

Second Reading

Mr DAVID SHOEBRIDGE [11.27 a.m.]: I move:

That this bill be now read a second time.

First, I thank honourable members for agreeing to the second reading of this bill today. Every year more than 700 people are diagnosed with mesothelioma, which is a cancer caused by exposure to asbestos. It only takes one fibre to put you at risk. Victims can be as young as 20 or as old as 90. Victims and families are given little time to get their affairs in order. The average time from diagnosis to death is just five months. Some people get only three weeks. Others are misdiagnosed and therefore can have even less time, or the family discovers the true reason for their loved one's death only after they have died.

The period from diagnosis to death is an enormously emotional and traumatic time for families. There have been many changes in the past decades to have the law adapt to these realities. The Dust Diseases Tribunal has adapted its procedures to deal with the medical realities facing litigants, limitations provisions have been relaxed, and technicalities as to the time of commencement of proceedings have been removed. Many of these improvements, it must be acknowledged, have come during the term of this Government. All these developments are positive. However, one significant problem remains, and this bill aims to address it.

The purpose of the bill is to prevent the situation that arose in *Bi (Contracting) Pty Ltd v Eileen Sylvia Strikwerda and Anor*, a 2005 case in the New South Wales Court of Appeal. In that case, the widow's damages in proceedings in the Dust Diseases Tribunal were reduced by more than \$80,000 by reason of the fact that as a widow she would receive a financial benefit in the form of a distribution from the estate that included the general damages her husband received for the painful and early death he suffered from asbestosis. Strikwerda adopted the principle in *Public Trustee v Zoanetti*, a 1945 High Court case. In that case His Honour Justice Dixon said, in part:

In jurisdictions where the survival of causes of action for civil wrongs has been provided for by statute ... the damages recoverable by the legal personal representative of the deceased go to swell the estate in which the widow or other relative may share, whether under his will or on intestacy. It will, therefore, operate to increase the interest which, in the absence of any legislative direction to the contrary, must be taken into account by way of reduction of the pecuniary loss otherwise resulting to the widow of the deceased or his relative.

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The Greens, and I believe all members in this place, consider it unfair to allow a defendant to reduce the damages payable to dependants by reason of the painful and preventable death the defendant occasioned to the deceased. It is a stark injustice to allow an asbestos manufacturer such as James Hardie to obtain a discount in the damages it must pay to a dependant, normally a widow, by reason of the fact that it has been ordered to pay general damages to the deceased, normally the widow's husband, for causing him a painful and untimely death by reason of their known negligence. Imagine a widow having a lawyer explain to her that the company that killed her husband was going to argue successfully before the courts that, because it had paid some money to compensate her for the painful and untimely death of her husband, it would use that fact to argue the widow had received an economic benefit from her husband's death. It only has to be stated to realise how offensive that is in practice.

The bill has the support of Asbestos Diseases Foundation of Australia and the Australian Manufacturing Workers Union [AMWU], which has been a strong advocate for those suffering from the effects of asbestos. The bill also has the support of many victims of dust diseases and their families in this State. I know that many widows and others who are currently the subject of this potentially unfair practice have personally contacted many members in this place. The Greens understand that if the bill is successful it will apply only to a handful of claims in any given year and, while having a significant impact on the lives of those people, it will not have a significant impact on the compensation scheme overall or on the James Hardie fund. The bill mirrors similar legislation that was introduced recently in Western Australia, South Australia and Victoria.

The Greens also understand that last week the Attorney General referred the issue raised in the Strickwerda case to the Law Reform Commission. That referral, as I read it, applies more broadly than just to dust diseases claims. We do not object to the referral. However, given that this is a straightforward amendment that has already been applied in multiple jurisdictions in relation to dust diseases claims, the referral and the review do not represent a rational basis for delaying passage of the bill. The Government has raised concerns that the passing of this bill may conflict with the funding agreement entered into between New South Wales and James Hardie in 2005. There are two immediate answers to this concern. First, this has not prevented the very same law reform being introduced in other State jurisdictions since 2005. Secondly, if it is true that the funding agreement does contain such a defect, it should not be at the expense of this class of vulnerable dependants. I turn now to the specific provisions in the bill. The bill will insert new section 12E into the Dust Diseases Tribunal Act. The key provision in new section 12E is subsection (2), which provides:

(2) The amount of damages to be awarded for pecuniary loss in proceedings to which this section applies is not to be reduced so as to take into account the amount of general damages that has been paid or is payable in relation to the deceased person's claim.

That key provision will remove the injustice that has been identified arising from the Strickwerda case. Schedule 1 [2] to the bill inserts part 7 of new section 16, which provides transitional arrangements whereby it applies new section 12E prospectively—that is, it will apply to all matters that have not been finally determined, including pending proceedings—but it will not unwind any prior determinations. I look forward to the prompt passage of this bill. It is a worthy goal for Parliament to turn this bill into law before the end of the year. That will end the uncertainty for a good many families across this State. It will also put an immediate stop to the unjust situation where a culpable defendant can obtain a discount in the damages it pays, normally to a widow, by reason of the fact that it previously paid general damages to her husband for having caused him to die a painful and suffocating death from an asbestos-related disease. I commend the bill to the House.