984 decision not to introduce damages for 'loss of assistance and guidance', legislation has been implemented recognising an injured person's right to recover damages for psychiatric or psychological injuries suffered as a result of the commission of an offence and in the case of the *Civil Liability Act 2002* (WA), wrongful acts more generally. Claims for 'nervous shock' or 'pure mental harm' have become almost commonplace in the compensation landscape.

Notwithstanding these developments in statute and common law, the *Fatal Accidents Act 1959* (WA) does not permit the recovery of damages recognising the grief and anguish of those dependents

whose level of suffering does not meet the criteria for claiming psychiatric or psychological injury under the existing legislative regime.

The Attorney General has requested that the Commission re-visit this issue and has sought advice and recommendations from the Commission as to whether the *Fatal Accidents Act 1959* (WA) should be reformed, and if so, the extent of such reform, to allow claims for non-economic loss for wrongful death and any other consequential amendments.

This Discussion Paper details the Commission's preliminary research and views in relation to this reference and seeks community and stakeholder feedback and comments.

## 1.1 Definitions

As will be seen in this paper, the terms 'non-pecuniary loss', 'solatium', 'non-patrimonial loss', 'happiness damages' and 'bereavement damages' are used by the various legislatures and courts to describe non-economic losses suffered by surviving relatives in wrongful death claims.

The Commission acknowledges that there are subtle differences in the meaning and application of each of these terms depending on their context and usage.

The Commission notes, however, that the term 'non-economic' loss is used in the Attorney General's reference.

For consistency, ease of reference and to assist those reading this paper, the Commission will, where possible, use the descriptor 'non-economic loss' to collectively describe the losses the subject of the Attorney General's reference.

The Commission recognises that there are some instances where context requires the use of particular terminology and will, in those instances, use the appropriate terminology to maintain that context.

## 1.2 Terms of Reference

The Terms of Reference from the Attorney General provide as follows:

'The Law Reform Commission of Western Australia is to provide advice and make recommendations for consideration by the Government as to whether there should be any reform, and if so, the extent of any reform, to allow for claims for non-economic loss for wrongful death under the *Fatal Accidents Act 1959* (WA) and any consequential amendments, including:

1. the scope of the class of persons who may claim for non-economic loss;
2. the types of non-economic loss that ought to qualify;
3. the appropriate quantum of damages for non-economic loss, including how damages are to be calculated and whether damages should be:
  - a. fixed or variable; or
  - b. capped or uncapped;

4. whether other types of damages awarded for non-economic loss for wrongful death should be deducted from any damages awarded for non-economic loss for wrongful death under the Act;
5. the measurable financial impact of any recommended changes on plaintiffs, insurers and the Government; and
6. any other related matter.'

This Discussion Paper addresses paragraphs 1-4 and 6 of the Terms of Reference. The measurable financial impact of any recommended changes will be the subject of a separate review and will be included in the Commission's Final Report.

### 1.3 Scope and purpose

The purpose of this Discussion Paper is to:

- (a) provide an historical context to the present discussion;
- (b) summarise the approach adopted in various comparable jurisdictions;
- (c) raise for discussion various reform options identified by the Commission,
- (d) outline the Commission's preliminary assessment of these options; and
- (e) invite responses from stakeholders and the Western Australian community in relation to these areas.

The Commission recognises that the prospect of reform in this area raises a number of significant policy issues. Accordingly, the Commission has not reached a preliminary view at this stage as to whether such reform is appropriate in Western Australia.

The Commission seeks community and stakeholder feedback on all aspects of the Discussion Paper.

### 1.4 Submissions

The Commission invites interested parties to make comments or submissions on the aspects of reform proposed in this Discussion Paper. These comments and submissions will assist the Commission in formulating its final recommendations for reform in relation to the areas set out in the Terms of Reference.

Comments and submissions may be made by email (preferred) or letter to the addresses set out in the box below. Those who wish to request a meeting with the Commission may telephone for an appointment.

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The closing date for submissions is **31 March 2020**.

Law reform is a public process. The Commission assumes that comments on this Discussion Paper are not confidential. The Commission may quote from or refer to your comments in whole or in part and may attribute them to you, although we usually discuss comments generally and without attribution. If you would like your comments to be treated confidentially, please clearly identify which information is confidential and we will do our best to protect that confidentiality, subject to our other legal obligations. The Commission is subject to the requirements of the *Freedom of Information Act 1992* (WA).

## 1.5 Acknowledgements

This Discussion Paper was written by Tom Offer and Adam Nolan, Barristers at Francis Burt Chambers. The Commission acknowledges their work and contribution to this reference.

## 2. Historical context

Before 1846, English law did not permit recovery in tort for the death of a human being. This was the combined result of two principles of common law.

The first of these principles was that the right of action of a person who had been tortiously injured was a personal right and did not survive for the benefit of the deceased's estate upon the deceased's death.

This rule survived until 1934, when it was abolished by the *Law Reform (Miscellaneous Provisions) Act 1934* (UK). Equivalent reform found its way into Western Australian law by way of section 4 of the *Law Reform (Miscellaneous Provisions) Act 1941* (WA).

The second principle was that '*in a civil court, the death of a human being could not be complained of as an injury*' by dependants claiming in their own right (*Baker v Bolton*<sup>1</sup>).

This rule was largely superseded by the *Fatal Accidents Act 1846* (UK) ('Lord Campbell's Act'), which created a new statutory cause of action for the benefit of certain categories of dependant. The impetus for this reform was the increase in fatal accidents due to the advent of railways in England, and the growing concern that dependents were being left without recourse to damages in the case of a wrongful death. Lord Campbell's Act was adopted in Western Australia in 1849.<sup>2</sup> Lord Campbell's Act was subsequently repealed in this State and replaced by the *Fatal Accidents Act 1959* (WA).

In 1976 the Commission received a reference from the Attorney General asking it to consider whether the *Fatal Accidents Act 1959* (WA) should be amended to:

- (a) widen the class of persons entitled to claim under the *Fatal Accidents Act 1959* (WA); and
- (b) provide for an amount to be awarded in the nature of solatium.

The Commission's Working Paper and Final Report provide important and useful background information for this present reference, and can be found on the Commission's website.<sup>3</sup>

In relation to the question as to solatium, the Final Report of the Commission, published in December 1978, recommended that the *Fatal Accidents Act 1959* (WA) be amended to provide for the award of damages (to be known as a 'loss of assistance and guidance award') to compensate certain close relatives of the deceased for the loss of such non-economic benefit as they might have expected to derive from the deceased's assistance and guidance if he or she had not died.<sup>4</sup>

The Commission recommended that damages for 'loss of assistance and guidance' be available to the following individuals:<sup>5</sup>

- (a) the deceased's husband or wife;
- (b) the deceased's de facto spouse;
- (c) a parent of the deceased;
- (d) an unmarried child of the deceased; and

<sup>1</sup> (1808) 1 Camp 493 per Lord Ellenborough.

<sup>2</sup> By Ordinance 12 Vic. No.21 (1849).

<sup>3</sup> [https://www.lrc.justice.wa.gov.au/P/project\\_66.aspx](https://www.lrc.justice.wa.gov.au/P/project_66.aspx).

<sup>4</sup> Law Reform Commission of Western Australia, *Fatal Accidents*, Report No 66 (1978) Recommendation 5.1(g), see also [4.13].

<sup>5</sup> *Ibid* at [4.14].

- (e) an unmarried person to whom the deceased stood in *loco parentis*.

The Commission also recommended that such an award:

- (a) not survive for the benefit of the estate of the claimants;<sup>6</sup>
- (b) be in addition to any award for pecuniary loss allowable under the *Fatal Accidents Act 1959 (WA)*;<sup>7</sup>
- (c) not be a fixed sum, but rather that the maximum amount able to be awarded be subject to a statutory cap (indexed to inflation) as follows:
- i. an award to a lawful spouse - \$5,000;
  - ii. an award to a de facto spouse - \$5,000;
  - iii. an award to a parent of the deceased - \$2,500;
  - iv. an award to an unmarried child of the deceased - \$2,500; and
  - v. an award to an unmarried person to whom the deceased stood in *loco parentis* - \$2,500.<sup>8</sup>

The relevant paragraphs of the Final Report provide:

- 4.11 *The Commission agrees that an award for solatium for grief and suffering could lead to unsatisfactory consequences. If the award was too small, it could be regarded with contempt by those whose grief was greatest. If the award was too large it could amount to a gratuity to those who felt no grief at all. Some persons could be affronted by any award of this nature at all. The Commission does not favour recovery of damages in the nature of solatium.*
- 4.12 *However, the Commission sees merit in the loss of society award which is now provided for in the Damages (Scotland) Act 1976. This award represents compensation for the loss of such non-pecuniary benefit as the relative might have expected to derive from the deceased's society and guidance if he had not died. The Commission considers that there should be an award of damages by way of compensation for the loss of such non-pecuniary benefit as the relative might have expected to derive from the deceased's assistance and guidance if he had not died. Assistance which can theoretically be replaced in return for money, or can at least be valued in terms of money, should be included in the pecuniary damages already recoverable under the Fatal Accidents Act. Assistance which would defy attempts at valuation would be compensated under the proposed new head of damages by way of a lump sum in the same way as pain and suffering or loss of enjoyment of life, in personal injury claims. The damages should be known as a "loss of assistance and guidance award" which the Commission considers is a more accurate description of the losses which are compensable under the Scottish provision. The Commission's intention is that its proposed award for loss of assistance and guidance should comprise the same losses as those comprised by the Scottish loss of society award.*
- 4.13 *The Commission accordingly recommends that the Fatal Accidents Act should be amended to provide for the award of damages to compensate certain close relatives of the deceased for the loss of such non-pecuniary benefit as they might have expected to derive*

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<sup>6</sup> Law Reform Commission of Western Australia, *Fatal Accidents*, Report No 66 (1978) at [4.15].

<sup>7</sup> *Ibid* at [4.19].

<sup>8</sup> *Ibid* at [4.16]-[4.20].

*from the deceased's assistance and guidance if he had not died. The damages should be known as a "loss of assistance and guidance award" and should be recoverable under the Fatal Accidents Act.*

The *Fatal Accidents Amendment Act 1985* (WA) implemented the Commission's recommendations to expand the class of claimants under the *Fatal Accidents Act 1959* (WA). However, the Commission's recommendation for the establishment of an award of damages for 'loss of assistance and guidance' was not taken up by Parliament, with the then Attorney General Mr J.M. Berinson setting out the following reasoning:

*The Government has decided not to proceed with these recommendations. It would require the courts to undertake a time-consuming and difficult task in assessing the appropriate award and in any event, the amount awarded under such an arbitrary limit would be very likely to affront claimants as often as it might solace them. There are very few jurisdictions where such provision exists.<sup>9</sup>*

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<sup>9</sup> Western Australia Parliamentary Debates, Legislative Council, 22 March 1984, page 6464.

### 3. Western Australian statutory regime

The *Fatal Accidents Act 1959* (WA) creates a right for a limited class of relatives to recover damages following the death of a person, where that death has been caused by a wrongful act, neglect or default.

The relevant provision is section 4(1) of the *Fatal Accidents Act 1959* (WA) which provides as follows:

*Where the death of a person is caused by a wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued is liable to an action for damages, notwithstanding the death of the person injured, and although the death was caused under such circumstances as amount in law to a crime.*

To bring a cause of action, it is necessary for a plaintiff to establish the following elements:

- (a) if the deceased had not died, they could have brought an action in relation to their injury, and they would have recovered damages;
- (b) there is a causal link between the defendant's wrongful conduct and the death; and
- (c) the claimants are relatives as defined in the *Fatal Accidents Act 1959* (WA).

The proper plaintiff for an action under the *Fatal Accidents Act 1959* (WA) is the executor or administrator of the deceased,<sup>10</sup> and the action shall be for the benefit of the relatives of the deceased.<sup>11</sup>

In the event that there is no executor or administrator of the deceased, or where the executor or administrator does not commence an action under the *Fatal Accidents Act 1959* (WA) within six months after the death, any one or more of the persons for whose benefit the action might be brought by the executor or administrator may bring the action.<sup>12</sup> No more than one action lies under the *Fatal Accidents Act 1959* (WA) for and in respect of the same subject matter of complaint.<sup>13</sup>

#### 3.1 Key provisions of the Act

The *Fatal Accidents Act 1959* (WA) defines 'relative' in clause 1 of Schedule 2 as follows:

**relative**, in relation to a deceased person, means —

- (a) a person who immediately before the deceased's death was —
  - (i) the spouse of the deceased; or
  - (ii) a de facto partner of the deceased who was living in a de facto relationship with the deceased and had been living on that basis with the deceased for at least 2 years immediately before the deceased died;
- (b) any person who was the parent, grandparent or step parent of the deceased;

<sup>10</sup> *Fatal Accidents Act 1959* (WA), s 6(1B).

<sup>11</sup> *Fatal Accidents Act 1959* (WA), s 6(1A).

<sup>12</sup> *Fatal Accidents Act 1959* (WA), s 9(1).

<sup>13</sup> *Fatal Accidents Act 1959* (WA), s 7.

- (c) any person who was a son, daughter, grandson, granddaughter, stepson or stepdaughter of the deceased;
- (d) any person to whom the deceased person stood in loco parentis immediately before the death of the deceased;
- (e) any person who stood in loco parentis to the deceased person immediately before his death;
- (f) any person who was a brother, sister, half-brother or half-sister of the deceased person; and
- (g) any person who was a former spouse or former de facto partner of the deceased person whom the deceased was legally obliged, immediately before his or her death, to make provision for with respect to financial matters.

The *Fatal Accidents Act 1959* (WA) contains very few provisions regarding the damages payable under it. Section 5(1) specifically provides for the payment of medical and funeral expenses incurred by the parties for whose benefit the action is brought. Section 5(2) specifies certain matters that shall not be taken into account in assessing damages.

Otherwise, the key operative provision is section 6(2), which provides as follows:

*In every action the court may give such damages as it thinks proportioned to the injury resulting from the death to the parties respectively for whom and for whose benefit the action is brought.*

Section 6(4) further provides that the amount of damages recovered, ‘shall be divided amongst the persons for whose benefit the action was brought in such shares as the court finds and directs.’

On their face, such provisions might be thought to allow (or at least not prohibit) the recovery of damages for non-economic loss suffered by the beneficiaries under the legislation.

However, this is not how these provisions (or other similar provisions in other jurisdictions) have been interpreted by the courts. Rather, it has been held that damages under the *Fatal Accidents Act 1959* (WA) are recoverable for the loss of economic benefits caused by the death only.

### 3.2 What is recoverable under the Act?

In *De Sales v Ingrilli*<sup>14</sup> the High Court considered a claim for damages under the *Fatal Accidents Act 1959* (WA). The claim was brought by Mrs De Sales on behalf of herself and the deceased’s two children following her husband’s death in an accident at a dam owned by the defendant.

At first instance, Jackson DCJ awarded sums of \$10,000 to each of the deceased’s sons for the non-economic loss of ‘loss of parental support, guidance and training’.

In the Court of Appeal the appellant argued that there was no entitlement at law to damages of that kind. In his reasons for decision Wallwork J, referencing Professor Luntz’s book *Assessment of Damages*, observed that it was ‘not usual’ to allow a sum for loss of parental guidance in Australia, although such damages had been allowed in some other countries.

Miller J, with whom Parker J agreed, reached the same conclusion stating:

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<sup>14</sup> (2002) 212 CLR 338

*I know of no authority to support the view that such an allowance is appropriate. Professor Luntz deals with the matter at par 9.13.12 [of his book], pointing out that in England the matter has been left open for consideration. Generally, however, loss of a parent's care, education and training is not considered to be a material loss for which damages are recoverable by the children: Hamlyn v Hann & Anor [1967] SASR 387.*

While these conclusions were not challenged in the subsequent appeal, the High Court's reasons for decision are instructive as to the types of damages that are and are not recoverable under the *Fatal Accidents Act 1959* (WA).

In *De Sales v Ingrilli*, Gleeson CJ explained that the *Fatal Accidents Act 1959* (WA) is directed to compensation for 'injury'. Whilst that term is not defined, it has been interpreted to mean:

*... the loss of a benefit the claimant would otherwise have reasonably expected to receive from the deceased, had the accident not occurred.*<sup>15</sup>

Gleeson CJ went on to note two points resulting from this interpretation:

*...First, damages are calculated by reference to the pecuniary benefit that could reasonably have been expected from the continuance of the life had death not occurred. Damages do not compensate for non-pecuniary injuries such as grief. Secondly, damages for injury are calculated on a balance of pecuniary gains and losses consequent upon the death....*<sup>16</sup> [Emphasis added].

In addition, Gleeson CJ noted that pecuniary losses also extend to a claim for loss of services.<sup>17</sup>

This approach to the assessment of damages under the *Fatal Accidents Act 1959* (WA) was supported by all members of the High Court in *De Sales v Ingrilli*. Gaudron, Gummow and Hayne JJ noted that under Lord Campbell's Act, compensation was limited to pecuniary loss as a result of death, and a jury could not award compensation for mental suffering or loss of society.<sup>18</sup> McHugh J also noted that the term 'injury' has always been confined to pecuniary loss and did not extend to compensation for 'grief, sorrow or bereavement'.<sup>19</sup>

When considering the wording of section 4 (liability for wrongful death) and section 6 (the effect and method of bringing an action) of the *Fatal Accidents Act 1959* (WA), Callinan J considered the context in which it was enacted stating:<sup>20</sup>

*The genesis of the Act is the Fatal Accidents Act 1846 (UK) ("Lord Campbell's Act"). Sections 4 and 6 of the Act provide that any action brought under the Act shall be for the benefit of the wife, husband, parent, and child of the deceased. Section 6(2) speaks of "damages ... proportioned to the injury ... to the parties respectively ... for whose benefit the action is brought". That "injury" means "financial injury" follows not only from the earlier reference in the section to "damages" but also, and particularly from the references in s 5 to the several, possibly beneficial, financial consequences of death for a dependent survivor which are to be disregarded for the purposes of assessing the damages. Injury has always, and rightly, been so understood in the cases, as financial injury, measured by the value of the support that would*

<sup>15</sup> *De Sales v Ingrilli* (2002) 212 CLR 338 at [11].

<sup>16</sup> *Ibid*.

<sup>17</sup> *Ibid* at [13].

<sup>18</sup> *Ibid* at [55].

<sup>19</sup> *Ibid* at [90]-[93].

<sup>20</sup> *Ibid* at [183].

*have been provided by the deceased to his or her dependents. In the words of Pollock CB in Franklin v The South Eastern Railway Company "[the damages] should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life".*

Justice Kirby expressed similar observations when considering the development and context of the *Fatal Accidents Act 1959 (WA)*, stating:<sup>21</sup>

*The Act has been interpreted as limited to the recovery only of the economic or material advantages lost by the survivors. In this respect, Australian law has followed the course of judicial authority and commentary concerning its English progenitor as well as the approach in other jurisdictions. As a matter of construction, it did not, in my view, have to be so. The statutory action is derivative from that of "the party injured". The measure of the damages refers to the "injury resulting from the death". For most mortals, the loss by death of the "relatives" for whom the Act provides would usually occasion shock, grief and distress. Some jurisdictions make a specific provision for solatium. The Law Reform Commission of Western Australia recommended such an addition to the Act. The recommendation was not implemented. Such "injuries" are therefore regarded as outside the statutory entitlement. It follows that, by settled law, not challenged in this appeal, recovery is restricted to the loss of dependency measured in financial terms.*

### 3.3 A subsequent attempt to recover non-economic loss

As noted above, the Court of Appeal of Western Australia's decision in *De Sales v Ingrilli* to disallow damages awarded for non-economic loss was not challenged in the appeal to the High Court.

In *Dinnison v Mindarie Regional Council*,<sup>22</sup> the plaintiff made a claim for solatium under the *Fatal Accidents Act 1959 (WA)* on the basis that there were no binding authorities which prevented an award of solatium being made.<sup>23</sup> Commissioner Archer (as Her Honour then was) rejected the claim relying on the judgments in *De Sales v Ingrilli* referred to above and also the decision of *Public Trustee v Zoanetti*<sup>24</sup> where Dixon J stated:

*In estimating the damages to be recovered under legislation taken from Lord Campbell's Act ... two rules are clearly settled. One is that what is recoverable for the benefit of the widow or other relative of the deceased is the pecuniary loss resulting from his death and that nothing may be recovered by way of solatium for the suffering that his death caused to the widow or relative.*<sup>25</sup>

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<sup>21</sup> *De Sales v Ingrilli* (2002) 212 CLR 338 at [126].

<sup>22</sup> *Dinnison v Mindarie Regional Council* [2005] WADC 252.

<sup>23</sup> *Ibid* at [65].

<sup>24</sup> *Public Trustee v Zoanetti* (1945) 70 CLR 266.

<sup>25</sup> In the context of considering the then South Australian equivalent provision of Lord Campbell's Act.

## 4. Damages for mental harm

It is important at this point to distinguish between damages for non-economic loss for wrongful death under the *Fatal Accidents Act 1959* (WA), and damages that might be recoverable in a negligence action for mental harm (or nervous shock as it was previously known).

The basis of the award of damages in the latter circumstance, is that the defendant owes the plaintiff a separate duty of care not to cause psychiatric or psychological injury to the plaintiff, by causing injury or death to another (see sections 5Q-5T of the *Civil Liability Act 2002* (WA) and the decisions of **Jaensch v Coffey**<sup>26</sup> and **Tame v New South Wales; Annetts v Australian Stations Pty Ltd**<sup>27</sup>). The damages are therefore not awarded for grief or suffering or loss.

It may be that in some cases in which damages are sought under the *Fatal Accidents Act 1959* (WA), a separate negligence action is also commenced by one (or more) persons for whose benefit an action may be commenced under the *Civil Liability Act 2002* (WA), seeking damages for mental harm.

Awards of damages for non-economic losses in psychiatric or psychological injury claims under the *Civil Liability Act 2002* (WA) are restricted by section 9 of the *Civil Liability Act 2002* (WA) which implements a 'threshold' or minimum level of damages at which damages must be assessed before a court may award damages for non-economic loss. The *Civil Liability Act 2002* (WA) prescribes a formulaic approach to this restriction on damages, correspondingly reducing the effect of the 'threshold' as the quantum of damages assessed by the court increases. The current amount of that threshold is \$22,000 and is reviewed annually.

The restrictions on the award of damages implemented by section 9 of the *Civil Liability Act 2002* (WA) do not apply to damages for economic losses.

### 4.1 Claims for non-economic loss to which the *Civil Liability Act 2002* (WA) does not apply

Section 3A of the *Civil Liability Act 2002* (WA) excludes (in part) a number of classes of damages for non-economic loss from the restrictions imposed by section 9 of the *Civil Liability Act 2002* (WA). These excluded classes include non-economic losses suffered as a result of an intentional act carried out with the intention to cause personal injury to a person, sexual offences and claims for non-economic loss arising from a motor vehicle accident or damages.

Notwithstanding the exclusion of these classes of damages from the 'threshold' restrictions on the awarding of damages for non-economic losses, the Western Australian legislature has seen fit to implement similar restrictions in some of those classes of damages.

In the case of damages for non-economic losses suffered as a result of a motor vehicle accident, the *Motor Vehicle (Third Party Insurance) Act 1943* (WA) implements similar and comparable restrictions on the recovery of damages for non-economic loss.

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<sup>26</sup> (1984) 155 CLR 549.

<sup>27</sup> (2002) 211 CLR 317.

## 4.2 Claims for non-economic loss under the *Motor Vehicle (Third Party Insurance) Act 1943 (WA)*

Damages for non-economic losses under the *Motor Vehicle (Third Party Insurance) Act 1943 (WA)* are currently capped at \$425,000 with such an amount reserved for a ‘most extreme case’.<sup>28</sup> In cases other than a ‘most extreme case’, awards of damages for non-economic loss are determined according to the severity of the non-economic loss suffered, proportionate to that ‘most extreme case’ and the maximum allowable damages award. In addition, at the lower end of the damages spectrum, section 3C of the *Motor Vehicle (Third Party Insurance) Act 1943 (WA)* imposes a ‘threshold’ of \$22,000<sup>29</sup> that currently results in claimants suffering non-economic losses assessed at or less than 5% of a ‘most extreme case’ being unable to recover any damages for non-economic loss.

These restrictions on recovery of non-economic losses apply equally to physical and psychological or psychiatric injuries and are adjusted on an annual basis.

It should be noted that while section 3A of the *Civil Liability Act 2002 (WA)* excludes damages for non-economic losses suffered as a result of a motor vehicle accident from the ‘threshold’ regime implemented by the *Civil Liability Act 2002 (WA)*, provisions such as sections 5Q-5T of the *Civil Liability Act 2002 (WA)* requiring a recognised psychiatric illness to be suffered before non-economic losses might be recovered, still apply.

## 4.3 Compensation for mental harm under the criminal injuries compensation legislation

The *Criminal Injuries Compensation Act 2003 (WA)* applies a similar approach to the *Civil Liability Act 2002 (WA)*, and section 35 provides that:

(2) *An assessor must not make a compensation award for mental and nervous shock suffered by a victim as a consequence of the commission of an offence, or for any loss in respect of such shock, unless the assessor is satisfied –*

...

(e) *that immediately before the offence was committed the victim –*

(i) *was a close relative of a person who suffered injury or died as a consequence of the commission of the offence; and*

(ii) *was living with that person.*

A ‘close relative’ is defined in section 4 of the *Criminal Injuries Compensation Act 2003 (WA)* as:

<sup>28</sup> *Motor Vehicle (Third Party Insurance) Act 1943 (WA)*, s 3C(3).

<sup>29</sup> This threshold reduces in accordance with a formula provided in section 3C of the *Motor Vehicle (Third Party Insurance) Act 1943 (WA)* for damages assessed at greater than 15% of ‘a most extreme case’ but equal to or less than 20% of ‘a most extreme case’. For any damages for non-pecuniary loss assessed in excess of 20% of a ‘most extreme case’ the threshold does not apply.

- (1) *For the purposes of this Act, a close relative of a victim who dies or is injured as a consequence of the commission of an offence, is a person who, immediately before the offence was committed, was –*
- (a) *a parent, grandparent or step-parent of the victim; or*
  - (b) *the spouse or a de facto partner of the victim; or*
  - (c) *a child, grandchild or stepchild of the victim.*

In the context of claims for criminal injuries compensation, damages for nervous shock and psychological injury have been held to include:

*a malfunction of the person which can be said to be a consequence of the impact of the events constituting or associated with the commission of the offence upon the mind or nervous system. It is bodily harm of one sort or another and it must be suffered in consequence of the commission of the offence.*<sup>30</sup>

It has also been said that:

*Mental and nervous shock includes distress, horror, disgust and other similar adverse mental reactions but does not encompass mere fright, humiliation or anguish.*<sup>31</sup>

and:

*Something of a more enduring character which may in both the legal sense and common parlance be described as an injury is required.*<sup>32</sup>

Notwithstanding these descriptors of injury, humiliation or anguish suffered as a result of a reaction of the victim's family or friends or of the litigation process itself is not considered to be a compensable 'injury'.<sup>33</sup>

It is important to note the difference between the pre-requisite 'injury' that must exist before criminal injuries compensation or damages for mental and nervous shock is able to be awarded, and the question posed by the Attorney General's reference, i.e. the potential amendment of the *Fatal Accidents Act 1959* (WA) to allow recovery of non-economic losses. While the *Civil Liability Act 2002* (WA) and *Criminal Injuries Compensation Act 2003* (WA) require something more than mere grief or distress before damages become payable, the very nature of an award of damages for solatium does not.

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<sup>30</sup> *Hatfield v Under Secretary for Law* (Unreported, WASC, Library No 4012, 15 December 1980 at 5 per Burt CJ).

<sup>31</sup> *M v J; J v J* (Unreported, WASC, Library No 920598, 19 November 1992).

<sup>32</sup> *S v Neumann* (1995) 14 WAR 452, 461.

<sup>33</sup> See for example *RJE v Bandy* (Unreported, WASC, Library No 5489, 31 May 1974); *Garton v McCormack* [2002] WADC 111; *McDavitt v McDavitt* [No 2] [2013] WADC 198; *Dunne* [2014] WADC 131.

## 5. Nature of compensation

The extract from Parliamentary debate set out above on page 7 usefully identifies two key issues that will need to be considered if non-economic loss is to be allowed in fatal accident claims, namely:

1. the need to identify the basis or rationale for any recognition of loss; and
2. the need for acute sensitivity in framing the relevant provisions to ensure that well intentioned reform does not lead to additional or aggravated emotional trauma.

To an extent, as will be discussed below, these two key considerations are interdependent.

### 5.1 Basis or rationale for an award of damages

At the most basic level, damages can be either compensatory or punitive in nature.

The Commission does not anticipate any great desire on the part of the community to expand the existing availability of punitive, or exemplary, damages. Accordingly the Commission proposes to focus discussion on the compensatory aspects of potential law reform in respect to damages.

As suggested above, the phrase used by the then Attorney General that *'the amount awarded under such an arbitrary limit would be likely to affront claimants as often as it might solace them'* is useful insofar as it highlights the need for sensitivity in the implementation of potential reform.

However, the phrase also highlights a potential for misunderstanding as to the basis upon which compensation would or could be made available.

It seems likely that the then Attorney General was concerned that a modest award for non-economic loss might prompt an aggrieved, and completely understandable, reaction to the effect: 'is that all my loved one's life is worth?'

In truth, barring a fundamental shift in the philosophy underlying the assessment of damages, an award for non-economic loss in fatal accidents would not, and could not, be 'compensation as substitute'<sup>34</sup> for the loss of a human life.

Quite apart from the moral and ethical considerations inherent in the very notion of ascribing value to a life, the practical challenges would be, in the Commission's respectful view, almost insurmountable. Courts would need to invite evidence and make determinations in respect to diverse and contentious variables such as:

- (a) an individual's 'value' to society;
- (b) from whose viewpoint such value was to be determined;
- (c) whether that value was increased by virtue of experience or depreciated by virtue of advancing years;
- (d) the extent to which such value was modified by such considerations as geographical location, socio-economic status and the like;
- (e) the extent to which an individual's talent was unique or widely available; and
- (f) an endless array of other potential variables.

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<sup>34</sup> P Cane, *Atiyah's Accidents, Compensation and the Law* (8<sup>th</sup> edition, Cambridge University Press, 2013) 89.

Whilst many economists have theorised about the notion of valuing a human life, the reality is that there is no convincing argument to suggest that a conclusive and practical methodology has been, or will ever be, devised.

The common law, not surprisingly, has largely and very sensibly avoided such an exercise in judicial accountancy. The very few decisions which touch upon such valuation exercises, do so in order to exclude the practicality or even morality of such consideration and move quickly on. Justice Heydon, for example, in *Cattanach v Melchior*<sup>35</sup> commented:

*It is contrary to human dignity to reduce the existence of a particular human being to the status of an animal or an inanimate chattel or a chose in action or an interest in land. It is wrong to attempt to place a value on human life or a value on the expense of human life because human life is invaluable - incapable of effective or useful valuation.*

And further:

*Human life is invaluable in the sense that it is incapable of valuation. It has no financial worth which is capable of estimation.*<sup>36</sup>

Whilst Heydon J was in the minority in the ultimate outcome in *Cattanach v Melchior*, his views about the valuation of human life very much represent the overwhelming mainstream of legal thought.

Even if this were not true, subsection 4(2)(d) of the *Fatal Accidents Act 1959* (WA) provides that curtailment of expectation of life does not survive a person's passing for the benefit of the deceased's estate. It would be anomalous if the value of life were not recoverable by the deceased, through his estate, but would be recoverable in the hands of another.

If non-economic damages are not to be regarded as compensation for the loss of a life then to what loss are they directed? Most debate in respect to this question settles on the notion of 'bereavement damages' but again there is little consistency or agreement as to what such a term means or to what loss such damages might be directed.

After noting that '*the very availability of bereavement damages is a controversial issue*', the Law Commission of England and Wales<sup>37</sup> noted:

*There are at least five distinct purposes which an award of bereavement damages might be seen to serve. These are:*

- (a) Compensating relatives for their mental suffering (that is, their grief and sorrow, both immediate upon the deceased's death and continuing).*
- (b) Compensating relatives for the non-pecuniary benefits which they would have enjoyed (that is, the loss of the care and guidance of the deceased, and/or the loss of society with the deceased).*
- (c) Providing practical help for the relatives.*
- (d) Symbolising public recognition that the deceased's death was wrongful.*
- (e) Punishing the tortfeasor who caused the wrongful death.*

<sup>35</sup> *Cattanach v Melchior* (2003) 215 CLR 1 at [353].

<sup>36</sup> *Ibid* at [356].

<sup>37</sup> Law Commission of England and Wales, Consultation Paper 148 *Claims for Wrongful Death* (1997) at [3.127].

It is clear from the provisions of the *Fatal Accidents Act 1959* (WA) and the case law considering claims brought pursuant to that Act, that the Act is compensatory rather than punitive. It is the Commission's view that if the circumstances of a deceased's death warrant criminal sanction then such sanction or punishment can be adequately dealt with under the existing criminal statutory regime. In light of these views the Commission does not propose to consider the punitive aspect identified in (e) by the Law Commission of England and Wales.

## 6. Australian statutory provisions permitting recovery of damages for non-economic loss consequent upon death

In Australia, the Northern Territory<sup>38</sup> and South Australia<sup>39</sup> have enacted legislation permitting the recovery of damages for non-economic loss consequent upon death. Damages under the South Australian and Northern Territory Acts are recoverable irrespective of whether the death of the person was caused by circumstances that might amount to an offence or, in the case of South Australia, an indictable offence.<sup>40</sup>

### 6.1 Northern Territory - *Compensation (Fatal Injuries) Act 1974* (NT)

The *Compensation (Fatal Injuries) Act 1974* (NT) permits the family members of a deceased to recover damages for economic and non-economic losses in circumstances where the deceased's death was caused by a wrongful act, neglect or default and the act, neglect or default was such that it would, had death not ensued, have entitled the deceased to maintain an action and recover damages in respect of the injury caused.<sup>41</sup>

The wording of section 7 of the *Compensation (Fatal Injuries) Act 1974* (NT) is not unique; the legislative instruments of each jurisdiction in Australia adopt similar, if not identical wording. However, unlike the *Fatal Accidents Act 1959* (WA), the Northern Territory legislation permits a court to award damages to a deceased's surviving family members for non-economic loss in one of three different circumstances:

- (a) loss of consortium (in the case of a surviving spouse or de facto partner);<sup>42</sup>
- (b) loss of care and guidance (in the case of a child);<sup>43</sup> and
- (c) an amount of solatium (for all relatives).<sup>44</sup>

The provisions of the Northern Territory legislation permitting the awarding of damages for solatium were introduced by the *Compensation (Fatal Accidents) Ordinance 1974* (NT) and as will be seen below, are much broader than the corresponding South Australian provisions.

#### 6.1.1 Classes of claimants

Damages for solatium under the Northern Territory legislation are available to the same class of persons eligible to claim pecuniary losses consequent upon the death of the deceased, namely:

- (a) a spouse or de facto partner of the deceased person;
- (b) a child of the deceased person;

<sup>38</sup> *Compensation (Fatal Injuries) Act 1974* (NT).

<sup>39</sup> *Civil Liability Act 1936* (SA).

<sup>40</sup> See *Compensation (Fatal Injuries) Act 1974* (NT), s 7; *Civil Liability Act 1936* (SA), s 30(4).

<sup>41</sup> *Compensation (Fatal Injuries) Act 1974* (NT), s 7.

<sup>42</sup> *Compensation (Fatal Injuries) Act 1974* (NT), s 10(3)(c).

<sup>43</sup> *Compensation (Fatal Injuries) Act 1974* (NT), s 10(3)(e)(ii).

<sup>44</sup> *Compensation (Fatal Injuries) Act 1974* (NT), s 10(3)(f).

- (c) a person to whom the deceased person stood, immediately before his or her death, in *loco parentis*;
- (d) a person who stood, immediately before his or her death in *loco parentis* to the deceased person;
- (e) a parent of the deceased person;
- (f) a brother, a sister, a half-brother and a half-sister of the deceased person;
- (g) a former spouse or de facto partner of the deceased person.<sup>45</sup>

The definition of child includes an adopted child, grandchild and step-child of the deceased. A parent is defined to include an adoptive parent, step-father, step-mother, grandfather and a grandmother of the deceased.<sup>46</sup>

Unlike the South Australian legislation, the Northern Territory legislation contains no pre-conditions to be fulfilled before a court can award solatium to a de-facto partner.

### 6.1.2 Solatium or consortium?

In addition to an award of damages for solatium under the Northern Territory legislation, a spouse or de facto partner is entitled to claim damages for loss or impairment of consortium, and a child of the deceased is also entitled to claim damages on account of loss of care and guidance that would have been provided by their deceased parent.<sup>47</sup>

The method of assessing damages for consortium, solatium and loss of care and guidance under the Northern Territory Act is not prescribed by the Northern Territory Act and is left to the exercise of judicial discretion.

In ***Cook v Cavenagh***<sup>48</sup> Muirhead J, when assessing damages payable to the father of a young child killed in a motor vehicle accident, made the following observations about the scope and application of the Northern Territory Act:

*This legislation is extraordinarily wide in its application and “damages” may include many items of components including, by virtue of s10(3)(f) solatium. Solatium is neither defined nor is its assessment subject to a statutory maximum. The question as to whether any solatium should be awarded to a particular “member of the family” must still be in the discretion of the court. A relationship to a deceased person does not automatically entitle such member to an award of solatium. The claimant must provide his entitlement. There is no statutory definition of solatium as such. Its inclusion as a factor compensable as damages under the Act assumes, it seems, that as a matter of law its ingredients can be defined and measured sufficiently to enable an assessment to be made.*

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<sup>45</sup> *Compensation (Fatal Injuries) Act 1974* (NT), s 4.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Compensation (Fatal Injuries) Act 1974* (NT), ss 10(3)(c) and 10(3)(e)(ii).

<sup>48</sup> (1981) 10 NTR 35 at 36.

While the legislation permits an award of damages for loss of consortium/loss of care and guidance in addition to an award for solatium, Northern Territory courts have approached claims for non-economic loss by making a single award to compensate for the various permitted heads of damage.<sup>49</sup>

In **Parsons & Ors v Australian Telecommunications Commission & Ors**<sup>50</sup> Muirhead J stated:

*The plaintiff and the child ... also request that I should assess their entitlement to solatium pursuant to s 10(3)(f) and the former also seeks an order for loss of consortium pursuant to s 10(3)(c). These are open for assessment on a discretionary basis. This court has for years recognised the danger of overlapping of such assessments which are basically arbitrary and which contain common elements. In Curator of Estates of Deceased Persons and Rozario v Fernandez (1977) 16 ALR 445 (the first assessment under this section) Ward J assessed solatium and loss of consortium together, a practice followed by me in Bennett v Liddy, supra, and by the Chief Justice of this court in Logan v Holmes, supra. In Dilworth v Peko Wallsend Operation Ltd, supra, Gallop J also included the claim for loss of household services (s 10(3)(d)) under the same composite heading. Mr Thomson QC submitted that as I am dealing with a de facto relationship it is inappropriate to introduce into the assessment components which traditionally arise following death or injury to husband or wife. However I am bound by s 4(3) to treat the parties as husband and wife not only for the assessment of damages for loss of support but for the ancillary components of damages referred to in s 10 (see also Bennett v Liddy, supra), not forgetting of course that the assessment must be "proportioned to the injury". In this case in assessing the plaintiff's entitlement I will deal with solatium and loss of consortium jointly. I will consider the claim for household services separately.*

His Honour ultimately allowed damages for loss of solatium and consortium to the deceased's wife in the sum of \$10,000 and to one of the deceased's sons in the sum of \$7,000 inclusive of an allowance of \$2,000 for loss of care and guidance. The deceased in *Parsons* was survived by a son, born shortly after the deceased's death. A claim was not made for loss of solatium by that son and the Court was not required to assess damages in circumstances where a child did not know or remember their deceased parent.

In **Young v Central Australian Aboriginal Congress Inc & Ors**<sup>51</sup> however, Thomas J was asked to make an award of damages for solatium to the daughter of a deceased; the daughter being 13 months of age at the time of the deceased's death. It was submitted that any award of solatium or loss of care or guidance ought to be reduced by reason of the infant plaintiff's age and gender. Thomas J allowing combined damages for solatium and loss of consortium to the deceased's wife of \$40,000 (this amount having been agreed between the parties) and a sum of \$30,000 to each of the deceased's children for solatium and loss of care and guidance stated:

*... it is the submission made by Ms Gearin on behalf of the first defendant that [the daughter's] claim is limited because of her gender and the fact she has no memory of her father. I do not consider the award to her should be reduced on this basis. Her gender does not mean the loss of a father is any greater or lesser than for her two brothers. Her father had stayed within the family unit during the difficult months of [the daughter's] illness. She has lost a person whom*

<sup>49</sup> See for example *Curator of Estates of Deceased Persons and Rozario v Fernandez* (1977) 16 ALR 445.

<sup>50</sup> (1983) 29 NTR 19.

<sup>51</sup> [2008] NTSC 47.

*she could have expected to look to for love and guidance for many years. The fact that she may have no memory of her father is, in itself, a source for sadness. I see no reason to distinguish between any of the three children.*<sup>52</sup>

Unlike the South Australian legislation, the Northern Territory legislation does not limit the amount of damages able to be recovered for non-economic losses. The quantum of damages allowed for solatium, loss of consortium and loss of care and guidance under the Northern Territory legislation is entirely at the discretion of the Court tasked with determining that award.

## 6.2 South Australia - *Civil Liability Act 1936 (SA)*

Where the death of an infant or a person is caused by a wrongful act, neglect or default and the act, neglect or default is such as would, if death had not ensued, have entitled that person to maintain an action to recover damages, the person who would have been liable if death had not ensued is liable under the *Civil Liability Act 1936 (SA)* to pay damages for solatium.<sup>53</sup>

In *Jeffries v The Commonwealth of Australia*<sup>54</sup> Napier CJ stated:

*I think that the idea of solatium has been borrowed from the Scottish law, and I propose to follow the cases to which I have referred, by fixing a moderate sum of - £100 to £150 – as the normal solatium, which can be “reasonably regarded as an adequate acknowledgment of the pain and grief which have been caused to the surviving relative”, and to use that as the basis of an assessment, which will vary according to the circumstances for the particular case...I should say that I am dealing with a claim by parents. In the case of a claim by a widow, some similar principle may be adopted, but other considerations will arise.*

The current South Australian legislation reflects the above approach; implementing a cap on damages and differentiating between loss suffered by a spouse or domestic partner and the parent of a deceased child.

A right to claim compensation for solatium under the *Civil Liability Act 1936 (SA)* by each or either of those classes is in addition to any other rights the parents of a deceased child or the spouse or domestic partner of a deceased person might have to compensation under the *Civil Liability Act 1936 (SA)*.<sup>55</sup>

In *Cook v Cavenagh*<sup>56</sup> the Supreme Court of the Northern Territory distinguished the South Australian legislation from its Northern Territory counterpart in the following way:

*The South Australian legislation, the Wrongs Act 1936-1975, has contained provisions for solatium since at least 1940. But throughout its history in that State there have been four factors which distinguish it from the unsatisfactory situation I am now dealing with.*

*(1) Solatium is awarded only to surviving spouses (as defined in the Wrongs Act) or to parents of the deceased children.*

<sup>52</sup> *Young v Central Australian Aboriginal Congress* [2008] NTSC 47 at [281].

<sup>53</sup> *Civil Liability Act 1936 (SA)*, ss 28 and 29.

<sup>54</sup> [1946] SASR 106 at 109.

<sup>55</sup> *Civil Liability Act 1936 (SA)*, s 30(1).

<sup>56</sup> (1981) 10 NTR 35 at 36-37 per Muirhead J.

- (2) *The maximum amount of solatium is defined. Where claimed by parents the amount recovered is “divided between the parents in such shares as the court directs”.*
- (3) *The Act refers to “solatium for the suffering caused to the parents...” or “to the spouse” as the case may be.*
- (4) *When both parents claim, the statutory limit is payable to the parents as an aggregate sum which may be divided between them.*

These points of difference endure; the *Civil Liability Act 1936* (SA) having adopted the provisions of its predecessor, the *Wrongs Act 1936-1975* (SA).

### 6.2.1 Awards of solatium for parents of a deceased child

In the case of a deceased child, a court may award such damages as the court thinks just by way of solatium for the suffering caused to the parents or parent by the death of their child.<sup>57</sup>

The quantum of damages awarded however, must not exceed \$1,000 in cases where death occurred before the commencement of the *Wrongs Act Amendment Act 1974* (SA) or \$10,000 in claims where death occurred after the commencement of the *Wrongs Act Amendment Act 1974* (SA).<sup>58</sup>

While the *Civil Liability Act 1936* (SA) defines ‘parent’ to include a father, mother, grandfather, grandmother, step-father and step-mother,<sup>59</sup> a claim for damages for solatium for the loss of a child is limited to the father or mother of the child only.<sup>60</sup>

In circumstances where both parents bring an action claiming damages for solatium, the amount awarded (after deducting any costs not recovered from the defendant) is divided between the parents of the deceased child in such shares as the court directs.<sup>61</sup> If either of the deceased child’s surviving parents does not join in bringing an action for solatium, the other surviving parent may bring an action for solatium but only for such amount as the surviving parent claims is due to them alone.<sup>62</sup>

### 6.2.2 Awards of solatium for surviving spouse or domestic partner

In the case of a deceased spouse or domestic partner, the South Australian legislation provides that the court may award to the surviving spouse or domestic partner a sum not exceeding \$1,400 in cases where the death occurred prior to the commencement of the *Wrongs Act Amendment Act 1974* (SA) or \$10,000 in cases where the death occurred after the commencement of the *Wrongs Act Amendment Act 1974* (SA).<sup>63</sup>

For the purposes of South Australian legislation, ‘spouse’ means a person who was legally married to another on the day on which the cause of action arose. ‘Domestic partner’ is defined to mean a person

<sup>57</sup> *Civil Liability Act 1936* (SA), s 28.

<sup>58</sup> The *Wrongs Act Amendment Act 1974* was assented to on 17 October 1974 and commenced on 28 November 1974.

<sup>59</sup> *Civil Liability Act 1936* (SA), s 3.

<sup>60</sup> *Civil Liability Act 1936* (SA), s 28(4).

<sup>61</sup> *Civil Liability Act 1936* (SA), s 28(2).

<sup>62</sup> *Civil Liability Act 1936* (SA), s 28(3).

<sup>63</sup> *Civil Liability Act 1936* (SA), s 29.

declared under the *Family Relationships Act 1975* (SA) to have been a domestic partner on the day on which the cause of action arose or a person who was in a registered relationship on the day on which the cause of action arose. A registered relationship is one that is registered under the *Relationships Register Act 2016* (SA) (or a corresponding law registered relationship under that Act).<sup>64</sup>

The *Civil Liability Act 1936* (SA) provides that where a spouse and a domestic partner both survive the deceased and both claim solatium, the amount of solatium to be awarded to each is to be apportioned between the two claimants. The degree of apportionment between the two parties is to be made in such manner as the court thinks just.<sup>65</sup> The quantum of the award of solatium where a spouse and domestic partner both claim, irrespective of the apportionment between them, remains subject to the statutory maximum.<sup>66</sup>

If proceedings for solatium are brought under the South Australian legislation for the benefit of a surviving spouse, the court is under no obligation to inquire if the deceased was also survived by a domestic partner. A domestic partner can however apply to the court to be joined as a party to the proceedings at any time prior to a final determination in those proceedings.<sup>67</sup>

### 6.2.3 General provisions relating to awards of solatium under the South Australian legislation

Any award of solatium is and remains within the discretion of the court. As noted above, the quantum of solatium available to a claimant is not fixed, but rather subject to a statutory maximum.

While originally introduced to address the inability of family members to access compensation when they did not suffer economic loss upon the death of a spouse or child,<sup>68</sup> the legislation does not mandate that a court must grant damages for solatium in all cases of wrongful death. If the court considers it appropriate, when determining a claim for solatium, the court may refuse to order payment of any sum by way of solatium if, having regard to the conduct of the plaintiff in relation to the deceased, or to the relations which existed between the plaintiff and the deceased or for any other sufficient reason, the court considers that no payment should be made.<sup>69</sup>

Under the South Australian legislation, if a claimant dies before his or her claim for solatium is settled or determined by the court, the claim for solatium does not survive for the benefit of the claimant's estate.<sup>70</sup>

## 6.3 New South Wales

New South Wales legislation does not currently recognise damages for non-economic loss in claims of wrongful death.

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<sup>64</sup> *Civil Liability Act 1936* (SA), s 3.

<sup>65</sup> *Civil Liability Act 1936* (SA), s 29(3).

<sup>66</sup> *Civil Liability Act 1936* (SA), s 29(2).

<sup>67</sup> *Civil Liability Act 1936* (SA), s 29(4).

<sup>68</sup> *Hansard* South Australia House of Assembly, 14 November 1940.

<sup>69</sup> *Civil Liability Act 1936* (SA), s 30(2).

<sup>70</sup> *Civil Liability Act 1936* (SA), s 30(3).

In its Report on Compensation to Relatives<sup>71</sup> the New South Wales Law Reform Commission considered whether amendments should be made to introduce bereavement damages in dust diseases cases, or fatal accident cases more generally.

The New South Wales Law Reform Commission noted the various methods of awarding bereavement damages in South Australia, the Northern Territory and the United Kingdom and emphasised the difference between damages for bereavement and damages for nervous shock but did not propose any particular model for the award of bereavement damages in New South Wales.

In response to its discussion paper seeking comment as to whether bereavement damages should be introduced, the New South Wales Law Reform Commission received submissions confirming the views long held in those jurisdictions that do permit recovery of such damages; that bereavement damages '*demonstrate the importance of society recognising the grief and suffering of those who are wrongfully deprived of the life and company of a close loved one*'.<sup>72</sup>

Arguments against the introduction of bereavement damages ranged from there being no pressing public policy need for the extension of damages in New South Wales to the increased cost and prejudice to insurers and the difficulty establishing proof of entitlement, particularly if it were necessary to assess the extent of a claimant's grief. Difficulties in defining a class of claimants who might be entitled to recover bereavement damages was also a prevalent argument.

Ultimately the New South Wales Law Reform Commission did not recommend the introduction of bereavement damages in dust diseases cases or more generally, stating:

*There are no grounds for limiting any award of bereavement damages only to dust diseases victims. Furthermore, there are not sufficient grounds for introducing a more general bereavement damages award. Grief has never been recognised as compensable harm in NSW and there has been no identified problem which would justify changing the established approach. Furthermore, there are problems inherent in determining who should be entitled to an award and the terms on which it should be available. Finally the direct and indirect costs that would be associated with this new cause of action are not justified, given the lack of any compelling reason for its introduction.*

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<sup>71</sup> New South Wales Law Reform Commission, *Report 131: Compensation to Relatives* (October 2011).

<sup>72</sup> Australian Lawyers' Alliance, *Submission CR14* to the New South Wales Law Reform Commission.

## 7. Comparable international statutory regimes

### 7.1 England

English legislation permits recovery of non-economic loss in claims for wrongful death, but only for 'bereavement damages' to compensate the loss of a deceased's counsel and guidance and a claimant's grief.

The right to recover such damages was introduced in 1982 when the *Administration of Justice Act 1982* (UK) inserted section 1A into the *Fatal Accidents Act 1976* (UK). That section permits a claim for damages for bereavement by a husband, wife or civil partner of a deceased and, where the deceased was an unmarried minor, to one or both parents, contingent on whether the child was legitimate or illegitimate.

This class of claimants is narrower than the class of claimants to whom an action to recover economic losses under the *Fatal Accidents Act 1976* (UK) might otherwise be available.

In recommending the introduction of bereavement damages into the *Fatal Accidents Act 1976* (UK) the Law Commission of England and Wales adopted the view that an award of damages, albeit small, could provide some slight consoling effect where parents had lost an infant child or where a spouse lost their respective husband or wife. The Law Commission took the view that if money could compensate for such bereavement, even minimally, then recovery of such damages should be permitted.<sup>73</sup>

In considering the quantum of proposed bereavement damages, the Law Commission stated:

*From the comments which we have received from those experienced in this sort of litigation, we are persuaded that the small conventional sums at present reaching, by an indirect route, the parents of a dead child do have some beneficial effect. We do not want our proposals to abolish this source of solace and we think the case of husband and wife should be treated in the same way as parent and child. We do not, however, feel justified in recommending any further extension, particularly as we depart from the South Australian and Irish examples in recommending a fixed tariff figure rather than an upper limit to an award otherwise at large.*

*We make this recommendation for a fixed tariff figure because we are anxious that there should be no judicial enquiry at all into the consequences of bereavement. Nor do we follow the South Australian example in distinguishing between the amounts recoverable in differing relationships; it is, we think fruitless to try to distinguish between the loss suffered by a parent and that suffered by a spouse; we accept that the award is no more than an arbitrary figure, but despite its arbitrariness, we think it is something that ought to be in these two limited contexts, recoverable. We recognise that the effects of bereavement will be greater in some cases than others but to avoid any judicial enquiry into degrees of grief we are prepared to accept this disparity.<sup>74</sup>*

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<sup>73</sup> Law Commission of England and Wales, Report LC056 *Personal Injury Litigation: Assessment of Administration of Damages Report* (1973).

<sup>74</sup> *Ibid* at [174]-[175].

When the 1982 amendments were introduced to the *Fatal Accidents Act 1976* (UK), damages for bereavement comprised a fixed sum of £3,500. The quantum of bereavement damages has been debated several times since its introduction. In 1988 it was the subject of a Private Member's Bill<sup>75</sup> seeking to increase the amount of the award to £10,000. This Bill was introduced primarily in response to a public scrutiny of the perceived inadequacy of bereavement damages following a series of national disasters. The Bill failed but ultimately achieved its purpose when the then Solicitor-General announced a review of the quantum of bereavement damages in 1989 and subsequently legislative amendment increased the quantum of bereavement damages recoverable to £10,000.<sup>76</sup>

Currently, damages for bereavement are limited to £12,980 and, in the event of a claim being brought by both parents of a deceased minor, divisible equally between those parents.

While the amount claimable under section 1A of the *Fatal Accidents Act 1976* (UK) is relatively modest, damages of this kind have continued to be recognised as performing a 'symbolic function of providing some "sympathetic recognition" by the state of the fact of bereavement, and an expression on the part of society of the gravity with which it regards the loss of a human life'.<sup>77</sup>

## 7.2 Scotland

Under the *Damages (Scotland) Act 2011* (Scotland), where a person dies in consequence of suffering personal injuries as a result of the act or omission of another person and that act or omission gives rise to a liability to pay damages to the deceased or would have given rise to such liability but for the deceased's death, any relative who is an immediate member of the deceased's family may claim damages for patrimonial (economic) or non-patrimonial (non-economic) loss suffered consequent upon the deceased's death.<sup>78</sup>

### 7.2.1 Classes of claimants

Damages for non-economic losses under the Scottish Act may be awarded in respect of any or all of a relative's:

- (a) distress and anxiety endured in contemplation of the deceased's suffering before the deceased's death;
- (b) grief and sorrow caused by the deceased's death; and
- (c) loss of such non-economic benefit as the relative might have been expected to derive from the deceased's society and guidance if the deceased had not died.<sup>79</sup>

While the *Damages (Scotland) Act 1976* (Scotland) restricted damages for non-economic loss to "immediate family", the repeal of that Act and enactment of the *Damages (Scotland) Act 2011* (Scotland) highlighted the distinction between the rights of those who could recover for economic

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<sup>75</sup> Citizen's Compensation Bill 1988, introduced by Mr Lawrence Cunliffe MP.

<sup>76</sup> *Damages for Bereavement (Variation of Sum) (England and Wales) Order* SI 1990 No 2575.

<sup>77</sup> Law Commission of England and Wales, Report 263 *Claims for Wrongful Death* (1999) at [2.67].

<sup>78</sup> *Damages (Scotland) Act 2011*, ss 3 and 4.

<sup>79</sup> *Damages (Scotland) Act 2011*, s 4(3)(b).

losses and those who might be entitled to economic and/or non-economic losses. The 2011 Act (Scotland) limits recovery of non-economic damages to relatives who:

- (a) immediately before the death of the deceased is the deceased's spouse or civil partner or is living with the deceased as if married to, or in civil partnership with, the deceased;
- (b) is a parent or child of the deceased, accepted the deceased as a child of the person's family or was accepted by the deceased as a child of the deceased's family;
- (c) is the brother or sister of the deceased or was brought up in the same household as the deceased and accepted as a child of the family in which the deceased was a child; or
- (d) is a grandparent or grandchild of the deceased, accepted the deceased as a grandchild of the person or was accepted by the deceased as a grandchild of the deceased.<sup>80</sup>

### 7.2.2 The Scottish method of assessing non-economic losses

In its 2007 Discussion Paper on *Damages for Wrongful Death*<sup>81</sup> the Scottish Law Commission argued that awards for non-economic loss consequent upon the death of a relative were problematic in that they attempted to provide compensation for a loss that cannot be quantified; that is, the suffering caused by the wrongful death of a relative and the loss of their love and companionship.

Noting that such losses were irreparable, the Scottish Law Commission recognised that in causing the deceased's death, the wrongdoer had committed a wrong against not only the deceased but also those closest to him. The Scottish Law Commission considered it was the family's sense of outrage that justified the awarding of damages for non-economic loss and that awarding such damages filled an important symbolic function.

Historically, the Scottish legislation governing the provision of damages in fatal accident claims has not restricted the amount of damages that might be awarded for non-economic losses, instead allowing the court to award such damages 'as the court thinks just'. This approach has been carried through to the present Scottish Act<sup>82</sup> and as can be seen above, despite the difficult task imposed upon the Court in assessing the quantum of non-economic losses, has been adopted in Australia in the Northern Territory.

In *Elliott v Glasgow Corporation*<sup>83</sup> Lord President Clyde described the difficulties experienced by Courts when assessing non-economic loss stating:

*When there is nothing to place in the scales except the pain and grief which the accident has occasioned to a bereaved survivor, no standard for fixing the amount to be awarded as solatium is available. No parent, for example, would pass through such an experience for any sum of money ... it is quite clear that solatium is not to be met by a nominal award. ... But it is desirable that juries ... should be made aware of the limited character of the claim, and of the considerations which require them to regard a strict moderation in fixing their award in respect of it.*

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<sup>80</sup> *Damages (Scotland) Act 2011*, ss 4(5), 14(1)(a)-(d).

<sup>81</sup> Scottish Law Commission, *Discussion Paper No 135 on Damages for Wrongful Death* (2007).

<sup>82</sup> *Ibid.*

<sup>83</sup> (1922) Sess Cas 146 at 147-149.

When contemplating amendments to the manner in which non-economic damages were calculated under the *Damages (Scotland) Act 1976* (Scotland) (the predecessor of the current Act), the Scottish Law Commission stated:

*While a tariff system has its attractions, we have decided that the current system should be retained. Under a tariff system, the deceased's relative would be entitled to the payment regardless of the quality of their relationship with the deceased. If the courts were to retain a discretion to depart from the level of the tariff to take into account exceptional cases, this would undermine the whole rationale for having a tariff system in the first place. Nor are we convinced that a tariff system would necessarily result in earlier settlements. While the quantum of damages for non-patrimonial loss would be set, there might be no admission of liability and such matters as contributory negligence or multiple defenders may still be outstanding.*<sup>84</sup>

Ultimately the 2011 Act (Scotland) retained judicial discretion as the mode of assessing damages for non-economic losses; granting a court the power to award any sum as the court 'thinks just'.<sup>85</sup>

In *Gallagher & Ors v S C Cheadle Hume Ltd & Ors*<sup>86</sup> Lord Usit described the Court's task in awarding damages for non-economic loss in the following way:

*It is clearly the case that the assessment of a loss of society award under section 4(3)(b) of the 2011 Act is a difficult task for a judge. The reason for that is that it involves assessing financial recompense for a non-financial loss. Such an assessment is akin to, but in my opinion even more difficult than, the assessment of solatium for a physical or psychological injury, in relation to which Lord Justice-Clerk Grant said in *McCallum v Paterson* 1968 SC 280 at p 282:*

*"No precise rule can be laid down as a yardstick for solatium awards, which must of necessity be of a somewhat arbitrary character. Money cannot compensate for pain and suffering and it is impossible, by a monetary award under this head, to put the victim in the situation in which he would have been had the accident not occurred. The test must always be what is fair and reasonable in the circumstances and, because of that, and because of the absence of any specific rules for quantification, reasonable men (sic) may vary considerably in their assessment of what the appropriate award should be."*

*Of course, what I have to assess in this case is not common law solatium, but, under section 4(3)(b) of the 2011 Act, such sum, if any, as I think just by way of compensation for the distress and anxiety endured by the relative in contemplation of the suffering of the deceased before his death, the grief and sorrow of the relative caused by the death and the loss of such non-patrimonial benefit as the relative might have been expected to derive from the deceased's society and guidance if he had not died. The legislature has therefore clearly enacted a provision laying down what elements have to be taken into account in the award of damages under the subsection and that the award of damages must be by way of compensation for all or any of them, but has given no guidance as to what level of award would be appropriate, even as a starting point. There is no range of figures provided and there is no limit on the amount which can be awarded, the only control over awards being by way of a reclaiming motion in the case of an award made by a judge and by way of a motion for a new trial in the*

<sup>84</sup> Scottish Law Commission, *Report No 213 on Damages for Wrongful Death* (2008) at [3.51].

<sup>85</sup> *Damages (Scotland) Act 2011*, s 4(3)(b).

<sup>86</sup> [2014] SCOH 103 at [12].

*case of an award made by a jury. This contrasts with the fixed bereavement award of £10,000 in England under section 1A of the Fatal Accidents Act 1976, which is payable to only the spouse of the deceased and, where the deceased was never married, to his parents if he was legitimate and to his mother if he was illegitimate. The existing statutory provision in Scotland contained in section 4(3)(b) of the 2011 Act, by which I am bound and to which I must give effect, in my opinion necessarily involves inquiring in each case into the nature and extent of all three elements referred to in the subsection. It is open to a pursuer to highlight the positive aspects of a relationship and to a defender to highlight the negative aspects. In relation to the loss of such non-patrimonial benefit as the relative might have been expected to derive from the deceased's society and guidance if the deceased had not died, the evaluation must consider what the non-patrimonial benefit is and for how long it is likely that it would have been derived by the relative if the deceased had not died. This must, in turn, involve consideration of the ages of the relative and of the deceased at the date of the deceased's death. Some may consider the carrying out of such an inquiry in each individual case to be distasteful, if not even offensive, but carried out it must be.*

## 7.3 Ireland

### 7.3.1 The introduction of 'happiness damages'

The ability to claim and recover damages for non-economic losses was implemented by the *Civil Liability Act 1961* (Ireland).

Then Parliamentary Secretary to the Minister for Justice, Mr Haughay in his second reading speech to parliament on 4 August 1961 described the introduction of such provisions in the following way:

*The assessment of what I may call happiness damages has given rise to considerable difficulty in England particularly in view of the fact that the test to be applied is an objective one. Moreover, it has been said that the maximum amount that can be awarded is £500; and in assessing damages under the Fatal Accidents Acts in England account must be taken of any damages payable under the survival statute of 1934. On a full consideration of this problem it seemed to me that what should be done was to give more damages to the dependants of a person who lost his life due to the wrongful act of another. The dependants and not the estate are the real sufferers, and this all the more so where the estate goes to a stranger under the will of the deceased. Accordingly, Section 49 of the Bill provides for an additional head of damages in a fatal case in order to compensate the dependants for mental distress resulting to them from the death.*

*The total of the amounts awarded in any one case will not exceed £1,000. The amount for each dependant will be assessed by the judge and indicated separately in the award. The idea of providing compensation for mental distress will be completely new to the common law and the relevant provisions in Section 49 will apply for a trial period of three years. Before the end of that period the law will be re-examined having regard to the actual cases where damages for mental distress have been awarded.*

*It is proposed to keep records of each case decided in the courts. I suggest that the figure of £1,000 is a generous one, which compares more than favourably with £750 which is, I understand, the top amount awarded for what in Scots law is known as solatium or solatium*

doloris. *The principle of awarding compensation for moral damage is an attractive one and it has operated successfully in Scotland and in France. We shall see how it will work in this country. The present system of confining damages in fatal cases to purely actuarial or financial loss means that a husband can recover nothing for the loss of his wife, unless he can prove economic dependency, which very often he is unable to do. Before I leave this subject, I may mention that mental distress under the new proposal will, of course, have to be proved.*

In the ensuing debate, Mr Lenihan in response welcomed the introduction of section 49 of the *Civil Liability Act 1961* (Ireland) (then *Civil Liability Bill*, 1960), stating:

*I particularly welcome Section 49 which provides for damages not to exceed £1,000 in the case of mental disturbance caused by a fatal accident. It has been an anomalous situation that fatal cases gave rise to comparatively low damages as against where a person might be injured in some way. To layman and lawyer alike, it was an anomaly that an injured person had far greater value in the assessment of damages than, to put it bluntly, a dead person. The situation now is that that has been remedied to a certain extent by the provision of compensation up to £1,000 in the case of mental distress which afterwards occurred following a fatality. It is a welcome innovation.*

### 7.3.2 Classes of claimants

Similar to the English and Scottish legislation, the *Civil Liability Act 1961* (Ireland) provides for an action for damages for the benefit of the dependents of a deceased to be brought in circumstances where the death of a person is caused by a wrongful act of another such as would have entitled the party injured, but for his death, to maintain an action to recover damages in respect of that act.<sup>87</sup>

The right to bring an action is not limited to a spouse or civil partner but includes the parents, grandparents, step-parents, children, grandchildren, siblings and half-brother and half-sister of the deceased who have suffered injury or mental distress as a result of the death.<sup>88</sup>

For the purposes of ascertaining the relationship between the deceased and a claimant, the Irish legislation considers adopted children and illegitimate children to be legitimate children of the deceased; and persons standing in *loco parentis* are considered to be a parent.<sup>89</sup>

However, the class of persons falling within the definition of 'dependent' under the *Civil Liability Act* (Ireland) is much broader than its Scottish counterpart. Unlike the Scottish legislation, the definition of dependent in the Irish legislation includes persons who while not married to or a civil partner of the deceased, had been living with the deceased as the deceased's co-habitant for a continuous period of not less than three years.

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<sup>87</sup> *Civil Liability Act 1961* (Ireland), s 48(1).

<sup>88</sup> *Civil Liability Act 1961* (Ireland), s 47(1).

<sup>89</sup> *Civil Liability Act 1961* (Ireland), s 47(2).

### 7.3.3 Claimants excluded by the Irish legislature

While the definition of dependent includes a divorced spouse who suffers injury or mental distress as a result of the deceased's death, the Irish Act precludes an award of damages for mental distress to a divorced spouse.<sup>90</sup>

### 7.3.4 Limits on awards of non-economic loss

The *Civil Liability Act* (Ireland) does not limit the quantum of damages to be claimed for 'injury'; rather, it provides for the quantum of damages for 'mental distress' to be determined by judicial discretion, subject to a statutory cap, which is currently €35,000.

### 7.3.5 What is 'mental distress'?

What constitutes mental distress is not defined by the *Civil Liability Act* 1961 (Ireland), however it is clear that the reference to mental distress has been interpreted by Irish courts as a reference to non-economic loss or solatium.

In ***Cubbard v Rederij Viribus Unitis and Galway Stevedores Ltd***<sup>91</sup> Lavery J when describing the purpose of damages for mental distress stated:

*The view I take of [section 48] is that it is not intended to provide monetary compensation for every member of the family ... I think the section must be considered in the light of some real intense feeling of being grievously affected by the death.*

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<sup>90</sup> *Civil Liability Act* 1961 (Ireland), s 47(1) and 49A.

<sup>91</sup> (1966) 100 ITLR 40.

## 8. Should non-economic loss damages for wrongful death be available?

The Commission notes that question of whether the *Fatal Accidents Act 1959* (WA) should be amended to provide for the provision of damages for non-economic loss for wrongful death may ultimately be a question of policy for the government of the day. However, from a legal policy perspective, the Commission notes that there are number of factors both in favour of and against the introduction of such damages.

### 8.1 Arguments in favour of reform

#### 8.1.1 Recognition of loss

The principal argument for legislating recovery of non-economic loss in cases of wrongful death is that such damages (whether described as bereavement damages, non-patrimonial loss or otherwise), recognise and compensate the relatives of the deceased for their grief and sorrow consequent upon the deceased's death.

The Law Commission of England and Wales recognised that the introduction of non-economic losses for bereavement was:

*widely perceived as performing a further symbolic function of providing some "sympathetic recognition" by the state of the fact of bereavement and an expression on the part of society of the gravity with which it regards the loss of a human life.*<sup>92</sup>

It is compensation for the emotional impact of the deceased's death; a natural and accepted consequence of that death, in circumstances where that death is attributable to the wrongful act or omission of another. While such emotional impact often may not rise to the severity or duration required to be diagnosed as an actual psychiatric injury, it is a trauma suffered nonetheless.

An award of solatium, however small, would serve as recognition and acknowledgment of the grief and sorrow experienced by relatives of the deceased following the death of their loved one. This may particularly be the case where a relative does not suffer any economic losses. For example, the *Fatal Accidents Act 1959* (WA) currently offers little to compensate a spouse who is the sole income earner. A surviving spouse (and child) in that circumstance may recover for loss of domestic services, but otherwise receive little recognition of the loss suffered. A spouse currently has no right to recover for the loss of companionship provided by the deceased, or the grief and anguish at their loss. In the case of a deceased child who did not make a financial contribution to the household, the parents of that child currently have no remedy for their loss. The Commission queries whether an award of solatium may go some way to assuaging, or at least recognising, that loss.

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<sup>92</sup> Law Commission of England and Wales, Report 263 *Claims for Wrongful Death* (1999) at [2.67].

### 8.1.2 The UK approach

As discussed under 5.1, in its Consultation Paper on *Claims for Wrongful Death*, the Law Commission of England and Wales considered that there were five distinct purposes that an award for damages for non-economic loss might serve:

- (a) compensating relatives for their mental suffering (i.e. grief and sorrow consequent upon the deceased's death);
- (b) compensating relatives for non-economic benefits which they would have enjoyed (i.e. loss of care, guidance and society of the deceased);
- (c) providing practical help for relatives of the deceased;
- (d) public recognition that the deceased's death was wrongful; and
- (e) punishment of the tortfeasor responsible for the wrongful death.<sup>93</sup>

The Law Commission considered that the purpose of bereavement damages ought not to be to compensate economic losses. The Commission agrees with that view. Further, while an award of solatium might provide some practical help for relatives of the deceased (item (c) above), the preliminary view of the Commission is that that practical benefit in and of itself is unlikely to be sufficient to warrant amendment to the current legislation. The Commission is also of the preliminary view that the purpose of bereavement damages should not be to punish the tortfeasor responsible for the wrongful death, as that is not the general purpose of damages under the *Fatal Accidents Act 1959* (WA) (item (e) above).

Rather, in the event bereavement damages of some sort are to be introduced under the *Fatal Accidents Act 1959* (WA), the Commission is of the preliminary view that the appropriate basis for so doing would be to publicly recognise that the deceased's death was wrongful (item (d) above) and to compensate relatives for their mental suffering and loss of care and guidance (items (a) and (b) above).

### 8.1.3 Damages for non-economic losses are not unprecedented

The Commission also notes that, in general terms, the concept of awarding damages for non-economic losses for mental harm is not foreign to the courts. Courts are presently required to, and do, award damages for mental harm (or nervous shock) in negligence cases and in the context of claims for criminal injuries compensation. Therefore, the Commission considers that if the *Fatal Accidents Act 1959* (WA) were to be amended to make provision for damages for non-economic loss for wrongful death, the courts are already equipped to consider and make such awards in appropriate circumstances.

Further, as outlined in this Discussion Paper, damages for non-economic loss for wrongful death are presently available in the jurisdictions of the Northern Territory, South Australia, England, Scotland and Ireland. The concept is therefore not unknown in the common law in other jurisdictions.

The introduction of damages for non-economic loss under the *Fatal Accidents Act 1959* (WA) is also consistent with the Commission's recommendations in its *Report on Fatal Accidents*,<sup>94</sup> where the

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<sup>93</sup> Law Commission of England and Wales, Consultation Paper 148 *Claims for Wrongful Death* (1997) at [3.127].

<sup>94</sup> Law Reform Commission of Western Australia, *Report on Fatal Accidents* (1978), No. 66 at [4.11]-[4.20].

Commission recommended damages be made available for loss of assistance and guidance to spouses, parents, unmarried children and unmarried persons to whom the deceased stood in *loco parentis*.<sup>95</sup>

## 8.2 Arguments against reform

### 8.2.1 Adding insult to injury

The key argument against reform is that it is impossible to ascribe a precise monetary value for a person's grief or the loss of companionship or guidance that results from the death of a loved one. Awards of solatium, by their very nature, are unlikely and unable to accurately assess or measure the loss suffered. This was recognised by Muirhead J in *Cook v Cavenagh*<sup>96</sup> when His Honour stated:

*In assessing solatium therefore I approach the matter objectively and separately in the case of each relative and I can only attempt to measure the intensity of sorrow and its duration. I must take into account aggravating and mitigating factors. There is no question of pecuniary loss or compensation for such loss. The assessment of general damages for pain and suffering including transitory suffering is an exercise frequently required by the law and of that there can be no measure save perhaps knowledge of earlier assessments. Compensating grief in terms of money is perhaps a more difficult exercise as in reality money can be little compensation in a society such as ours and one must in the long run endeavour to do justice between the plaintiff and the defendant.*

Leaving the assessment of non-economic losses to the exercise of judicial discretion necessitates inquiry into and a weighing up of the degree and extent of grief suffered by surviving dependents. While such a process (to the extent that it can) might permit awards that more accurately reflect losses suffered, the inquiry itself is likely to increase a surviving dependent's suffering, delay the grieving process and be viewed as distasteful and insulting to both claimants and the deceased.

The current South Australian provisions permitting awards of solatium fix arbitrary and nominal amounts. A similar position exists in England. The Commission is conscious of the risk that, in fixing nominal or arbitrary awards for solatium, such awards might be considered insulting to those who have suffered the loss of a close relative. However, the Commission also notes that the absence of any award of solatium may also cause insult to those surviving the deceased.

The Commission also recognises the risk that the imposition of a fixed award for non-economic loss (aside from the arbitrary and/or nominal nature of that award) may give the impression of creating an entitlement rather than being compensatory in nature.

### 8.2.2 Insurance against non-economic losses?

The Commission is also conscious that in many cases it is the insurer of the wrongdoer, rather than the wrongdoer themselves, who will fund any award of non-economic loss. In the case of death occasioned by motor vehicle accident, for example, the Insurance Commission of Western Australia as the statutory third party insurer will (save in limited circumstances) stand in place of the wrongdoer. Similarly, an insurer may stand in place of an at-fault employer. Arguably, if an insurer does not stand

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<sup>95</sup> This recommendation was not implemented.

<sup>96</sup> (1981) 10 NTR 35 at 37.

in place of the wrongdoer, the ability of a claimant to recover such damages (as distinct from being awarded damages) may be significantly diminished. Conversely, if legislative amendment permits an award of non-economic loss, insurance premiums may well increase to allow for an insurer's additional exposure. The financial impact of any proposed amendments to the award of damages under the *Fatal Accidents Act 1959* (WA) will be separately considered after the publication of this Discussion Paper, taking into account the preliminary recommendations made in this paper, and the results of public consultation. The results will then be included in the Commission's Final Report.

### 8.2.3 Should an award of non-economic loss fill 'gaps' in recoverable damages?

The Commission notes that some damages for non-economic losses (e.g. services provided by the deceased) are already recoverable under the *Fatal Accidents Act 1959* (WA). It is arguable that if the current legislative provisions do not compensate, or inadequately compensate a deceased's surviving dependents for all economic losses suffered following wrongful death, then consideration ought to be given to amending those provisions to correct such inadequacies rather than attempting to incorporate them by way of an award for non-economic loss.

## 8.3 Commission's preliminary view

The Commission has not formed a preliminary view as to whether the *Fatal Accidents Act 1959* (WA) should be amended to allow for claims for non-economic loss for wrongful death. Rather, the Commission invites public submissions on this important question, including any submissions identifying the reasons and rationale as to why such an amendment should or should not be made.

**Question 1:** Should the *Fatal Accidents Act 1959* (WA) be amended to allow claims for non-economic loss for wrongful death?

## 9. Nature and scope of damages

Whilst the Commission has not formed a preliminary view as to whether the *Fatal Accidents Act 1959* (WA) should be amended to provide for damages for non-economic loss, the Commission has considered the nature and scope of such amendments, if they were to occur.

The Commission has considered and formed preliminary views on the following aspects of any amendments:

- (a) the types of non-economic loss that ought to qualify;
- (b) the scope of the class of persons who may claim for such damages; and
- (c) the appropriate quantum of damages, including how such damages are to be calculated and whether the damages should be fixed or variable and capped or uncapped.

### 9.1 Type of non-economic loss

The Commission is of the preliminary view that in the event that the *Fatal Accidents Act 1959* (WA) is to be amended to provide for damages for non-economic loss, such damages should be in the form of an award of damages to recognise the grief suffered by the claimant, and/or the loss of the companionship, guidance and/or counsel provided by the deceased.

This approach is broadly consistent with other jurisdictions that have made provision for the award of such damages, and is consistent with the object of, and purpose of, providing damages under the *Fatal Accidents Act 1959* (WA) (being to compensate the claimant for losses the claimant has suffered as a result of the death of their relative). This approach also addresses the (justifiable) concern about placing a value on the life of the deceased. The Commission invites submissions as to the type of non-economic loss that ought to be compensable under the *Fatal Accidents Act 1959* (WA).

**Question 2(a):** If the *Fatal Accidents Act 1959* (WA) is to be amended to allow damages for non-economic loss, what type of non-economic loss ought to be compensable under the *Fatal Accidents Act 1959* (WA)?

**Question 2(b):** If the *Fatal Accidents Act 1959* (WA) is to be amended to allow damages for non-economic loss, should it be in the form of an award of damages to recognise the grief suffered by the claimant, and/or the loss of the companionship, guidance and/or counsel provided by the deceased?

### 9.2 Class of claimants

If the *Fatal Accidents Act 1959* (WA) is to be amended to allow for compensation for non-economic loss for grief and the loss of companionship, guidance and/or counsel, the Commission has considered the class of persons who ought to qualify for such damages. The Commission considers that there are two broad options in this respect:

- (a) the class of persons to be same as the class of persons for whose benefit an action can currently be brought under the *Fatal Accidents Act 1959* (WA); or
- (b) a more limited class of persons.

The first broader category would include all those persons currently falling within the definition of 'relative' of the deceased contained in clause 1 of Schedule 2 to the *Fatal Accidents Act 1959* (WA) as follows:

- (a) *a person who immediately before the deceased's death was —*
  - (i) *the spouse of the deceased; or*
  - (ii) *a de facto partner of the deceased who was living in a de facto relationship with the deceased and had been living on that basis with the deceased for at least 2 years immediately before the deceased died;*
- (b) *any person who was the parent, grandparent or step parent of the deceased;*
- (c) *any person who was a son, daughter, grandson, granddaughter, stepson or stepdaughter of the deceased;*
- (d) *any person to whom the deceased person stood in loco parentis immediately before the death of the deceased;*
- (e) *any person who stood in loco parentis to the deceased person immediately before his death;*
- (f) *any person who was a brother, sister, half-brother or half-sister of the deceased person; and*
- (g) *any person who was a former spouse or former de facto partner of the deceased person whom the deceased was legally obliged, immediately before his or her death, to make provision for with respect to financial matters.*

This is consistent with the approach adopted in the Northern Territory in relation to the solatium payment. It is also broadly consistent with the approach adopted in Scotland and Ireland which, whilst excluding some classes of relative (notably the former spouse or civil partner), make provision for an award of damages to a broad class of persons.

The second approach is to adopt a more restrictive class of persons who may claim damages for non-economic loss. Both England and South Australia adopt a restrictive category of claimants, limited to the spouse or de facto partner and the parents of an infant child, but do not include a child of the deceased. The Northern Territory, in addition to the solatium payment, also provides for a specific award of damages for non-economic loss for the spouse/de facto partner of the deceased and a child/children of the deceased.

The Commission notes that the first approach has the benefit of ensuring that the relatives of the deceased are treated equally under the *Fatal Accidents Act 1959* (WA). From a legal policy perspective, the *Fatal Accidents Act 1959* (WA) currently identifies those relatives for whom a claim under the *Fatal Accidents Act 1959* (WA) might be brought. If it is appropriate for those relatives to be awarded

damages for economic loss, then if damages for non-economic loss are to be made available, there is no obvious reason why they should not be made available to the same category of relatives.<sup>97</sup>

However, the Commission acknowledges that the list of persons falling within the definition of relative is extensive (although it may not be in any one case). There may be an argument that damages for non-economic loss have historically been treated differently under the law to damages for economic loss, and therefore it is appropriate to restrict the class of persons to whom they are applicable. Based on the approaches adopted in South Australia, England and parts of the Northern Territory legislation, that class of persons is generally limited to what might be described as ‘close relatives’.

The Commission invites submissions as to the appropriate class of persons who may be awarded damages for non-economic loss under the *Fatal Accidents Act 1959* (WA).

**Question 3:** If the *Fatal Accidents Act 1959* (WA) is to be amended to allow damages for non-economic loss, what is the appropriate class of persons who may awarded such damages?

### 9.3 Quantum of damages and how such damages should be calculated

If the *Fatal Accidents Act 1959* (WA) is to be amended to allow for compensation for non-economic loss for grief and the loss of companionship, guidance and/or counsel, the Commission has considered what the quantum of damages should be, and how such damages should be calculated. The Commission has identified the following different options in this respect. Damages for non-economic loss might be:

1. Determined according to common law principles without statutory limitation or capping.
2. Determined according to common law principles but subject to a statutory limit on the award of damages.
3. Determined according to a formula similar in effect to that set out in section 3C of the *Motor Vehicle Third Party Insurance Act 1943* (WA), with appropriate adjustments to ‘Amount A’, ‘Amount B’ and ‘Amount C’ to take into account the reality that non-economic loss for relatives in the fatal accidents context is unlikely to include pain and physical suffering, curtailment of expectation of life or bodily harm;.
4. By lump sum payment to each relative entitled by reference to Schedule 2 of the *Fatal Accidents Act 1959* (WA), or alternatively a more limited class of ‘close relatives’:
  - (a) in a set amount without differentiation between relationship with the deceased; or
  - (b) in amounts pursuant to a table of entitlement, with the amount determined by reference to the relationship with the deceased.
5. By lump sum payment to be divided between all relatives entitled by reference to Schedule 2 of the *Fatal Accidents Act 1959* (WA), or alternatively a more limited class of ‘close relatives’:

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<sup>97</sup> On the assumption that the court will retain the ultimate discretion as to the whether an award of damages will be made in any one case, and if so to whom (see the discussion further below).

- (a) in equal shares; or
- (b) according to a table of percentages based on their relationship with the deceased.

### 9.3.1 Determined according to common law principles without limitation or capping

The first option is for damages to be determined pursuant to common law principles, without any statutory limitations. Such an approach would essentially follow the Northern Territory model. The principal advantage of the Northern Territory model is that it allows for judicial discretion and flexibility in examining the extent to which various claimants have been impacted by the loss of a family member. The Commission envisages this would include the ability for the court to exercise its discretion so as not to make an award of damages if it thinks just.

Of course the principal disadvantage flows from those same considerations. There is clearly a risk that enquiries as to the relationship between various claimants and the deceased and the impact the passing had upon such individuals might lead to distress or unnecessary conflict. Further, enquiring as to the very personal and emotional impact of the death of a loved one might serve to reinforce or aggravate a family's suffering and highlight the limited ability of the legal system to adequately evaluate and compensate such loss.

Considerations such as these led the Law Commission of England and Wales to declare that '*...we are anxious that there should be no judicial enquiry at all into the consequences of bereavement*'.<sup>98</sup>

On a functional level, the Commission accepts that the assessment of such damage involves new lines of enquiry and reasoning which have not previously been the subject of consideration. Accordingly, the introduction of such compensation is likely to involve some passing degree of challenge or uncertainty on the part of the courts and of legal practitioners providing advice and representation.

However, the Commission anticipates that the process of adaption would be relatively unproblematic given:

1. the limited number of claims under the legislation; and
2. the availability of judgments out of the Northern Territory which are likely to provide assistance until a body of local experience can be accumulated.

The Commission anticipates that damages awards in the fatal accidents context are likely to be significantly lower than awards for non-economic loss claims for personal injuries. Such expectation flows from the absence of direct pain and physical suffering, curtailment of expectation of life or the existence bodily harm on the part of potential claimants.

This is consistent with the awards flowing from the Northern Territory courts, which appear to have been relatively modest, with awards typically in the region of \$20,000 to \$25,000 per claimant. However, the Commission does note a trend towards significantly increasing awards under section 4(3)(b) of the *Damages (Scotland) Act 2011* (Scotland), initially driven by jury awards but more recently taken up by judges in non-jury cases.<sup>99</sup>

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<sup>98</sup> Law Commission of England and Wales, Report LC056 *Personal Injury Litigation: Assessment of Administration of Damages Report* (1973) at [175].

<sup>99</sup> For example, in *Anderson & others v Brig Brae Garage Ltd* [H.S. at W 2015 21(3), 6] (a jury trial) the surviving partner of deceased person was awarded £140,000. In *Young v MacVean* [2015] CSIH 70 the Scottish Appeal

### 9.3.2 Determined according to common law principles but subject to a statutory limit on the award of damages.

The second alternative is for any damages to be determined according to common law principles, but subject to a statutory limit. Again, the Commission envisages this would include the ability for the court to exercise its discretion so as not to make an award of damages if it thinks just.

Whilst the Northern Territory experience leads the Commission to the view that awards for non-economic loss would be relatively modest, the recent trends in Scotland raise the prospect of unanticipated consequence in the form of more substantial compensation.

In those circumstances, the question arises as to whether a more managed introduction of awards of damages might be necessary to avoid issues with respect to insurance and the costing of risk. In this context, concerns as to a 'blow out' resulting from an unfettered common law approach might be addressed by way of a statutory cap.

In order to address the prospective economic impact associated with reform, the Commission will be obtaining costings assuming a cap of \$20,000 to \$25,000. Such range would accord generally with lump sum payments under the English model and with the range of awards made in the Northern Territory. In utilising such figures, the Commission stresses that it makes no recommendation as to the adequacy or otherwise of such sums. The Commission looks forward to receiving a broad range of views as to this aspect of the proposed reforms.

### 9.3.3 Determined according to a formula similar to that in section 3C of the *Motor Vehicle Third Party Insurance Act 1943*

In Western Australia, many claims in tort are subject to statutory restrictions on the recovery of non-economic loss; notably those claims impacted by the *Civil Liability Act 2002* (WA) and the *Motor Vehicle (Third Party Insurance) Act 1943* (WA).

Under both the *Civil Liability Act 2002* (WA) and the *Motor Vehicle (Third Party Insurance) Act 1943* (WA) the legislature has sought to limit the recovery of low value or modest claims for non-economic loss.

In the case of the *Motor Vehicle (Third Party Insurance) Act 1943* (WA), the legislature has gone further, imposing a statutory maximum to be awarded 'only in a most extreme case' (see section 3C(3)) with all other awards 'to be a proportion, determined according to the severity of the non-pecuniary loss, of the maximum amount that may be awarded' (section 3C(2)).

The Commission recognises the advantages that flow from a consistent approach to the assessment of non-economic loss across various legislative instruments. To this end the Commission proposes to examine whether a formula, similar to that which applies to damages under the *Motor Vehicle (Third Party Insurance) Act 1943* (WA), ought to apply in the event that reform of the *Fatal Accidents Act 1959* (WA) is pursued.

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Court noted that Judges must have regard to the 'upward pull of Jury awards' when making awards of damages for non-pecuniary losses in fatal accidents cases (and in general).

Consistent with the motor vehicle legislation:

1. smaller claims would not attract an award for non-economic loss; and
2. non-economic loss would otherwise be calculated as a proportion of a most extreme case.

Given that pain and physical suffering, curtailment of expectation of life or the existence bodily harm are unlikely to be present (save insofar as the claimant might be injured in the same event resulting in a direct cause of action), the various caps and thresholds would need to be adjusted.

Whilst the methodologies considered above work around figures of \$20,000 to \$30,000, the introduction of the concept of 'a worst case' against which claims are benchmarked might justify a higher cap.

With this in mind, the Commission will be obtaining costings in relation to a modified version of the motor vehicle injury formula. The costings will be based on the following:

- Amount A - \$50,000;
- Amount B - \$5,000;
- Amount C - \$10,000.

This approach would allow for the award of a more substantial award than the cap discussed in 9.3.2 above in the case of particularly traumatic loss.

However, such methodology would require courts to directly compare loss against 'a worst case' benchmark. The Commission recognises that such analysis may cause considerable distress to and conflict between family members. Such benchmarking may also have the effect of suggesting a lack of understanding or empathy on the part of judicial officers called upon to carry out such enquiry.

#### 9.3.4 Lump sum payment to each relative

Whilst the three models above all call for judicial examination of the 'quality' or extent of grief or loss of companionship or guidance/counsel, the lump sum models discussed in sections 9.3.4 and 9.3.5 of this Discussion Paper avoid such potentially fraught analysis.

Under the proposed model in this section 9.3.4, there could be fixed payments of compensation to each relative entitled by reference to Schedule 2 of the *Fatal Accidents Act 1959* (WA), those relatives being:

- (a) a person who immediately before the deceased's death was:
  - (i) the spouse of the deceased; or
  - (ii) a de facto partner of the deceased who was living in de facto relationship with the deceased and had been living on that basis with the deceased for at least 2 years immediately before the deceased died;
- (b) any person who was the parent, grandparent or step parent of the deceased;
- (c) any person who was a son, daughter, grandson, granddaughter, stepson or stepdaughter of the deceased;
- (d) any person to whom the deceased person stood in *loco parentis* immediately before the death of the deceased;

- (e) any person who stood in *loco parentis* to the deceased person immediately before his death;
- (f) any person who was a brother, sister, half-brother or half-sister of the deceased person; and
- (g) any person who was a former spouse or former de facto partner of the deceased person whom the deceased was legally obliged, immediately before his or her death, to make provision for with respect to financial matters.

Alternatively, the lump sum payment could be limited to 'close relatives', as discussed at section 9.2.

The Commission notes that Parliament frequently adjusts entitlements depending on the nature of the relationship between family members. An obvious example of such differentiation can be found in the *Administration Act 1903* (WA). The Commission has not formed a view as to whether similar differentiation should apply in the present circumstances. However, to allow for meaningful discussion, the Commission has sought guidance in the form of economic modelling on two distinct approaches.

The first approach allows for a set award to all claimants in equal amounts. For the purposes of discussion, the Commission has adopted a range of \$20,000 to \$25,000, again reflecting the quantum of awards flowing out of the Northern Territory.

The second approach takes a more structured approach, assuming a different quality of bereavement or loss depending on the nature of the relationship to the deceased. For the purposes of discussion, the Commission advances the following model:

- (a) surviving spouse or de facto partner: \$25,000;
- (b) each surviving parent or step parent of a deceased child under the age of 18 years as at the date of death: \$15,000;
- (c) each surviving parent or step parent of a deceased child over the age of 18 years as at the date of death: \$10,000;
- (d) each surviving child of the deceased under the age of 18 years as at the date of death (including persons to whom the Deceased stood in *loco parentis*): \$10,000;
- (e) each surviving child over the age of 18 years as at the date of death (including persons to whom the deceased stood in *loco parentis*): \$5,000; and
- (f) each surviving sibling (including half siblings) of the deceased: \$5,000.

### 9.3.5 Lump sum payment to be divided between relatives

If compensation for non-economic loss were to be awarded according to one of the models set out in section 9.3.4 above, there could obviously be a degree of variation in exposure on the part of the tortfeasor dependant on the number of relatives and their relationship to the deceased.

Such variability inevitably causes issues with the respect to matters such as insurance and the pricing of risk. Such challenges are not unprecedented; the tortfeasor has always taken injured persons as they find them, with all of their vulnerabilities and individual circumstances. Common law jurisdictions

have proved adept at recognising and adapting to the variability in this respect and the Commission does not anticipate any particular long term difficulty arising out of any changes to the law in this area.

However, if it were considered desirable, some degree of certainty might be achieved by allowing for a lump sum or pool from which all claimants would be compensated, either in equal shares or according to a table of percentages based on their relationship with the deceased. For the purposes of discussion, the Commission has adopted a figure of \$150,000, with the reservation that no claimant would be entitled to an award greater than \$25,000.

### 9.3.6 Submissions

The Commission invites submissions in relation to the various options for the assessing the quantum of damages for non-economic loss.

**Question 4(a):** If the *Fatal Accidents Act 1959* (WA) is to be amended to allow damages for non-economic loss, should those damages be determined according to common law principles and without any limitation or statutory cap?

**Question 4(b):** If the *Fatal Accidents Act 1959* (WA) is to be amended to allow damages for non-economic loss, should those damages be determined according to common law principles and be subject to a limitation or statutory cap?

**Question 4(c):** If the *Fatal Accidents Act 1959* (WA) is to be amended to allow damages for non-economic loss, and such damages are to be determined according to common law principles subject to a limitation or statutory cap, should that statutory cap be:

- (a) Determined according to a formula similar in effect to that set out in section 3C of the *Motor Vehicle Third Party Insurance Act 1943* (WA), with appropriate adjustments to 'Amount A', 'Amount B' and 'Amount C' to take into account the reality that non-economic loss for relatives in the Fatal Accidents context is unlikely to include pain and physical suffering, curtailment of expectation of life or bodily harm?
- (b) A lump sum payment to each relative entitled by reference to Schedule 2 of the *Fatal Accidents Act 1959* (WA), or alternatively a more limited class of 'close relatives':
  - (i) in a set amount without differentiation between the relationship with deceased; or
  - (ii) in amounts pursuant to a table of entitlement, with the amount determined by reference to the relationship with the deceased?
- (c) A lump sum payment to be divided between all relatives entitled by reference to Schedule 2 of the *Fatal Accidents Act 1959* (WA), or alternatively a more limited class of 'close relatives':
  - (i) in equal shares; or
  - (ii) according to a table of percentages based on their relationship with the deceased?
- (d) Some other form of statutory limitation or cap?

The Commission has referred to different amounts of damages for non-economic loss in analogous jurisdictions for the purpose of stimulating discussion of an appropriate methodology and quantum of damages in the event that the *Fatal Accidents Act 1959* (WA) is amended to permit recovery for non-economic losses.

The Commission has not formed a firm view as to the appropriate quantum of an award of damages for non-economic losses or the methodology to be implemented.

The Commission invites submissions to make reference to the amounts proposed and particularly whether the *Fatal Accidents Act 1959* (WA) should be amended to align the Western Australian approach to the awarding of damages for non-economic loss in fatal accident claims with the approaches taken in other jurisdictions.

## 10. Financial impact

This discussion paper does not address item 5 of the terms of reference, being the measurable financial impact of any recommended changes on plaintiffs, insurers and the Government. The Commission will arrange for appropriate economic modelling and assessment to be undertaken following the publication of this Discussion Paper. The Commission proposes to model the following options for the assessment of damages for non-economic loss under the *Fatal Accidents Act 1959* (WA):

1. Determined according to common law principles without limitation or capping.
2. Determined according to common law principles but subject to a statutory limit on the award of damages.
3. Determined according to a formula similar in effect to that set out in section 3C of the *Motor Vehicle Third Party Insurance Act 1943* (WA), with appropriate adjustments to 'Amount A', 'Amount B' and 'Amount C' to take into account the reality that non-economic loss for relatives in the fatal accidents context is unlikely to include pain and physical suffering, curtailment of expectation of life or bodily harm.
4. By lump sum payment to each relative entitled by reference to Schedule 2 of the *Fatal Accidents Act 1959* (WA), or alternatively a more limited class of 'close relatives':
  - (a) in a set amount without differentiation between relationship with the deceased; or
  - (b) in amounts pursuant to a table of entitlement, with the amount determined by reference to the relationship with the deceased.
5. By lump sum payment to be divided between all relatives entitled by reference to Schedule 2 of the *Fatal Accidents Act 1959* (WA), or alternatively a more limited class of 'close relatives':
  - (a) in equal shares; or
  - (b) according to a table of percentages based on their relationship with the deceased.

## 11. Conclusion

This Discussion Paper has provided an overview of the current regime in Western Australia and briefly set out the historical and interjurisdictional contexts for damages in fatal accident claims. The Discussion Paper has posed a series of questions about possible courses of action open to the Western Australian Government in relation to introducing damages for non-economic loss for wrongful death under the *Fatal Accidents Act 1959* (WA). The Commission would welcome submissions that address the questions as set out in this Discussion Paper, or any related matters. The closing date for submissions is **31 March 2020**.

A consolidated list of discussion questions is on the following page.

## List of discussion questions

**Question 1:** Should the *Fatal Accidents Act 1959* (WA) be amended to allow claims for non-economic loss for wrongful death?

**Question 2(a):** If the *Fatal Accidents Act 1959* (WA) is to be amended to allow damages for non-economic loss, what type of non-economic loss ought to be compensable under the *Fatal Accidents Act 1959* (WA)?

**Question 2(b):** If the *Fatal Accidents Act 1959* (WA) is to be amended to allow damages for non-economic loss, should it be in the form of an award of damages to recognise the grief suffered by the claimant, and/or the loss of the companionship, guidance and/or counsel provided by the deceased?

**Question 3:** If the *Fatal Accidents Act 1959* (WA) is to be amended to allow damages for non-economic loss, what is the appropriate class of persons who may be awarded such damages?

**Question 4(a):** If the *Fatal Accidents Act 1959* (WA) is to be amended to allow damages for non-economic loss, should those damages be determined according to common law principles and without any limitation or statutory cap?

**Question 4(b):** If the *Fatal Accidents Act 1959* (WA) is to be amended to allow damages for non-economic loss, should those damages be determined according to common law principles and be subject to a limitation or statutory cap?

**Question 4(c):** If the *Fatal Accidents Act 1959* (WA) is to be amended to allow damages for non-economic loss, and such damages are to be determined according to common law principles subject to a limitation or statutory cap, should that statutory cap be:

- (a) Determined according to a formula similar in effect to that set out in section 3C of the *Motor Vehicle Third Party Insurance Act 1943* (WA), with appropriate adjustments to 'Amount A', 'Amount B' and 'Amount C' to take into account the reality that non-economic loss for relatives in the Fatal Accidents context is unlikely to include pain and physical suffering, curtailment of expectation of life or bodily harm?
- (b) A lump sum payment to each relative entitled by reference to Schedule 2 of the *Fatal Accidents Act 1959* (WA), or alternatively a more limited class of 'close relatives':
  - (i) in a set amount without differentiation between the relationship with deceased; or
  - (ii) in amounts pursuant to a table of entitlement, with the amount determined by reference to the relationship with the deceased?
- (c) A lump sum payment to be divided between all relatives entitled by reference to Schedule 2 of the *Fatal Accidents Act 1959* (WA), or alternatively a more limited class of 'close relatives':
  - (i) in equal shares; or
  - (ii) according to a table of percentages based on their relationship with the deceased?
- (d) Some other form of statutory limitation or cap?

Table 1: Damages for non-economic loss by jurisdiction

Jurisdiction	Legislation	Class of persons	Type of damages	Quantum and how calculated Fixed v variable Capped v uncapped
<b>Northern Territory</b>	<i>Compensation (Fatal Injuries) Act 1974</i> (NT)	<ol style="list-style-type: none"> <li>1. Spouse or de facto partner</li> <li>2. Child</li> <li>3. Full list of relatives</li> </ol>	<ol style="list-style-type: none"> <li>1. Loss/impairment of consortium</li> <li>2. Loss of care and guidance</li> <li>3. Solatium</li> </ol>	Variable and uncapped. At the discretion of the Court.
<b>South Australia</b>	<i>Civil Liability Act 1936</i> (SA)	<ol style="list-style-type: none"> <li>1. Parents of an infant child</li> <li>2. Spouse or domestic partner</li> </ol>	Solatium for the suffering caused to the parents or spouse or domestic partner.	Variable but capped at \$10,000.  (That sum to be apportioned between the parents if more than one parent claims in such manner as the court thinks just; and between the spouse and the domestic partner if more than one claims in such manner as the court thinks just).
<b>England</b>	<i>Fatal Accidents Act 1976</i>	<ol style="list-style-type: none"> <li>1. Spouse or civil partner</li> <li>2. Parents of an infant child (if legitimate) or the mother of an infant child (if illegitimate)</li> </ol>	Damages for bereavement.	Fixed at £12,980.  (That sum to be divided equally between the parents if more than one claims).
<b>Scotland</b>	<i>Damages (Scotland) Act 2011</i>	<ol style="list-style-type: none"> <li>1. Spouse or civil partner or de facto partner</li> <li>2. Parent or child</li> <li>3. Brother or sister</li> <li>4. Grandparent or Grandchild</li> </ol>	<ol style="list-style-type: none"> <li>1. Distress and anxiety endured in contemplation of the suffering of the deceased before their death.</li> <li>2. Grief and sorrow caused by the deceased's death.</li> <li>3. Loss of such non-patrimonial benefit as the relative might have expected to derive from the deceased's society and guidance.</li> </ol>	Variable and uncapped. At the discretion of the Court.

<b>Ireland</b>	<i>Civil Liability Act 1961</i>	<ol style="list-style-type: none"><li>1. Spouse or civil partner or de facto</li><li>2. Parent</li><li>3. Grandparent</li><li>4. Step-parent</li><li>5. Child</li><li>6. Grandchild</li><li>7. Step-child</li><li>8. Brother, sister, half-brother or half-sister</li></ol>	Mental distress resulting from the death of the deceased.	Variable but capped at €35,000 in total for the death of the deceased.
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