

Fatal Accidents

Terms of Reference

In July 1976 the Commission was asked to consider whether the *Fatal Accidents Act 1959* (WA) should be amended to:

- (a) widen the class of persons (including any posthumous child) entitled to claim; and
- (b) provide for an amount to be awarded in the nature of solatium.¹

Background of Reference

At common law, a person cannot receive damages in tort for the death of another.² In 1846 an English statute, generally known as '*Lord Campbell's Act*', was enacted to remedy this situation. Western Australia adopted *Lord Campbell's Act* by Ordinance in 1849³ and this formed the basis of the *Fatal Accidents Act 1959* (WA) ("the Act"). The class of people entitled to claim damages for a wrongful death under the Act was restricted to the deceased's surviving spouse, children, step-children, grandchildren, parents, step-parents and grandparents. Additionally, claims were limited to economic and material loss and did not include non-economic loss such as grief, loss of companionship and mental suffering.

The limited class of claimants and the lack of provision for solatium under the Act was brought to the attention of the legal profession by a conference paper delivered in 1976 by Mr PL Sharp QC.⁴ Shortly thereafter the Attorney-General referred the matter to the Commission for consideration.

After considering applicable compensatory provisions in other legislation⁵ and the law in other jurisdictions, the Commission reached the provisional view that the existing class of claimants was inadequate. In February 1978, the Commission released a working paper in which it suggested various solutions including extending the class of relatives and creating a general provision to protect either 'familial relationships' or 'dependants'. The Commission also considered a report by the English Law Commission⁶ and raised a number of questions regarding the introduction of a solatium award.

Nature and Extent of Consultation

The working paper was distributed for comment to a number of interested parties and a notice was placed in the West Australian newspaper inviting public submissions. The Commission received submissions in response to the working paper from the Law Society, the Motor Vehicle Insurance Trust, an academic lawyer and a number of legal practitioners, including Mr PL Sharp QC. After considering these responses the Commission released its final report in December 1978.⁷

Recommendations

Following a comprehensive review of the issues the Commission concluded that the Act required significant reform. The Commission made 12 recommendations including that:

- The class of persons entitled to make a claim under the Act be extended to include the deceased's:
 - (a) defacto spouse in certain circumstances;
 - (b) divorced spouse;

¹ Solatium is compensation allowed for injury to the feelings: West Publishing Co, *Black's Law Dictionary* (6th ed, 1990).

² *Baker v Bolton* (1808) 1 Camp 493.

³ Ordinance 12 Vict. No. 21 (1849).

⁴ PL Sharp, 'Methodology in Assessment of Damages in Personal Accidents' [1976] *Law Society of Western Australia: Law Summer School Papers*.

⁵ *Law Reform (Miscellaneous Provisions) Act 1941* (WA), *Workers' Compensation Act 1912–1976* (WA), *Criminal Injuries Compensation Act 1960–1976* (WA), *Social Services Act 1947* (Cth).

⁶ English Law Commission, *Personal Injury Litigation: Assessment of Damages*, Report No 56 (1973).

⁷ Law Reform Commission of Western Australia, *Fatal Accidents*, Project No 66 (1978).

◀ Fatal Accidents

- (c) brothers and sisters, including half brothers and sisters;
 - (d) illegitimate children;⁸
 - (e) adopted children;
 - (f) posthumous child whether it is legitimate or illegitimate;
 - (g) a person to whom the deceased stood in loco parentis; and
 - (h) a person who stood in loco parentis to the deceased;
- A 'loss of assistance and guidance award' be introduced to compensate certain close relatives⁹ for the loss of the non-pecuniary benefit they may have expected to derive from the deceased's guidance and assistance. This award should be limited¹⁰ and be in addition to any award for pecuniary loss.
 - Courts be empowered to order a person to be added to proceedings and permit or require separate representation¹¹ for a person for whose benefit an action lies under the Act.

A comprehensive outline of recommendations may be found at pages 33–35 of the Commission's final report.

Legislative or Other Action Undertaken

The *Fatal Accidents Amendment Act 1985* (WA) implemented the Commission's recommendations to expand the existing class of claimants under the Act. However, Parliament decided against implementation of the Commission's recommendation for an award of damages for 'loss of assistance and guidance'.¹²

8 The Commission recommended that an illegitimate child should be treated as a legitimate child. This recommendation was expressed to be dependant upon completion of Project No 68 on illegitimacy, which was withdrawn in 1986. The Commission did provide for an alternative procedure if Project No 68 was not completed or implemented.

9 'Close relatives' was defined to include the deceased's lawful spouse, a defacto spouse in certain circumstances, parents, an unmarried child and an unmarried person to whom the deceased stood in loco parentis.

10 The Commission recommended a limit of \$5000 for a spouse and defacto and \$2500 for the remainder and also empowering the Governor in Council with the discretion to increase the maximum amounts.

11 See Law Reform Commission of Western Australia, *Legal Representation of Children*, Project No 23 (1972).

12 This was said to be due to a number of reasons, including that such a provision did not exist in other jurisdictions, that it may be difficult to apply judicially and may affront, rather than give solace to, claimants. See Western Australia, *Parliamentary Debates*, Legislative Council, 22 March 1984, 6464 (Mr JM Berinson, Attorney-General).