



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 66

Fatal Accidents

WORKING PAPER

FEBRUARY 1978

The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972*.

The Commissioners are -

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PREFACE

The Law Reform Commission has been asked to consider and report on whether the *Fatal Accidents Act 1959* should be amended -

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

The Commission having completed its first consideration of the matter now issues this working paper. The paper does not necessarily represent the final views of the Commission.

Comments and criticisms on individual issues raised in the working paper, on the paper as a whole or on any other aspect coming within the terms of reference, are invited. The Commission requests that they be submitted by 21 April 1978.

Copies of the paper are being sent to the -

Chief Justice and Judges of the Supreme Court
Citizens Advice Bureau
Institute of Legal Executives
Insurance Council of Australia
Judges of the District Court
Judges of the Family Court
Law School of the University of W.A.
Law Society of W.A.
Magistrates' Institute
Motor Vehicle Insurance Trust
Parliamentary Counsel
P.L. Sharp, Q.C.
Solicitor General
State Government Insurance Office
Under Secretary for Law
Workers' Compensation Board
Law Reform Commissions and Committees with which this Commission is in correspondence, and to other persons on the Commission's mailing list.

A notice has been placed in *The West Australian* inviting anyone interested to obtain a copy of the paper and to submit comments.

The research material on which the paper is based is at the offices of the Commission and will be made available there on request.

CHAPTER 1 - TERMS OF REFERENCE

1.1 The Commission's terms of reference are:

"To consider and report on whether the *Fatal Accidents Act 1959* should be amended -

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

CHAPTER 2 - OUTLINE OF THE FATAL ACCIDENTS ACT

History of Act

2.1 At common law, no one could receive damages in tort for the death of another. In *Baker v Bolton*,¹ Lord Ellenborough enunciated the principle in the following terms:

"In a civil court the death of a human being cannot be complained of as an injury".

2.2 However, by a statute of 1846, generally known as *Lord Campbell's Act*, protection was given in England to certain close relatives who had lost the expectation of support by the deceased. The impetus for reform was the increase in fatal accidents towards the middle of the nineteenth century due to the advent of railways in England.

2.3 *Lord Campbell's Act* was adopted in Western Australia in 1849.² The Act was repealed in this State and replaced (with some modifications) by the *Fatal Accidents Act 1959*.

Scope of Act

2.4 Section 4 of the *Fatal Accidents Act* provides that where the death of a person is caused by a wrongful act, neglect or default, which 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.³

2.5 The action may only be brought for the benefit of certain designated relatives of the deceased.⁴ The claim is limited to the loss of economic or material advantages which the deceased would have given them had he lived. The dependants cannot receive compensation

¹ (1808) 1 Camp 493.

² By Ordinance 12 Vict. No.21 (1849).

³ The provision applies notwithstanding that the death was caused under such circumstances as amount in law to a crime: s.4.

⁴ See paragraphs 2.14 to 2.15 below for the designated relatives. The action must be brought in the name of the executor or administrator of the deceased: *Fatal Accidents Act 1959*, s.6(1)(b). However, where there is no executor or administrator or where the executor or administrator does not bring an action within six months after the death of the deceased, any one or more of the designated relatives may bring the action (for the benefit of all the designated relatives): s.9(1) and (2).

for non-economic loss, such as loss of companionship, or grief or mental suffering caused by the death.⁵

2.6 Although the prime object of the *Fatal Accidents Act* is to provide a remedy for death caused by tort (e.g. negligence in the driving of a motor vehicle), the Act extends to fatalities resulting from such other defaults as breach of contract. This is illustrated in *Woolworths v Crotty*.⁶ In that case the plaintiff's son bought an electric light globe from the defendant. The globe was imperfectly constructed and electrocuted the son. Negligence by the retailers could not be established but the High Court of Australia held that it was sufficient to rely on breach of the implied warranty of fitness which would have conferred a right of action on the deceased son.

2.7 However, the circumstances in which liability usually arises are in the case of deaths caused by negligence on the roads or by accidents at work caused, for example, by an unsafe system of work or the negligence of a fellow employee. In the case of death caused by negligence on the roads, defendants are virtually always insured against their liability under the *Fatal Accidents Act* because of the third party insurance which owners of vehicles are compelled by law to take out in Western Australia. The insurance covers not only the owner but any person who drives the vehicle. Where an employee is fatally injured at work and his employer is liable under the *Fatal Accidents Act* in respect of his death, usually the employer will be insured against liability under that Act but it is not obligatory for him to be so insured.

2.8 Occasional instances arise, such as sporting and social occasions, where it can be expected that the defendant will not be insured, for example, where a man negligently discharges a bullet from a rifle which kills a fellow member of a shooting expedition.⁷

⁵ The Act itself does not expressly exclude such claims. The limitation has been the result of judicial interpretation: see Fleming, *The Law of Torts* (5th ed. 1977) at 652, and the cases referred to therein.

⁶ (1942) 66 CLR 603.

⁷ Houseowners and householders insurance policies now normally provide fairly extensive public risk cover for the insured (or any member of his family ordinarily residing with him) as *owner or occupier* of the building. Such a provision would clearly not extend to include the defendant in the accidental shooting example.

Calculation of damages

2.9 In an action under the *Fatal Accidents Act*, the court may give ‘such damages as it thinks proportioned to the injury resulting from the death of the parties respectively for whom and for whose benefit the action is brought’.⁸

2.10 For one of the relatives designated in the Act to be entitled to damages, he or she must have⁹ a reasonable expectation of pecuniary benefit from the continuance of the life and his or her pecuniary gains resulting from the death of the deceased must not outweigh the pecuniary losses (although not all gains have to be deducted¹⁰). It is in this sense that the expressions "dependant" and "dependency" are used by judges and text book writers when discussing fatal accidents legislation. The terms are not used in the Act itself.

2.11 As Windeyer J. said in *Parker v The Commonwealth*,¹¹ the governing principles in assessing damages under the fatal accidents legislation are that -

1. Damages should be calculated by reference to a reasonable expectation of pecuniary benefit as of right or otherwise from the continuance of the life.
2. Damages are awarded to compensate the recipient on a balance of gains¹² and losses for the injury sustained by the death.

As explained above,¹³ damages in the nature of a solatium for injured feelings and affection are excluded.

⁸ *Fatal Accidents Act* (WA), s.6(2).

⁹ See judgment of Windeyer J. in *Parker v The Commonwealth* (1964) 112 CLR 297.

¹⁰ See note 12 below.

¹¹ (1964) 112 CLR 295 at 308.

¹² The Act specifically states in s.5(2), however, that the following gains are not to be taken into account -

- (a) insurance money;
- (b) money paid or payable out of a superannuation, provident or like fund or scheme, or by way of benefit from a friendly society, benefit society or trade union; and
- (c) pensions.

"...[Any] disposition in favour of the widow under the will of the deceased [has to be taken into account], though by no means all of it since she may have gained little by merely stepping into full control of assets which had formerly been at her disposal anyway, such as the home and furniture or even capital. The full amount will only be deducted for true "windfalls", such as damages recovered by the estate from the tortfeasor (and devolving on the dependant) for the deceased's clothing destroyed in the accident ...": Fleming, *The Law of Torts* (5th ed. 1977) at 656.

¹³ See paragraph 2.5 above.

2.12 Where the person killed was a wage earner, the normal method of assessment of damages by the courts in Western Australia is to make an assessment of the present financial advantages that the dependants of the deceased were receiving at the time of his death. The sum is then multiplied by a certain number of years purchase so as to yield the present value of a notional annuity, calculated by reference to the joint span of the deceased's prospective working life and the claimants' dependency. A percentage is then deducted for contingencies such as ill health or unemployment of the wage earner or re-marriage in the case of a dependent widow. Then the gains to the dependant resulting from the deceased's death must be deducted, although some gains do not have to be brought into account.¹⁴

2.13 In establishing the "reasonable expectation of pecuniary benefit",¹⁵ it need not be shown on the balance of probabilities that the claimant would have received any particular benefit.¹⁶ The court has to value the chance that the particular claimant would have derived some financial benefit from the deceased had he or she lived. The injury for which damages are given is the loss of that chance. This was explained by Lord Reid in his judgment in *Davies v Taylor* where he put the illustration of two widows who had separated from their husbands in circumstances in which they were not entitled to and did not receive maintenance:¹⁷

"...[in the one case] it is estimated that the chance that she would have returned to him is a sixty percent probability (more likely than not) but in the other the estimate of that chance is a forty percent probability (quite likely but less than an even chance). In each case the tribunal would determine what its award would have been if the spouses had been living together when the husband was killed, and then discount it or scale it down to take account of the probability of her not returning to him."

But the chance must be substantial, and not merely speculative.¹⁸ Thus the question whether the death of a young child will entitle the parent to compensation under the *Fatal Accidents Act* is dependent upon whether the chance of pecuniary benefit can be established as substantial, and is not a mere speculative possibility. Sometimes the matter is beset with so many doubts and uncertainties that the claim is "pressed to extinction by the weight of multiplied contingencies".¹⁹

¹⁴ See note 12 above.

¹⁵ See paragraph 2.11 above.

¹⁶ *Davies v Taylor* [1972] 3 All ER 836, a decision of the House of Lords.

¹⁷ *Ibid.*, at 838.

¹⁸ *Ibid.*, at 848, per Lord Cross of Chelsea.

¹⁹ *Barnett v Cohen* [1921] 2 KB 461 at 472.

Class of claimants

2.14 Under the *Fatal Accidents Act* an action can only be brought for certain designated relatives of the deceased. To be entitled to damages under the Act, a person must not only show dependency but must also establish that he is one of the relatives designated by the Act. These are - ²⁰

- (a.) husband²¹ or wife;
- (b) "child" which is defined to mean son, daughter, grandson, granddaughter, stepson and stepdaughter; and
- (c) "parent" which is defined to mean father, mother, grandfather, grandmother, stepfather and stepmother.

For the purposes of the Act, a person is deemed to be the parent or child of a deceased person notwithstanding that he was only related to him illegitimately or in consequence of adoption: s 3(2). Accordingly, in "deducing"²² any relationship which under the Act is included within the meaning of the expressions "parent" and "child", any illegitimate person and any adopted person are treated as being or as having been the legitimate child of his mother and reputed father, or as the case may be, of his adopters.²³ For the purposes of the Act, an "adopted person" is one who is legally adopted whether in Western Australia or elsewhere.²⁴ However, in any action under the Act where the question of illegitimacy arises, the relationship shall not be taken to have been proved unless paternity had been admitted by or established against the father during the lifetime of the deceased person (i.e. the father or the illegitimate child, who has died).²⁵

²⁰ See s.6(1)(a) and s.3(1).

²¹ Even where there were no children and the deceased's wife was not contributing to the family purse from outside earnings and there was no probability that she would be, her surviving husband can recover damages in respect of her domestic services in looking after the home and the husband. However, the wife's "cost" to the husband had she remained alive has to be deducted from the value of her services in the calculation of the damages.

²² This is the word used in the *Fatal Accidents Act* itself: see s 3(2).

²³ See s.3(2).

²⁴ s 3(2). When a child born illegitimate is adopted under Western Australia's *Adoption of Children Act 1896-1976*, his illegitimate relationships determine upon his adoption: s.7(1) of the *Adoption of Children Act 1896-1976* (WA). Hence, for example, such an adopted child could not make a claim under the *Fatal Accidents Act 1959* (WA) in the event of the death of his natural father but he could make a claim if his adoptive father died.

²⁵ See s.6(3).

2.15 There is no express provision in the Western Australian Act regarding a posthumous child of the deceased. However, in an English case *The George and Richard*,²⁶ a decision of a single judge, it was held that a posthumous child was within the class of relatives protected by the original English Act (the *Fatal Accidents Act 1846*). It would seem to be fairly certain that the position would be the same under the Western Australian Act.

2.16 It would seem that if the personal representative brings an action under the *Fatal Accidents Act*, it is the duty of that person to take all reasonable steps to see that the dependants are informed of the action and, if they wish to claim, are named as persons on whose behalf it is brought.²⁷

²⁶ (1871) LR 3 A & E 460.

²⁷ See judgment of Lord Denning M.R. in *Cooper v Williams* [1963] 2 All ER 282.

CHAPTER 3 - OTHER LEGISLATION

3.1 The *Fatal Accidents Act* is not the only statute under which compensation may be payable where a person dies as a result of the act or omission of another. Before one can properly decide whether the present class of claimants under the Act should be widened, or provision made for the payment of a solatium, it is desirable to have regard to the provisions of other enactments in this area.

3.2 The other enactments are the -

- (a) *Law Reform (Miscellaneous Provisions) Act 1941*;
- (b) *Workers' Compensation Act 1912-76*;
- (c) *Criminal Injuries Compensation Act 1970-76*;
- (d) *Social Services Act 1947 (Cwth)*.

THE LAW REFORM (MISCELLANEOUS PROVISIONS) ACT 1941

3.3 At common law, a personal representative could not sue for any tort committed against the deceased in his lifetime. However, under the *Law Reform (Miscellaneous Provisions) Act* which was passed in 1941, on the death of any person any cause of action vested in him survives for the benefit of his estate.¹ This is different from the cause of action given by the *Fatal Accidents Act*, which is one in favour of specified dependants of the deceased and not his estate.

3.4 The cause of action covers both the case where the injury caused the death, and where the death was unrelated. In this latter case, the claim would be limited to any loss of earnings caused by the injury between the date of the injury and death² and any expenses arising out of the injury. Where the injury caused the death, it seems the estate can claim for loss of earnings on the basis of the pre-accident life expectancy of the deceased, and that damages would be assessed having regard to the gain, if any, which would have accrued to the deceased from his

¹ *Law Reform (Miscellaneous Provisions) Act 1941* (WA), s.4(1). This Act was based on the English *Law Reform (Miscellaneous Provisions) Act 1934*. As in England, the Western Australian Act does not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims under s.94 of the *Supreme Court Act 1935* for damages on the ground of adultery: s.4(1). The latter two causes of action have now been abolished: see *Family Law Act 1975* (Cwth), s.120.

² Damages are not recoverable under the Act for pain or suffering, or for bodily or mental harm or loss of expectation of life: s.4(2)(d).

future probable earnings after taking into account the expenditure which he would have incurred, if he had survived, in maintaining himself and his dependants, if any.³ Medical expenses and other special damages incurred before death will be recoverable by the estate and the Act specifically provides that a sum in respect of funeral expenses may be included.⁴

3.5 Normally then when a person dies as a result of the wrongful act or omission of another, there will be two causes of action - that under the *Law Reform (Miscellaneous Provisions) Act* accruing to his estate and that under the *Fatal Accidents Act* accruing to a specified class of relatives. There seems to be no overlap between the two actions, except possibly as to medical and funeral expenses when one of the relatives has incurred them.

WORKERS' COMPENSATION ACT 1912-1976

3.6 Where an employee dies as a result of an accident which arose out of or in the course of his employment, compensation is payable by his employer under the *Workers' Compensation Act* to specified relatives if they were wholly or partly dependent upon, or wholly or partly supported by, his earnings at the date of his death. The legislation is analogous to the *Fatal Accidents Act* but, unlike the position under that Act, the amount of compensation payable is fixed by the *Workers' Compensation Act* and is not calculated by reference to the earnings of the deceased. The sum is payable by the employer irrespective of fault.

3.7 The total amount of compensation payable to dependants (other than a child) of the deceased worker who are wholly dependent upon his earnings is at present \$35,042.10.⁵ The Act provides that if the deceased worker leaves a dependant (wholly dependent on his earnings) who is a child or step child under the age of sixteen years the sum of seven dollars fifty cents per week in compensation is payable in respect of the child until the child reaches that age.⁶ Normally the deceased's wife will be the only person wholly dependent on the

³ See Fleming, *The Law of Torts* (5th ed. 1977) at 661 and 220. The author's view is based on the decision in *Shelton v Collins* (1965-66) 115 CLR 94. In this respect the law in England is different. The claim for loss of earnings there is limited to the period between injury and death.

⁴ s.4(2)(c).

⁵ *Workers' Compensation Act 1912-1976*, First Schedule, clause 1(a). Lump sum payments prescribed by that Act are altered each year by applying the formula described in the interpretation of "prescribed amount" in s.5 of that Act.

⁶ *Workers' Compensation Act 1912-1976*, First Schedule, clause 1(a). Seven dollars and fifty cents per week is also payable in respect of a fully dependent student child or step child who has attained the age of sixteen years but is under the age of twenty-one years or in respect of a fully dependent child or step child

deceased's earnings, apart from any children, and where this is so she will receive the whole of the \$35,042.10. If there were two people wholly dependent on his earnings, for example, the deceased's lawful wife and his de facto wife, the Board would have to divide the \$35,042.10 between them.⁷

3.8 If the deceased worker leaves dependants in part dependent upon his earnings,⁸ they are entitled to such amount not exceeding \$35,042.10 as may be agreed upon, or in default of agreement as may be determined, by proceedings under the Act, to be reasonable and proportional to the injury to those dependants.⁹ It may be that part dependants are only entitled to compensation if there is no one wholly dependent on the deceased. The Act is not clear on this point.

3.9 The following relatives of a deceased worker may claim compensation under the *Workers' Compensation Act* -¹⁰

wife or husband;

father, mother;

grandfather, grandmother;

stepfather, stepmother;

any person who stands in the place of a parent to another person and also that other person;

son, daughter, (whether ex-nuptial or not);

grandson, granddaughter;

stepson, stepdaughter;

brother, sister, half brother and half sister.

In the case of an ex-nuptial worker, his mother, and his brothers and sisters, whether legitimate or not, by the same father and mother, can claim.

of any age whom by reason of circumstances the Board in its absolute discretion decides should receive continued support: *ibid*.

⁷ Clauses 1(a)(i)(I) and IA of the *Workers' Compensation Act 1912-1976*.

⁸ It is a question of fact whether any person was a dependant of the deceased: *Re Hendrik de Haan* [1969] WAR 161.

⁹ *Workers' Compensation Act 1912-1976* (WA) First Schedule, clause, 1(a)(ii).

¹⁰ See definition of "member of a family" in s.5(1) of the *Workers' Compensation Act*.

3.10 It is compulsory for employers to insure with an insurance company against liability to pay compensation under the *Workers' Compensation Act*.¹¹ Insurance premiums are normally charged to production expenses and the cost of the scheme would in the normal course be ultimately borne by the consumer public.

3.11 Co-existence of liability under the *Fatal Accidents Act* and the *Workers' Compensation Act* raises the question of overlapping benefits. The position in Western Australia appears to be that the dependants are permitted to exercise both rights cumulatively, subject to the following provisions -

- (a) workers' compensation received from the employer is to be deducted from the amount of a judgment for damages;¹²
- (b) money paid towards a judgment for damages is to be deducted from the amount of workers' compensation payable,¹³ and
- (c) where a judgment for damages has been paid in full, the dependants may not commence or continue proceedings for workers' compensation.¹⁴

SOCIAL SERVICES ACT 1947 (CWTH)

3.12 Where a husband dies, his widow is entitled to a pension under the *Social Services Act 1947-1976* (Cwth), provided her income does not exceed that permitted by the means test. The present rates¹⁵ for widows' pensions, where the widow's "other income" is sufficiently low¹⁶ for her to receive the full pension, are as follows -

¹¹ s.13(1). In this context, the expression "worker" extends to any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work or otherwise: see definition of "worker" in s.5(1) of the *Workers' Compensation Act*. There is, of course, no liability to insure with respect to independent contractors. Nor is there a liability to insure with respect to a person whose employment is of a casual nature where that person is employed otherwise than for the purpose of the employer's trade or business: *ibid*. But, for example, where a man employs a woman on a permanent footing (as distinct from a casual one) to assist his wife in the housework for a half a day each week, he must insure.

¹² *Workers' Compensation Act 1912-1976*, ss.7(13) and 5(1).

¹³ *Ibid*.

¹⁴ *Ibid*.

¹⁵ As at November 1977. The basic widows' pension is now increased each May and November in line with increases in the consumer price index. It is at present \$49.30.

¹⁶ A widow with no children, can have "other income" up to \$20 a week and still receive the full pension. This limit increases by \$6 for each child she has in her care. A widow with no children can have "other income" up to \$118.60 a week before entitlement to some pension ceases. This cut off point is \$147.60 if she has one child over six years of age (\$151.60 if the child is under six). The cut off point increases, after the first child by \$21 for every other child in her care.

Widow without children	\$49.30 a week
If with children under 16 or dependent full time students, the following additional amounts:	
mother's allowance	4.00 a week
(\$6 a week if there is a child under 6)	
Plus a payment for <i>each</i> child of	7.50 a week

For the purposes of this pension, the term “widow” includes a de facto wife who has lived with a man for at least three years immediately before his death.

3.13 People bringing up children or supporting full time students are also entitled to a family allowance which in 1976 replaced child endowment. For one child, the amount is \$3.50 a week. Where there is more than one child, the rate is \$3.50 for the first child, \$5 for the second, \$6 each for the third and fourth and \$7 for each other child. The family allowance is not subject to a means test.

3.14 Where a child is orphaned a pension of \$11 a week is paid to his guardian who will also receive a family allowance in respect of the child. The orphan’s pension is not subject to a means test.

CRIMINAL INJURIES (COMPENSATION) ACT 1970-1976

3.15 Under the *Criminal Injuries (Compensation) Act 1970-1976* (WA) where a person has died as a result of the commission of an offence committed by some other person, the court may make an order that a sum not exceeding \$7,500 be paid out of the property of the offender and apportioning the sum among the deceased's wife or husband, parents and children.¹⁷ "Parent" and "child" are defined in the same way as in the *Fatal Accidents Act*.¹⁸ The court is required to assess the sum in the same way as damages are assessed under the *Fatal Accidents Act*,¹⁹ subject to the cut off point. If the offender does not pay the amount of the order, the personal representative may apply to the Government for payment of the amount out of the Consolidated Revenue Fund. Before the Government will make any

¹⁷ *Criminal Injuries (Compensation) Act 1970-1976*, s.4(1a). See also s.4(2b), s.6 and s.6A.

¹⁸ *Ibid.*, s.3.

¹⁹ *Ibid.*, ss.4(1a) and 3. See also s.4(2b), s.6 and s.6A.

payment, there must be deducted from the sum ordered to be paid by the offender the amounts that in the opinion of the Under-Secretary for Law the husband or wife, parents and children of the deceased have received or would receive if they exhausted "all relevant rights of action and other legal remedies available to [them], independently of [the] Act by reason of the loss to which the application relates".²⁰ This would include, for example, a widow's pension.²¹ The Treasurer may, in his discretion, pay to the dependants the balance remaining.²²

INTERACTION OF THE VARIOUS PROVISIONS

3.16 The interaction of the *Fatal Accidents Act* with the other provisions referred to above can perhaps best be illustrated by an example. Suppose a worker, H, is seriously injured in the course of his employment. He lingers for two months in hospital and then dies. He is survived by his wife, W, (who was fully dependent) and three children C1, C2 and C3 aged three, six and nine. During the period while H was in hospital, his employer's insurance company was paying him an amount equal to his weekly earnings and also paid his medical expenses. These payments were made pursuant to the *Workers' Compensation Act*. H's personal representative is advised by his solicitors that his prospects of succeeding in a damages claim against the employers, on the ground that the death was caused by an unsafe system of work, are good. If they do succeed the damages will exceed the amount payable under the *Workers' Compensation Act*. H's personal representative decides to commence proceedings before the Workers' Compensation Board for compensation and in the Supreme Court for damages. The Supreme Court proceedings comprise two causes of action: the first is under the *Law Reform (Miscellaneous Provisions) Act 1941* and is for loss of earnings for the period between injury and death and for the deceased's medical expenses and funeral expenses; the second is for damages under the *Fatal Accidents Act 1959*. H's personal representative obtains an award before the Board for \$35,042.10 plus \$7.50 per week for each of the three children and these amounts are paid by the insurance company. Six months after the Board's award, the Supreme Court gives judgment in favour of H's personal representative in the action before that Court. The Judge assessed general damages under the *Fatal Accidents Act* at \$70,000, of which he apportioned \$51,000 to W and \$7,600, \$6,400 and \$5,000 to C1, C2 and C3 respectively. The

²⁰ *Criminal Injuries (Compensation) Act 1970-1976*, s.7. Where the offence has resulted in death the amounts to be deducted must include "the amounts of any sums of the kind described in paragraphs (a), (b) and (c) of subsection (2) of Section 5 of the *Fatal Accidents Act 1959*": *ibid.* These include sums paid or payable by way of pension under the *Social Services Act 1947-1976* (Cwth).

²¹ See paragraph 3.12 above.

²² *Criminal Injuries (Compensation) Act 1970-1976*, s.7.

Judge also found that the employer was liable to pay the deceased's loss of earnings for the period between injury and death and his medical expenses and funeral expenses. The Judge deducted the amounts paid under the *Workers' Compensation Act* from the amounts which he found the employer was liable for in the Supreme Court action and entered judgment for the balance.

3.17 In this example, if the system of work was so unsafe that his death constituted manslaughter by his employer, then although H died as a result of the commission of an offence, his personal representative would not be able to recover any compensation under the *Criminal Injuries (Compensation) Act 1970*. The reason is that by enforcing the remedies available to him he would be able to recover more than the maximum payable under the Act - \$7,500. However, if instead of dying as a result of an accident at work, H whilst on his way home from visiting his parents was attacked in the street and later died because of the injuries, his personal representative would almost certainly receive compensation under the *Criminal Injuries (Compensation) Act*.

3.18 If, however, H had been killed in an accident for which no one else was to blame, or which did not occur in the course of his work, his wife and children would only be able to claim under the *Social Services Act (Cwth)*.

POSSIBLE SIMPLIFICATION OF THE LAW

Should the Fatal Accidents Act be repealed?

3.19 The number of statutory provisions which can come into operation when a person dies as a result of an act or omission of another raises the question whether the law is too fragmented.

3.20 The position would be simplified if the *Fatal Accidents Act 1959* were repealed and the *Law Reform (Miscellaneous Provisions) Act 1941* clarified so as to provide expressly that the deceased's estate could recover damages on the basis of his pre-accident life expectancy for his future probable earnings after taking into account the expenditure which he would have incurred in maintaining himself. The amount he would have spent on his dependants would therefore become part of his estate.

3.21 There is something to be said for such a step. A right of action under the fatal accidents legislation is anomalous in that it is at odds with the general principle of tort law that the law compensates the victim of the person immediately injured - and not those who suffer loss because of their association with them.

3.22 When the fatal accidents legislation was first enacted, there was a doctrinal difficulty in conferring a right of action on the deceased's estate. This was the principle that personal representatives could not sue for a tort committed against the deceased in his lifetime.

However, this difficulty was removed in Western Australia in 1941 when the *Law Reform (Miscellaneous Provisions) Act* was passed.²³

3.23 There are, however, arguments against the proposal. The damages, which would include the amount he would have used to maintain his dependants, could be a windfall to non-dependent beneficiaries. If the dependants were not beneficiaries under the deceased's will, they could no doubt claim under the *Inheritance (Family and Dependants Provision) Act 1972*, but it could be strongly argued that the *Fatal Accidents Act* assists in avoiding the necessity and inconvenience of applications under the former Act. Furthermore, the damages would be added to the deceased's estate for death and estate duty purposes, and this could result in the dependants receiving less than they would have under the *Fatal Accidents Act*, as damages under that Act do not attract duties.²⁴

3.24 The Commission accordingly considers that such a simplification could well result in injustice, and it would be reluctant to recommend such a course, assuming the matter lay within the Commission's terms of reference. The *Fatal Accidents Act* and the *Law Reform (Miscellaneous Provisions) Act* provide independent causes of action for the benefit of different persons and it would seem to be undesirable to assimilate the two causes of action into one.

²³ See paragraph 3.3 above.

²⁴ The proposed amendments to the law relating to death and estate duties lessen the importance of this point.

National Compensation Bill

3.25 In New Zealand, the Legislature effected a far more radical simplification. Legislation was enacted in 1972²⁵ which abolished all rights of action in tort for personal injury or death and provided instead for State funded compensation in respect of all those who suffered injury or death due to an accident, whether or not caused by the act or default of another. An attempt was made in Australia in 1974 to enact similar legislation. The then Commonwealth Government introduced into the Federal Parliament a bill called the National Compensation Bill, which was designed in part to replace all rights of action in tort for personal injury or death throughout Australia by a State funded compensation scheme. The Commonwealth bill went further than the New Zealand legislation, since it also contained provisions for compensation for disabilities due to illness or disease. The bill lapsed when Parliament was dissolved in November 1975, and has not been reintroduced.

3.26 Questions of the desirability or otherwise of such a radical change in the law relating to actions for personal injury claims are clearly outside the Commission's terms of reference, and therefore the Commission does no more than draw the reader's attention to them. In any event, whether or not the present multiplicity of statutory compensation provisions were to be replaced by a single scheme, the question of what classes of dependants of a deceased person should be compensated for the loss of their dependency would remain.

²⁵ The *Accidents Compensation Act 1972* (NZ). The abolition of tort actions for personal injury or death involved the repeal of the New Zealand legislation equivalent to the *Fatal Accidents Act 1959*, the *Law Reform (Miscellaneous Provisions) Act 1941* and the *Criminal Injuries (Compensation) Act 1970* of this State and certain provisions of the *Social Services Act 1947* of the Commonwealth.

CHAPTER 4 -THE LAW ELSEWHERE

4.1 The legislative enactments in England, New Zealand, the Australian Capital Territory and the other Australian States corresponding to the *Fatal Accidents Act* of this State are as follows:

England	<i>Fatal Accidents Act 1976</i> (this was a consolidation and did not effect any reform)
New Zealand	<i>Death by Accidents Compensation Act 1952</i> ¹
New South Wales	<i>Compensation to Relatives Act 1897</i>
Victoria	<i>Wrongs Act 1958</i>
Queensland	<i>Common Law Practice Act 1867</i>
South Australia	<i>Wrongs Act 1936</i>
Tasmania	<i>Fatal Accidents Act 1934</i>
Australian Capital Territory	<i>Compensation (Fatal Injuries) Ordinance 1968</i>
Northern Territory	<i>Compensation (Fatal Injuries) Ordinance 1974</i>

Full particulars of the dependants who may claim under each of these Acts are set out in the following table.

¹ In New Zealand in 1972 the *Accidents Compensation Act* established a national compensation scheme which virtually took the place of damages actions arising out of personal injury: see paragraph 3.25 above. References in this working paper to the New Zealand fatal accidents legislation are references to the *Death by Accidents Compensation Act 1952* which was virtually superseded by the *Accidents Compensation Act 1972*.

PERSONS ENTITLED TO CLAIM IN JURISDICTIONS WHICH HAVE FATAL ACCIDENTS LEGISLATION

WHO CAN CLAIM

JURISDICTION ¹

	W.A.	England	N.Z.	A.C.T.	N.S.W.	VIC.	QLD.	S.A.	TAS.	N.T.
Marriage										
spouse	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Lineal relatives										
(a) children	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
(b) grandchildren	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
(c) more remote descendants	No	No	No	No	No	No	No	No	No	No
(d) parents	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
(e) grandparents	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
(f) more remote ancestors	No	No	No	No	No	No	No	No	No	No

1. The relevant legislation is as follows -

Western Australia

- *Fatal Accidents Act 1959*

Victoria

- *Wrongs Act 1958*

England

- *Fatal Accidents Act 1976*

Queensland

- *Common Law Practice Act 1867*

New Zealand

- *Deaths by Accident*

South Australia

- *Wrongs Act 1936*

Compensation Act 1952

Tasmania

- *Fatal Accidents Act 1934*

Australian Capital Territory

- *Compensation (Fatal Injuries)*

Northern Territory

- *Compensation (Fatal Injuries)*

Ordinance 1968

Ordinance 1974

New South Wales

- *Compensation to Relatives Act 1897*

	W.A.	England	N.Z.	A.C.T.	N.S.W.	VIC.	QLD.	S.A.	TAS.	N.T.
Collateral ²										
(a) brothers & sisters	No	Yes	No	Yes	Yes	No	No	Yes	Yes	Yes
(b) uncles & aunts	No	Yes	No	No	No	No	No	No	No	No
(c) issue of (a) or (b)	No	Yes	No	No	No	No	No	No	No	No
Step relationship										
(a) step child	Yes	Yes ³	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
(b) Step parent	Yes	Yes ⁴	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
(a) a person to whom the deceased stood in loco parentis.	No	No	No	Yes	Yes	No	Yes	No	No	Yes
(b) a person who stood in loco parentis to the deceased.	No	No	No	Yes	Yes	No	Yes	No	No	Yes

2. In those jurisdictions which permit collaterals to claim, a relationship of the half blood is treated as one of the whole blood.
3. The English Act provides that in deducing any relationship a stepchild of a person shall be treated as his child. Hence where a stepchild has a child of his own that child would be a “grandson” of the stepfather.
4. The Act is not absolutely clear on this point.

	W.A.	England	N.Z.	A.C.T.	N.S.W.	VIC.	QLD.	S.A.	TAS.	N.T.
Former husband or wife	No	No	Yes ⁵ (wife only)	Yes	No	No	No	No	No	Yes
De facto spouse	No	No	No	Yes	No	No	No	Yes	No	Yes
Illegitimacy ⁶ whether illegitimate relationships are included	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes
Adoption ⁷ whether relationships by adoption are included	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Relatives by marriage	No	Yes	No	No	No	No	No	No	No	No

5. Provided she was maintained or entitled to be maintained by the deceased either wholly or in part at the time of his death, or would have been so maintained or entitled but for the incapacity due to the accident from which his death resulted.
6. Most of the jurisdictions have limitations to when the child-reputed father relationship will be recognised. In the case of New Zealand, New South Wales, Victoria, and South Australia, provision as to illegitimates is contained in legislation dealing with the status of children: see *Status of Children Act 1969* (NZ), *Children (Equality of Status) Act 1976* (NSW), *Status of Children Act 1974* (Vic), *Family Relationships Act 1975* (SA).
7. In the case of England, New Zealand, Australian Capital Territory, New South Wales, Queensland, South Australia, Tasmania and Northern Territory, the provision as to adopted children is contained in legislation dealing with adoption: see *Adoption Act 1976* (Eng), *Adoption Act 1955* (NZ), *Adoption of Children Ordinance 1965* (ACT), *Adoption of Children Act 1965* (NSW), *Adoption of Children Act 1964* (Qld), *Adoption of Children Act 1966* (SA), *Adoption of Children Act 1968* (Tas) and *Adoption of Children Ordinance 1964* (NT).

4.2 The following are the principal points of difference and similarity which emerge from the table.

Lineal relatives

4.3 The table shows that, as far as lineal relatives are concerned, all jurisdictions have the same provisions - the children, grandchildren, parents and grandparents, but no others, can claim. All jurisdictions include stepchildren and stepparents and relationships by adoption. However, in regard to other relationships, there is no common factor. The following sets out the most significant differences.

Collateral relatives

4.4 The Western Australian Act does not include any collateral relatives, such as brother and sister. In New South Wales, South Australia, Tasmania, the Australian Capital Territory and the Northern Territory brothers and sisters (including half brothers and sisters) can claim. The English legislation goes even further, and also includes uncles, aunts and their issue (including, in the case of all collateral relatives relationships of the half blood).

Divorced spouse

4.5 In the Australian Capital Territory and the Northern Territory, a former husband or wife of the deceased may claim. In New Zealand, a former wife could claim, provided she was being maintained by the deceased, or was entitled to be so maintained. In none of the other jurisdictions, including Western Australia, can a divorced spouse claim.

De facto husband or wife

4.6 In the Australian Capital Territory and the Northern Territory, a de facto husband or wife of the deceased can claim. In South Australia, such a person can claim, provided a court order has been obtained that he or she -

- (a) had cohabited continuously with the deceased for five years immediately before his or her death or for five years in the aggregate in the six years immediately before the death, or
- (b) had had sexual relations with the deceased which resulted in the birth of a child.

None of the other jurisdictions, including Western Australia, makes provision for such a relationship.

In loco parentis

4.7 In New South Wales, Queensland, the Australian Capital Territory and the Northern Territory -

- (a) a person to whom the deceased stood in loco parentis; and
- (b) a person who stood in loco parentis to the deceased person

is entitled to claim. No other jurisdictions studied, including Western Australia, covers such a relationship.

Relatives by marriage

4.8 Of the jurisdictions studied, the English legislation is unique in that it provides that a relationship of affinity (i.e. by marriage) shall be treated as a blood relationship. This means that in England, for example, a sister-in-law of the deceased and the wife of the deceased's half brother fall within the class of claimants.

CHAPTER 5 - DISCUSSION: CLASS OF CLAIMANTS

THE RATIONALE OF FATAL ACCIDENTS LEGISLATION

5.1 The reason given by Lord Campbell when moving the second reading of the bill in the United Kingdom Parliament in 1846 was that if a man was injured due to the negligence of another he had a remedy in a court of justice but if he died as a result of the negligence of another, there was no remedy, despite the loss to his family. This was unjust and in contrast to the position "in Scotland and foreign countries" where the law gave compensation.¹ The remedy provided by the new legislation ensured that immediate dependants were compensated for their pecuniary loss. Nowadays, the legislation serves a similar purpose, although because of modern social welfare legislation² survivors would not face destitution, as many of them would have in the nineteenth century.

5.2 Although the existing Western Australian legislation, which differs only in comparatively minor respects from the original English legislation,³ probably adequately protects the immediate dependants of a deceased in most family situations, it is not difficult to imagine cases where compensation would be denied to a survivor even though he was as fully a member of the deceased's household, and was as fully dependent upon him as other persons who would be entitled to claim. A foster child, for example, would be such a person.

5.3 It can be argued that the extensions which have been made in other jurisdictions to the list of the claimants contained in *Lord Campbell's Act*⁴ have been to provide for more unusual family situations. For example, the extension to certain collateral relatives such as brothers and sisters and their issue⁵ means that if A's brother B and B's wife are both killed in a car accident, and A takes on responsibility of bringing up B's children and then A is later killed in a further accident, then those children can make a claim under the English *Fatal Accidents Act*. A further example occurs in the New South Wales legislation where amendments have brought foster children within the protection of the Act.

¹ U.K. Parl. Deb. Vol. 85 at 968 (1846).

² See paragraph 3.12 above. If the deceased had been killed while at work, his dependants would receive compensation, even though the employer was not negligent.

³ See footnote 4 for position under original English legislation and, paragraph 2.14 for the position under the existing Western Australian legislation.

⁴ The list of claimants contained in *Lord Campbell's Act* was: wife, husband, parents, grandparents, step parents, children, grandchildren and step children.

⁵ See table in paragraph 4.1 above.

5.4 It is noteworthy that the class of claimants under the *Workers' Compensation Act* of this State is wider than that specified in the *Fatal Accidents Act*. Under the former Act, claims can be made by brothers and sisters of the deceased, by any person who stands in loco parentis to the deceased and any person to whom the deceased stood in loco parentis, and (in certain circumstances) by the de facto wife of the deceased. These persons are not included in the *Fatal Accidents Act*.

Possible extentions

5.5 It could accordingly be suggested that the range of dependants who are able to claim under the Western Australian fatal accidents legislation is too limited, even if in principle the protection of the legislation should not extend beyond the deceased's family circle, ⁶since it can result in arbitrary exclusions in unusual types of family situations.

5.6 It would seem that the community at large has an interest in extending the class of persons entitled to claim under the *Fatal Accidents Act*. Dependants at present not entitled to claim are very often thrown back on the State for support by means of social welfare payments. An extension of the class entitled to claim would mean some saving (admittedly small) of social welfare funds. In the main, defendants are insured against liability under the *Fatal Accidents Act*⁷ and hence the damages payable to those dependants who had hitherto been unable to claim would usually be paid by the defendant's insurers.

5.7 Possibly one reason why the list of dependants entitled to claim was so narrowly drawn in *Lord Campbell's Act* when it was enacted in 1846 was that it may have been considered to be unduly oppressive to defendants for them to be required to compensate other than close relatives in the absence of generally available liability insurance.⁸

5.8 However, because of the modern prevalence of liability insurance, some extension of the existing class of claimants would not now be considered oppressive. Since most of the fatal accidents in which liability under the Act arises occur on the roads or at work, the Motor Vehicle Insurance Trust and insurers of employers' liability would bear most of the additional

⁶ See paragraphs 5.13 to 5.23 below.

⁷ See paragraph 2.7 above.

⁸ On the other hand, a defendant in 1846 would have been liable to pay full compensation for a person's loss of earnings in a case where the accident left him permanently and totally incapacitated but did not kill him. This amount could have been used to support his dependants whoever they may have been.

claims. Higher insurance premiums might result, although any increase would be small.⁹ Any higher premiums would be borne by those sections of the community who participate in or profit from the risk-creating activity.

5.9 Broadly speaking, an extension of the Act in keeping with the present rationale could be achieved in two ways -

- (a) by prescribing additional classes of relatives who would be entitled to claim, as has been done in various ways in other jurisdictions,
- (b) by enacting a general provision which would extend protection to any person who could establish a "familial relationship" with the deceased (possibly with certain prescribed exclusions that may be required on the grounds of social policy).¹⁰

5.10 Each of these approaches has its advantages and disadvantages. The advantage of approach (a) is that it leaves no room for argument as to who is, or is not, within the protected categories.¹¹

The disadvantage is that, no matter how wide the net was cast, it would still be possible for some family situations not to be covered.

5.11 An advantage of approach (b) is that it would ensure that all family situations were covered, no matter how unusual the situation was.¹² A disadvantage of this approach is its uncertainty, with its attendant litigation, cost and delay. Argument would often arise as to whether a particular relationship could properly be classified as a familial relationship. For example, would members of a commune or a religious sect be considered to be members of a family? Would a foster child of a person be considered to be the de facto "brother" of the

⁹ If the principle in *Shelton v Collins* (see note 30 above) applies to death caused by injury, then there might not be any increase in premiums brought about by an extension of the class of claimants under the *Fatal Accidents Act*. There would merely be a transfer of compensation from the estate to the additional dependants.

¹⁰ See paragraph 5.23 below.

¹¹ This would not be altogether true if a relatively vague category such as de facto spouse was included.

¹² This would, however, depend on how "family relationship" was defined in the legislation. For example, if a former spouse was to be covered, the definition would have to be drawn so as to cover former family relationships.

natural son or daughter of that person?¹³ These are just some examples of difficult cases which come to mind.

5.12 It would be possible to combine the two approaches by specifying those relatives who would be entitled to claim as of right and by providing in addition that any other dependants who could satisfy the court that they were a member of the deceased's family or had a familial relationship with the deceased could claim. However, although this approach would reduce uncertainty, it would not eradicate it altogether.

CHANGING THE RATIONALE

5.13 The suggested imposition of the uncertain test of familial relationship, even as an ancillary test, raises the question why the benefit of the fatal accidents legislation should be restricted to those who had a certain sort of relationship with the deceased, whether by blood or as a member of the deceased's household or family. Why should not any person who can satisfy the test of dependency be entitled to compensation, whether or not he also satisfies these other tests?

5.14 A deceased person may have been wholly or partly maintaining someone who did not happen to be a relation. He may have been supporting a child over whom he had accepted the obligations of guardianship. He may have been supporting, or helping to support, an elderly parent of a friend who had died earlier. He may have been contributing to the support of a hospital, school or charitable organisation.

5.15 The suggestion that the protection of the fatal accidents legislation should be extended to any person who could show that he was dependent on the deceased was actually made in the Western Australian Parliament in 1947, when the Government introduced a bill in the Legislative Assembly aimed at replacing *Lord Campbell's Act* in this State. The bill, among other things, proposed that the protection of the legislation be extended to illegitimate children and adopted children, and also to the brothers and sisters of the deceased.¹⁴ A member of the Opposition, Mr. H.E. Graham, gave notice that he intended to move that the

¹³ In this last example, it may be that the foster child and the natural child would be considered to be members of the deceased's family, but would they be said to have a family relationship to each other?

¹⁴ W.A. Parl. Deb. 1947 at 520.

list of the persons in the bill as those for whose benefit an action could be brought should be deleted and replaced by a provision giving a right of action to - ¹⁵

"any person who at the time of the death of the deceased person was being financially maintained, either wholly or in part, by such deceased person."

Mr. Graham's motion was never put to the vote, as the bill lapsed.

5.16 The issue again came under notice in this State in 1976 when Mr. P.L. Sharp Q.C. delivered a paper at the 1976 Western Australian Law Summer School entitled *Methodology in Assessment of Damages in Personal Accidents*. In the paper, Mr. Sharp said: ¹⁶

"Clearly there may be people outside the group specified [in the Western Australian Act] who were dependent upon the deceased and, without at all being exhaustive, these include a de facto wife, brothers and sisters and children who have been de facto adopted and as such maintained by the deceased.

Rather than have an exhaustive list of entitled dependants it is submitted it would be simpler to enact that any person is entitled to claim who can show a relationship of dependency upon the deceased, irrespective as to whether the relationship is legitimate or illegitimate.

...

In case public morals are shocked, the definition could exclude the case of a dependent mistress when the husband is living with his wife and supporting her".

5.17 The general view expressed by Mr. Sharp has subsequently been supported by the Council of the Law Society of Western Australia in a letter to the Attorney General. The Council, however, considered that care should be taken to ensure that employees as such were excluded, and that difficulties created by definitions such as those appearing in the *Workers Compensation Act* should be avoided. ¹⁷

¹⁵ W.A. Parl. Deb. 1947 at 593: see also W.A. Parl. Deb 1959 at 1205. A difficulty with Mr. Graham's proposal is that it would appear to exclude a claimant who was not presently being maintained by the deceased. Another difficulty is that the use of the word "maintain" might limit compensation to those who were being supported in a subsistence sense.

¹⁶ A similar proposal has also been made in *McGregor on Damages* (13 ed. 1972) paragraph 1186. The author explicitly recognises that, under the proposal, persons whose dependency on the deceased rested on no family ties would be able to claim.

¹⁷ The definition of "dependants" in s.5 of that Act has caused difficulty: see *Re Hendrik de Haan* [1969] WAR 161.

5.18 However, there seem to be two principal arguments against the proposal -

- (a) Relationships of a purely commercial sort would be included, a step which not only would be against the principles adopted elsewhere in the law of tort, but would also be oppressive to the defendant.
- (b) Relationships of a socially undesirable sort would be included, to which the law should not extend protection. (This objection could also be made to approach (b) in paragraph 5.9 above).

(a) Commercial relationships

5.19 Under the existing *Fatal Accidents Act*, it is not enough for a claimant to show he was a relative of a prescribed class of the deceased and that he suffered pecuniary loss as a result of the death of the deceased. The claimant must also show that the pecuniary benefit he would have received had the deceased lived would have accrued to him by virtue of the fact that he was a prescribed relative of the deceased.

This was explained by Devlin J. in *Burgess v Florence Nightingale Hospital*¹⁸ where he said:

"Let me take for example the case of a man in the prime of life, who takes into partnership a young man, and within two or three years the senior partner is killed. The junior partner's prospects may be grievously injured; he may not have had time to establish himself in the good graces of the clients of the firm, and the result may be that a lot of work goes elsewhere. At common law there would be no claim by the junior partner. Can it make any difference that the senior partner is a father who has taken a son into the family business? Plainly, in the mind of the law, no; and, therefore, counsel for the defendant submits that relationship, in such a case as that, is purely incidental, and he submits that that is also the position in this case. The loss claimed is claimed in that case qua junior partner, not qua son, and to allow the loss under the *Fatal Accidents Act, 1846*, merely because of the incidental factor that the senior and junior partner happen to be father and son would be wrong. Therefore, one must cut down the wide words of the Act by reading into them an implication that the loss must result from one or other of the relationships which are specified in the section."

In *Burgess v Florence Nightingale Hospital*,¹⁹ the plaintiff husband and his deceased wife had been professional dancing partners. They shared their earnings equally but their joint earning

¹⁸ [1955] 1 All ER 511 at 515.

capacity greatly exceeded that of either of them individually. Each derived an advantage from the arrangement. However, Devlin J. said that the wife was receiving the market rate so far as there was any evidence before him. She was not rendering any services to her husband which he got either free or at less than market value. He further held that as no benefit arose from the dancing partnership of the plaintiff and his wife which could properly be attributed to their relationship as husband and wife, no damages were recoverable for the value of the wife to the plaintiff as his dancing partner.

5.20 In the Commission's view, the decision of Devlin J. is in accordance with the purpose of the fatal accidents legislation. Generally, the law has only afforded compensation to persons immediately injured by the wrongful act or omission of another and does not compensate third persons who in consequence lose their livelihood, support or expected benefits for their association with him.²⁰ For example, where because of injuries caused to him by the negligence of another in an accident, an employer is forced to close down his business and dismiss his employees, those employees cannot recover damages from the person whose negligence caused the injury, even though they are unable to find positions which earn them comparable wages.²¹ Similarly, if a member of a long established professional two-man comedy team is forced into immediate and permanent retirement because of serious injuries received in a traffic accident as a result of the negligence of his taxi driver, the surviving member of the team will not be entitled to damages from the taxi driver, even though it appears that his income in the future will be less than he could earn with his old partner. In these types of cases, liability would be denied on the ground that either the damage is too remote or that there is no duty of care because the injury is said to be unforeseeable. No doubt the real reason is that it is considered to be unduly oppressive to burden defendants with responsibility for unpredictably heavy economic loss in such cases.

5.21 The right of action for damages under the fatal accidents legislation could therefore be said to be anomalous in that it is at odds with the general principle that the law compensates the victim - the party immediately injured - and not those who suffer loss because of their association with him. But the Act, as at present drafted, circumscribes the anomaly by firstly confining the action to prescribed classes of relatives and secondly requiring the applicant to

¹⁹ [1955] 1 All ER 511.

²⁰ See Fleming, *The Law of Torts* (5th ed. 1977) at 170 and 171.

²¹ See *Best v Fox* [1952] 2 All ER 394 at 398.

satisfy the court that the pecuniary benefit would have come to him by virtue of that relationship.

5.22 If however, the requirement that an applicant must be a prescribed relative is dropped, there may be nothing for the court to rely on to distinguish clearly cases for which compensation should be paid from those cases for which compensation should not. It would perhaps be possible for the legislation to provide guidelines for the court, such as that it must be satisfied that the benefit would have accrued only because the claimant was a relative of the deceased, or was his friend or because the deceased would have made the payment out of charity or moral obligation. Another alternative might be to put the limit negatively by providing that a claimant could not succeed if the benefit would have accrued because of a purely commercial relationship with the deceased. However, this test, as well as its alternatives, would be very imprecise and difficult to apply. Whichever one was chosen might include undeserving cases and exclude deserving ones.

(b) Socially undesirable relationships

5.23 The other objections to the proposal is that compensation could be recoverable in respect of socially undesirable relationships. This objection could also be made against the test suggested above of "familial relationships".²² Mr. Sharp²³ drew attention to the possibility of the deceased's mistress recovering compensation if dependency were to be the sole test, and suggested that the proposed enactment could expressly exclude such a case. However, this is only one sort of case where recovery may be considered inappropriate. Other examples which the community might consider to be inappropriate would be homosexual or lesbian relationships, cases where the dependency arose out of membership of a socially undesirable religious²⁴ or political²⁵ group, or even cases where the relationship was a criminal one.²⁶

²² See paragraph 5.9(b) above.

²³ See paragraph 5.16 above.

²⁴ A witches coven, for example.

²⁵ A Neo-Nazi Party, for example.

²⁶ For example, blackmail.

EXTENSION BY ADDING TO PRESCRIBED CLASS

5.24 Assuming that a general test of dependency²⁷ (whether absolute or qualified) or of "familial relationship"²⁸ as a substitute for the present method of prescribing eligible relationships is considered undesirable, the question arises what extensions should be made to the prescribed class of relatives.²⁹

5.25 At present in Western Australia the prescribed class consists of -

- (a) husband or wife;
- (b) children (including step children) and grandchildren; and
- (c) parents (including step parents) and grandparents.

The only alteration effected since 1849 when *Lord Campbell's Act* was adopted in Western Australia has been to bring within the definition of "parent" and "child" persons related to the deceased illegitimately or by consequence of adoption.³⁰

5.26 In paragraphs 5.27 to 5.47 below, the Commission discusses the desirability of covering certain other relatives.

Divorced spouse

5.27 This category is covered in the legislation of the Australian Capital and Northern Territories and of New Zealand. The English Law Commission has also recommended its inclusion in the English legislation.³¹ The English Commission said that a divorced wife who had been awarded maintenance may well suffer serious hardship if her former husband is killed and she is not recognised as a dependant for the purposes of a claim under the *Fatal*

²⁷ See paragraphs 5.13 to 5.23 above.

²⁸ See paragraphs 5.9(b) and 5.11 above.

²⁹ The Commission considers that *some* extension is justified: see paragraphs 5.7 and 5.8 above.

³⁰ These extensions were made by the *Fatal Accidents Act 1959*.

³¹ Report, *Personal Injury Litigation - Assessment of Damages* (Law Com. No.56, 1973) paragraph 262. This report has not yet been acted on by the United Kingdom Parliament.

Accidents Act.³² The same position would apply in Western Australia. The *Family Law Act 1975 (Cwth)*³³ gives a party to a marriage a right to be maintained by the other party in certain circumstances, and empowers the Court to make appropriate orders as to maintenance. In many cases, no doubt, the former husband, if he had lived, would have made payments to his ex-wife even though there was no court order. If a former spouse is killed due to the fault of another, it does not seem unreasonable that the defendant should be obliged to compensate the survivor if it can be shown that the deceased would have continued to support him or her.³⁴

The omission of the class of divorced spouse from the original Act is no doubt explicable on the grounds that in 1846 divorces were difficult to obtain and were very rare.

De facto husband or wife

5.28 In South Australia, a de facto husband or wife can in certain circumstances make a claim under the fatal accidents legislation of that State. To be entitled to make a claim, he or she must first obtain a court order under the *Family Relationships Act 1975*.³⁵ To obtain the order, the applicant must prove to the satisfaction of the court that he or she was at the time of the deceased's death cohabiting with the deceased as de facto husband or wife and -

- (a) he or she -
 - (i) had so cohabited with the deceased continuously for the period of five years immediately preceding the death; or
 - (ii) had during the period of six years immediately preceding that date so cohabited with the deceased for periods aggregating not less than five years; or

³² Report, paragraph 259.

³³ ss.71-75.

³⁴ That is, the defendant would not be liable to pay compensation merely because the deceased had been ordered by the Family Court to pay compensation, but only if the defendant can show that payment *would in fact have been made*.

³⁵ *Wrongs Act 1936-1975 (SA)*, ss.20(1) and 3a; *Family Relationships Act 1975 (SA)*, s.11.

- (b) he or she had sexual relations with the deceased which resulted in the birth of a child.³⁶

An order may not be made unless the application is supported by credible corroborative evidence.³⁷

5.29 Apart from South Australia, the Australian Capital Territory and the Northern Territory are the only jurisdictions of those examined by the Commission³⁸ in which a de facto husband or wife may make a claim.³⁹ The strict preconditions to a claim by a de facto husband or wife which exist in South Australia do not apply in the Australian Capital Territory and the Northern Territory.

5.30 Statutory recognition of the interests of de facto spouses would not be new in Western Australia. The list of those who may make a claim for compensation under the *Workers' Compensation Act* was amended in 1973⁴⁰ to include a woman who, although not legally married to him, -

- (i) lived with him as his de facto wife immediately before his death, if he leaves any dependant who is the child of the union between him and the woman; or
- (ii) lived with him on such a basis for not less than three years immediately before his death, if he does not leave any such dependant.

5.31 In 1972, the Western Australian Parliament enacted the *Inheritance (Family and Dependants Provision) Act* which enables a de facto widow⁴¹ of the deceased to claim against his estate if she has not been left enough for her proper support. This legislation is not, of course, parallel with the *Fatal Accidents Act*, since it concerns claims against the estate of the deceased, not against third parties.

³⁶ Ibid.

³⁷ *Family Relationships Act 1975* (SA), s.11(5).

³⁸ See paragraph 4.1 above.

³⁹ *Compensation (Fatal Injuries) Ordinance 1968* (ACT), ss.8(2) and 4(2)(h); *Compensation (Fatal Injuries) Ordinance 1974* (NT), ss.8(2), 4(2) and 4(3)(c). Both of these Ordinances give a right to claim to "a person who, although not legally married to the deceased person, was, immediately before the death of the deceased person, living with the deceased person as wife or husband, as the case may be, on a permanent and bona fide domestic basis". The expression "de facto" spouse is not used in the Ordinances.

⁴⁰ No. 96 of 1973.

⁴¹ These are the words used in the statute: see s.7(1)(f).

5.32 However, a de facto relationship cannot be proved by production of official certificates, as it can in the lawful relationship, and there may be the temptation for some claimants to exaggerate the extent of their relationship to the deceased. On the other hand, the preconditions which have to be fulfilled under the South Australian fatal accidents legislation before a court order can be obtained would significantly lessen the possibilities of false claims succeeding.

5.33 The English Law Commission in its report, *Personal Injury Litigation - Assessment of Damages* said that it had contemplated extending the ambit of the Act to such persons as a fiancée and a de facto wife, but difficulties of definition and social policy had persuaded it not to propose any such extension.⁴² The Commission thought, however, that there might be a case for examining the legal position of a de facto wife in all its aspects.⁴³

5.34 The Commission has formed no final view on whether a de facto spouse should be covered by the *Fatal Accidents Act* and invites comment.

In loco parentis

5.35 In New South Wales, Queensland, the Australian Capital Territory and the Northern Territory, the statutory list of those entitled to claim under the fatal accidents legislation includes -

- (a) a person to whom the deceased stood in loco parentis; and
- (b) a person who stood in loco parentis to the deceased person.⁴⁴

The expression "in loco parentis" in New South Wales legislation was considered by the Full Court of that State in *Commissioner for Railways v Nash*.⁴⁵ In a joint judgment, the Court said:⁴⁶ -

⁴² Report, paragraph 258.

⁴³ Ibid.

⁴⁴ See table in paragraph 4.1 above.

⁴⁵ [1963] NSW 30.

⁴⁶ [1963] NSW 30 at 34.

"It would accordingly not appear to be sufficient, to found a claim under the 'in loco parentis' relationship, merely to show that the deceased, either in the role of 'father', or of 'child', provided, or might reasonably have been expected to provide, benefits or services measurable in money to another member of the family. It is necessary to show that the 'father' stood in the shoes of an actual father, and the 'child' in the shoes of an actual child, looking to the 'father' for care, protection, maintenance and upbringing, as the 'father' looked to him, perhaps, ultimately, for some support in his declining years. We are, in other words, not concerned. ...merely to seek a person taking upon himself the duty of making financial provision for a child and a child so provided for; what must be shown is a relationship of foster parent and foster child with all its incidents".

5.36 The list of those who may make a claim under the *Workers' Compensation Act 1912* (WA) includes "any person who stands in the place of a parent of another person and also that other person".⁴⁷ The phrase was considered by the Full Court of Western Australia in *Re Hendrik de Haan*.⁴⁸ Jackson J. who was one of the members of the Court said in his judgment:⁴⁹

"...the words 'any person' in the passage under consideration should be taken to denote. ...a person who stands in the place of a parent to the worker, one who has taken upon himself (or herself) the duties of a parent to the worker; or, in other words, one who is in fact but not in law an adoptive parent of the worker. Then follows the curious and difficult phrase 'and also that other person'... If the preceding words mean, as I would hold, the worker's adoptive parent, in fact but not in law, then 'that other person' can reasonably be interpreted as describing the reverse side of the coin, that is the child whom the worker has adopted in fact though not in law".

5.37 The English Law Commission in its report, *Personal Injury Litigation - Assessment of Damages* recommended that the class of claimants under the English Act should be extended to include any person (not being a child of the deceased person) who, in the case of any marriage to which the deceased person was at any time a party, was treated by the deceased person as a child of that family in relation to that marriage.⁵⁰ The Law Commission thought the justification for admitting the claims of such children as dependants every bit as strong, if not stronger, than for admitting those of step children, who were already recognised under the *Fatal Accidents Act*.⁵¹

5.38 Under the English Commission's recommendation only the child treated as a member of the family could claim: in the reverse situation, where the child is killed, the person who treated him as a member of the family could not claim. The proposal would also only apply in

⁴⁷ See *Workers' Compensation Act 1912*, s.5.

⁴⁸ [1969] WAR 161.

⁴⁹ [1969] WAR 161 at 169.

⁵⁰ Report at paragraphs 257, 262 and clause 8 of the draft bill which constitutes Appendix 5 to the report.

⁵¹ Report, paragraph 257.

relation to a marriage to which the deceased was a party. It would not apply to a relationship of foster parent and foster child where the foster parent is unmarried. This Commission considers that these limitations are unnecessary, and prefers the legislation as it exists in the Australian jurisdictions which have provided for such relationships.

Collateral relatives such as brother and sister

5.39 The bill referred to in paragraph 5.15 above which was introduced into Parliament of Western Australia in 1947 proposed, among other things, to extend the class of claimants to include the brothers and sisters of the deceased. Referring to this provision the Attorney General said:⁵²

"I am not wedded to the inclusion of brothers and sisters in this Bill, but I have included them in order that the matter may receive the consideration of the House and because the recent Act in South Australia extended legislation there to brothers and sisters".

However, the bill lapsed and the provision was not voted on. The position in this State is still that no collateral relatives are protected by the legislation.

5.40 The English *Fatal Accidents Act 1976* includes in its list of those entitled to claim "any person who is, or is the issue of, a brother, sister, uncle or aunt of the deceased": s.1(3). These relatives were first brought into the statutory list of dependants in 1959.⁵³ Prima facie, "issue" means not simply children but descendants of all generations.⁵⁴ It would appear that in s.1(3) of the English *Fatal Accidents Act 1976*, "issue" would in fact have its prima facie meaning. This creates an anomaly in that under the English Act the deceased's great grandson would be unable to make a claim but the great grandson of the deceased's brother would be entitled to claim.

5.41 In New South Wales, South Australia, Tasmania, the Australian Capital Territory and the Northern Territory brothers and sisters fall within the statutory list, but not uncles, aunts or

⁵² W.A. Parl. Deb. [1947] at 520.

⁵³ By s.1(1) of the *Fatal Accidents Act 1959* (UK).

⁵⁴ Re *Burnham, Corrick & Corrick* [1918] 2 Ch 196, at 201, 202, 204.

issue of uncles, aunts, brothers and sisters.⁵⁵ The list⁵⁶ of those who may make a claim under the *Workers' Compensation Act 1912* of Western Australia includes the deceased's brothers and sisters.⁵⁷

5.42 If reform is to be effected by extending the present statutory list, then bearing in mind that only a right to claim would be conferred, one view might be that at least the following collateral relatives should be included in the list -

- (a) great-uncle, great-aunt;
- (b) uncle, aunt;
- (c) child, grandchild and great-grandchild of uncle or aunt;
- (d) brother, sister;
- (e) child and grandchild of brother or sister.

Great-uncles and great-aunts are not included in the English list but if the grandsons of brothers are to be included as they are in England,⁵⁸ then it seems reasonable that great-uncles and great-aunts should be included.

Collateral half blood relatives and relationships deduced through them

5.43 The English legislation was altered in 1959⁵⁹ to provide that in deducing a relationship for the purposes of the Act a relationship of the half blood (i.e. a half brother or half sister) was to be treated as a relationship of the whole blood (i.e. as a brother or sister). The provision was carried forward into the English *Fatal Accidents Act 1976*.

5.44 In New South Wales, South Australia, Tasmania, the Australian Capital Territory and the Northern Territory, the list of those entitled to claim includes the half brother and the half sister of the deceased.⁶⁰ The list⁶¹ of those who may make a claim under the *Workers' Compensation Act 1912* (WA) includes the deceased's half brother and half sister.⁶²

⁵⁵ See table in paragraph 4.1 above.

⁵⁶ See *Workers' Compensation Act 1912*, s.5.

⁵⁷ The position may be that dependants who are only part dependent upon the employee's earnings can only recover compensation if there are no dependants wholly dependent upon his earnings: see paragraph 3.8 above.

⁵⁸ Because the grandson of a brother is issue of that brother.

⁵⁹ See *Fatal Accidents Act 1959* (UK).

⁶⁰ See table in paragraph 4.1 above.

5.45 It would seem reasonable that the English provision should be adopted in Western Australia if the statutory list of dependants entitled to make a claim in this State is to be extended to include brothers and sisters.

Relatives by marriage, and not by blood

5.46 The English *Fatal Accidents Act 1976* also provides that in deducing a relationship for the purposes of the Act a relationship by affinity (i.e. by marriage) is to be treated as a relationship by consanguinity (i.e. a blood relationship).⁶³ This provision was also first brought into the English legislation in 1959. There seems to be a fairly strong argument in favour of incorporating such a provision into the Western Australian legislation. It is quite common for people to assist financially others who are only related to them by marriage. Examples which come readily to mind are: the man who assists his son-in-law financially in the son-in-law's business; the man who financially assists his daughter-in-law who has been widowed at an early age, and the man who supports or helps to support his aging father-in-law or mother-in-law.

Other relationships: great-grandson and great-grandfather

5.47 In the light of the fact that people are now living longer than ever before and that life expectancy will probably increase rather than diminish, the Commission's tentative view is that the great-grandson of a deceased should probably be included in the list and that if this is done that it would only be reasonable to include in the list the great-grandfather of a deceased. (Neither the great-grandson of the deceased nor the great-grandfather of the deceased are included in the list of claimants under any of the enactments studied by the Commission).

⁶¹ See *Workers' Compensation Act 1912*, s.5.

⁶² But see footnote 110 above.

⁶³ *Fatal Accidents Act 1976* (UK), s.1(4).

OTHER MATTERS

Posthumous child

5.48 The fatal accidents legislation in the Australian Capital Territory and the Northern Territory both expressly provide that a child of the deceased person born alive after the death of that person is to be treated as having been born before the death of the deceased person.⁶⁴ Although it is fairly certain that in Western Australia the deceased's posthumous child is within the relatives protected by the Act,⁶⁵ the Commission considers that the matter should be put beyond doubt by enacting the express provision.

Illegitimate children

5.49 For the purposes of the *Fatal Accidents Act* of Western Australia, a person is deemed to be the parent or child of a deceased person notwithstanding that he was only related to him illegitimately.⁶⁶ Accordingly, in deducing any relationship which under the Act is included within the meaning of the expressions, "parent" and "child", any illegitimate person is to be treated as being or as having been the legitimate child of his mother and reputed father.⁶⁷ However, s.6(3) of the Act provides that:

"Where in any action under this Act the question of illegitimacy arises in respect of any relationship, that relationship shall not be taken to have been proved unless paternity had been admitted by or established against the father during the lifetime of the deceased person."

In the view of the Commission, s.6(3) is defective. As s.6(3) at present stands, where the mother of an illegitimate child is killed in an accident, the child could only bring an action in respect of the loss resulting to him from his mother's death if paternity had been admitted by or established against his father during his mother's lifetime. However, as the child is claiming in respect of his mother's death, the question of paternity ought to be completely irrelevant. It also seems that even where an illegitimate child brings a claim in respect of the death of his father the subsection could operate unfairly against the child. There is a fairly strong argument

⁶⁴ *Compensation (Fatal Injuries) Ordinance 1968* (ACT), ss.8(2), 4(2)(b) and (3)(b); *Compensation (Fatal Injuries) Ordinance 1974* (NT), s.4(3)(b).

⁶⁵ See paragraph 2.15 above.

⁶⁶ *Fatal Accidents Act 1959* (WA), s.3(1) and (2).

⁶⁷ *Ibid.*

that the child ought to be able to claim even though the paternity of the child's father is only established after the father's death. A solution might be to amend the subsection to confine the qualification to the case where an action is brought for the benefit of the father of an illegitimate child in respect of the child's death. The Commission invites comments on this suggestion.

Prospects of surviving spouse's remarriage

5.50 In England, in assessing damages payable to a widow in respect of the death of her husband in an action under the *Fatal Accidents Act*, the court is prohibited from taking into account the remarriage of the widow or her prospects of remarriage.⁶⁸ The object of the provision is to protect the widow from distasteful cross-examination on these questions. An equivalent provision does not operate in Western Australia and in assessing her damages in this State a widow's prospects of remarrying must be taken into account.⁶⁹ The English Law Commission in its report, *Personal Injury Litigation - Assessment of Damages*⁷⁰ made no comment on the provision as it related to widows but said it was a policy decision as to whether the provision should be extended to a dependent divorced wife, should the Act be amended to enable her to claim. Beyond drawing attention to the question it made no recommendation for any extension of the provision to divorcees, although it did say that it would be absurd if the actual remarriage of a divorcee after the death of her former husband could not be taken into account.⁷¹

5.51 The Commission welcomes comment on whether the court should be prohibited from taking into account a remarriage of the widow or widower, or their prospects of remarriage. Whatever rule is decided upon for a claim by a surviving spouse should also apply to a claim by a divorced spouse, were he or she to be covered by the legislation.

⁶⁸ *Fatal Accidents Act 1976* (UK), s.3(2).

⁶⁹ In the Northern Territory, a divorcee is entitled to make a claim and the Ordinance provides that in assessing damages, no reduction shall be made on account of "the remarriage or prospects of remarriage of the surviving former spouse": *Compensation (Fatal Injuries) Ordinance 1974*, ss.4(2) and 10(4)(h). In no other Australian jurisdiction is there an equivalent provision.

⁷⁰ Report, paragraph 260.

⁷¹ *Ibid.*

CHAPTER 6 - DISCUSSION: SOLATIUM

PRESENT LAW IN WESTERN AUSTRALIA

6.1 In an action under Western Australia's *Fatal Accidents Act 1959*, only recovery of economic or material advantages to the survivor is allowed.¹ Where the deceased is a wife and mother, damages can be claimed for loss, not only of outside earnings by which she contributed to the family purse, but also of her domestic services in looking after the home, husband and children. Her medical expenses and funeral expenses may be recovered under the *Fatal Accidents Act*, if they have been incurred by the parties for whose benefit the action is brought.²

6.2 But the husband cannot recover for the loss of her companionship or for the loss of her love. Nor can he recover for grief or mental suffering which he endures because of her death. The child cannot recover for the loss of its mother's guidance and of help not capable of translation into money's worth. Similarly, where the deceased is a husband and father, there can be no recovery for matters such as loss of companionship, loss of love, for grief or for the loss of the deceased's guidance as a husband and father and for his non-pecuniary help.

6.3 Where the deceased is a child, for the parents to recover any damages there must be a loss of a reasonable expectation of pecuniary benefit. Sometimes, the claim is pressed to extinction.

"Adverse factors are the extreme youth of the child, the risks of illness, disease, accidents and death, the expense of bringing him up before he could be expected to contribute to his parent's income, and the possibility that the parents might not have survived their child. When damages are awarded, the reasons usually are that the child had already made contributions to the home budget, that his prospects in life were good, and that there was a strong likelihood of household services (like baby sitting) or financial support forthcoming or continuing".³

¹ See paragraph 2.5 above. In the case of domestic airline fatalities solatium can be awarded under the *Civil Aviation (Carriers' Liability) Act 1959* (Cwth). Section 35(8) of that Act provides that "in awarding damages, the court...is not limited to the financial loss resulting from the death of the passenger". Any of the designated relatives entitled to claim damages under the Act would be entitled to claim solatium.

² *Fatal Accidents Act 1959* (WA), s.5(1). As to the damages recoverable by the wife's estate under the survival legislation (*Law Reform (Miscellaneous Provisions) Act 1941*): see paragraph 3.4 above.

³ Fleming, *Law of Torts* (5th ed. 1977) at 655.

The child's parents are unable to recover anything for grief or mental suffering, the loss of the pleasure derived from having the child in the family circle and from their hopes and thoughts upon the future of the child.

THE LAW IN OTHER PLACES

South Australia

6.4 Of the jurisdictions which have been referred to in this paper, only South Australia and the Northern Territory have made provision for a solatium.⁴ It was in 1940 that the South Australian fatal accidents legislation was amended to provide for the payment of solatium. The concept was first introduced into the law of the Northern Territory as part of the *Compensation (Fatal Injuries) Ordinance 1974* which repealed and replaced an earlier Ordinance.

6.5 Under the South Australian legislation the court may, in the case of a deceased child, award to the surviving parents a sum not exceeding \$3,000 as it thinks just, by way of solatium for the suffering caused to them by the death.⁵ For the purposes of this provision, "parent" means the father or mother of the child.⁶ Where both parents of a child claim solatium, the amount awarded after deducting the costs not recovered from the defendant is to be divided between them in such shares as the court directs.⁷ If one of two parents does not join in bringing the action for payment of solatium, the other may bring an action for the amount which he or she claims to be due to him or her.⁸

6.6 Under the South Australian legislation, in the case of a deceased spouse, the court may award to the surviving spouse a sum not exceeding \$4,200, as it thinks just, by way of solatium for suffering caused to the spouse by the death.⁹ A de facto spouse can claim under this provision but must first obtain a court order under the South Australian *Family*

⁴ Eire also provides for compensation by way of solatium. The total amount that may be awarded for mental distress is one thousand pounds: *Civil Liability Act 1961* (Eire), s.49.

⁵ *Wrongs Act 1936-1975* (SA), s.23a(1).

⁶ The natural mother of an illegitimate child is a "parent" for the purposes of the provision: see *Family Relationships Act 1975* (SA), s.6(1). There are limitations to when the natural father of an illegitimate child will be recognised as a parent for the purposes of the provision: see *Family Relationships Act 1975* (SA), s.7.

⁷ *Wrongs Act 1936-1975* (SA), s.23a(2).

⁸ *Ibid.* s.23a(3).

⁹ *Ibid.* s.23b(1).

Relationships Act 1975.¹⁰ To obtain that order the de facto spouse must establish that the preconditions set out in paragraph 5.30 above have been fulfilled. Where the deceased is survived by a lawful spouse and a de facto spouse they may both claim solatium, but the aggregate awarded by the court may not exceed \$4,200 and is to be apportioned between the two claimants as the court thinks fit.¹¹

6.7 An award for solatium under the South Australian legislation is in addition to any award for pecuniary loss consequent upon the death of the deceased.¹² The claim for solatium cannot be set off against the award for pecuniary loss.¹³ If a person entitled to solatium dies before an award is made or his claim is settled out of court, the claim does not survive for the benefit of his estate.¹⁴

6.8 Under the South Australian *Wrongs Act*, the amount of the solatium is not a fixed sum. Subject to the maximum prescribed by the Act, the amount payable is in the discretion of the court.¹⁵

The court can refuse to order the 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 such payment should be made.¹⁶

6.9 Decisions of the Supreme Court of South Australia have shown that the concept of solatium complements on the emotional side the conventional recovery which looks only to the purely material aspects of the injury.¹⁷ Primary consideration must be given to the suffering¹⁸ of the claimants and to the loss to the claimants of pleasure derived from having the deceased in the family circle and from their hopes and thoughts (in case of parents) upon the future of their children.¹⁹ The nature of the relations between the claimant and the

¹⁰ Ibid., s.23b(1) and 3a, *Family Relationships Act 1975* (SA), s.11.

¹¹ *Wrongs Act 1936-1975* (SA), s.23b(2) and (3).

¹² Ibid., s.23c(1).

¹³ *Public Trustee v Zoanetti* (1945) 70 CLR 266.

¹⁴ *Wrongs Act 1936-1975* (SA), s.23c(3).

¹⁵ Ibid., ss.23a and 23b.

¹⁶ Ibid., s.23c(2). The Appendix to this working paper contains a copy of the sections relating to solatium in the South Australian Act.

¹⁷ See *Taverner v Swanbury* [1944] SASR 194.

¹⁸ See *Wrongs Act 1936-1975* (SA), ss.23a(1) and 23b(1).

¹⁹ See *Jeffries v The Commonwealth* [1946] SASR 106 at 108.

deceased is relevant.²⁰ The nature and circumstances of the death may be taken into account.²¹ In short, the court should have regard to the whole situation - to the past, and to the future, as well as to the pain suffered by the claimant.²²

Northern Territory

6.10 Section 10(3)(f) of the Northern Territory's *Compensation (Fatal Injuries) Ordinance 1974* provides that:

"Damages in an action may include solatium".

The provision is much wider than that in South Australia. In South Australia, the only possible claimants for solatium are the parents of a deceased child and the surviving spouse of a deceased husband or wife.

A child of the deceased, for example, cannot claim. In the Northern Territory, however, the class of claimants for solatium is the same as that for pecuniary loss.²³ Furthermore, in the Northern Territory there is no upper limit on the amount which the court may award for solatium.

6.11 Not only does the Northern Territory legislation contain provision for the payment of solatium to the child, but it also contains provision for damages to the child on account of loss of care and guidance by the deceased parent. Section 10(3)(e) of the Territory's *Compensation (Fatal Injuries) Ordinance 1974* provides that -

"Damages in an action may include if the deceased person is survived by a child of his who is an infant damages on account of loss of care and guidance of the child by the deceased person as a parent".

²⁰ *Taverner v Swanbury* SASR 194 at 198.

²¹ *Ibid.*

²² *Jeffries v The Commonwealth* [1946] SASR 106 at 108.

²³ See table in paragraph 4.1 above

PROPOSALS FOR REFORM

6.12 As has already been mentioned, in 1947 the Western Australian Government introduced a bill into Parliament aimed at repealing and replacing *Lord Campbell's Act* in this State. One of the innovations proposed in the bill was the adoption of the South Australian provisions relating to solatium.²⁴ The bill lapsed but there was some discussion on the proposal relating to solatium in the Legislative Assembly. Mr. H.E. Graham M.L.A. pointed to the fact that under the South Australian enactment there was no provision for a payment of this nature to a child who had lost its parents in an accident. He suggested that a child should be entitled to some payment for the loss of the natural love and affection to which it was normally entitled and of the discipline and guidance exercised by its parents.²⁵

6.13 When the present Western Australian fatal accidents legislation was introduced into Parliament in 1959, Mr. H.N. Guthrie M.L.A. moved an amendment aimed at incorporating the South Australian provisions relating to solatium into the bill.²⁶ However, the motion was defeated. In opposing it, the Attorney General said that the whole purpose of the Act was to compensate the relatives for the actual loss they had sustained. The South Australian provisions fixed an arbitrary sum for the grief and suffering of the parents or surviving spouse, and he thought that one could not reasonably assess that loss in monetary value. The general policy of the law was against the payment of solatium, he said.²⁷

6.14 In his paper, *Methodology in Assessment of Damages in Personal Accidents* delivered at the 1976 Western Australian Law Summer School, Mr. P.L. Sharp Q.C. submitted that Western Australia should introduce a provision for solatium in terms similar to the South Australian legislation.

6.15 In its report, *Personal Injury Litigation - Assessment of Damages* the English Law Commission recommended that -

²⁴ W.A. Parl. Deb. (1947) at 521.

²⁵ *Ibid.*, at 591 and 592. The Scottish Law Commission has recently suggested the enactment of a provision which would have the effect of entitling a child to compensation for the loss of a parent's guidance and other non-pecuniary help. Under the suggested provision, the relatives' existing right in Scotland to solatium would be replaced by a head of damages acknowledging the non-pecuniary loss suffered by a person who was the husband, wife, parent or child of the deceased: Scottish Law Commission, *Memorandum No. 17* (1972) at pages 73 to 76 and 81. (The existing law in Scotland already entitles *the relatives* of a deceased to an award of solatium for their grief and suffering).

²⁶ *Ibid.*, at 1207 and 1208.

²⁷ *Ibid.*, at 1207.

- (a) the parents of an unmarried minor child should be entitled to recover one thousand pounds in an action under the *Fatal Accidents Act*;
- (b) if both parents are included in the claim, each should be awarded five hundred pounds;
- (c) in the case of an illegitimate child, only the mother should be able to claim;
- (d) the surviving spouse should be entitled to recover one thousand pounds;
- (e) there should be included a provision permitting the variation of the figure of one thousand pounds by statutory instrument;
- (f) awards should bear interest from the date of death;
- (g) any subsisting claim for solatium should not survive to the estate of a claimant who dies before a judgment;
- (h) the specified sum of one thousand pounds be liable to proportionate reduction (for example, because of the deceased's contributory negligence) in the same way as other damages under the *Fatal Accidents Act* (UK) are liable to be reduced.²⁸

The English Commission considered that the purpose of the award should comprehend not only grief and mental suffering but the non-pecuniary loss suffered by a person who was either the husband, wife or parent of the deceased. In this connection by "non-pecuniary loss", the Commission meant the sort of loss which a man's wife and children suffer through the loss of his help as a member of the household and of his counsel and guidance as a husband and father.²⁹

²⁸ Report at paragraphs 176 to 180 and clause 10 of the draft bill which constitutes Appendix 5 to the Report.

²⁹ Report at paragraphs 172 and 169.

6.16 The English Commission said that it followed -³⁰

"the South Australian example in believing that an award of damages, albeit small, can have some slight consoling effect where parents lose an infant child or where a spouse loses husband or wife. If money can, even minimally, compensate for such bereavement we think that it should be recoverable".

6.17 The English Commission said that it made the recommendation for a fixed tariff figure because it was anxious that there should be no judicial enquiry at all into the consequences of bereavement.³¹ It had indicated the reasons for this anxiety in its working paper when it quoted with approval the following passage from a submission of the Bar Council -³²

"There will undoubtedly be cases in which widows will be put forward as grief-stricken, when this is wholly untrue. With substantial sums at stake, defendants will feel obliged to probe the evidence and, perhaps, to employ inquiry agents in an attempt to test the truth of the allegations".

No doubt for the same reason, the Commission recommended that if both parents were included in the claim they should be awarded solatium in equal shares.

6.18 The English Commission did not follow the South Australian example in distinguishing between the different amounts recoverable in differing relationships "-³³

"...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".

6.19 The English Commission considered that the only claimants should be the parents (in the case of the death of an unmarried minor child) and the surviving spouse (in the case of the death of a spouse). It said that it did not feel justified in recommending any further extension, particularly as it had departed from the South Australian example in recommending a fixed tariff figure rather than an upper limit to an award otherwise at large.³⁴

³⁰ Report at paragraph 173.

³¹ Report at paragraph 175.

³² The Law Commission's published working paper No. 41, *Personal Injury Litigation - Assessment of Damages* at paragraph 201.

³³ Report at paragraph 175.

³⁴ Report at paragraph 174.

ARGUMENTS FOR AND AGAINST

Arguments for

6.20 It seems harsh to many people that only recovery of economic or material advantages lost to the survivor is allowed. A husband's loss of his wife's companionship and love and the grief suffered by him are real losses and it can be argued that he should be compensated for them. Similarly a parent's grief on the death of a child and the loss of the pleasure of having that child in the family circle are real losses. It is a traumatic experience for a parent to lose a child, as it is for someone to lose his or her spouse. There is an injury to that parent or spouse.

6.21 It can be strongly argued that where an injured person survived an accident, damages paid to him for pain and suffering, loss of expectation of life and loss of amenities are a solace not only to the victim but also to his wife and children. But if the victim is killed, rather than seriously injured, damages for these matters are, in Western Australia, not payable.

6.22 In the main, defendants are insured against liability under the *Fatal Accidents Act*.³⁵ If the Act is amended to provide for the payment of solatium, compulsory third party vehicle insurance and employers liability insurance would bear most of the claims.³⁶ Provision for the payment of solatium would no doubt result in the payment of higher insurance premiums, but if the solatium is fixed at modest levels (as is the case in South Australia and under the English Law Commission's recommendations) any increase in premiums would be small.

Arguments against

6.23 In a claim for personal injury, a person is never entitled to recover damages for grief, anguish, unhappiness, outrage and so on unless they follow on a physical injury to him. Only if the plaintiff suffers an actual illness usually referred to in the law of tort as "nervous shock" but recently said to mean "a recognizable psychiatric illness"³⁷ does any question of compensation arise. Even where such an illness occurs a firm line is drawn between those who are merely told of the distressing occurrence and those who witness some of the things

³⁵ See paragraph 2.7 above.

³⁶ Ibid.

³⁷ See the judgment of Lord Pearson in *Hinz v Berry* [1970] 1 All ER 1074 at 1077.

which go to make up the accident as an entire event.³⁸ Only the latter may recover damages. The proposal for the payment of solatium which is under consideration in this working paper would, if implemented, be a departure from general principle.

6.24 The amounts of the upper limits for solatium which can be awarded in South Australia are arbitrary. This comment applies even more so to the English Commission's recommendations, as the Commission recommended a fixed figure, and not an upper limit.

6.25 The other principal arguments against provision for the payment of solatium seem to be summed up by P.S. Atiyah in his book *Accidents, Compensation and the Law*.³⁹ Writing of the English Law Commission's proposal referred to earlier in this paper, he said -⁴⁰

“There are two main objections to all awards by way of solatium. The first is that 'they tend to be sought by vindictive survivors, either by way of penalizing the party thought to be responsible (although it is of course the insurers who will pay) or else as a form of distasteful gold-digging. The second main objection is that it seems so very arbitrary to select the death of a close relative as the criterion for paying what is still to many people a substantial capital sum of money. In addition, the Law Commission's insistence that 'there should be no judicial enquiry at all into the consequences of bereavement means that the same sum would be awarded in a very wide variety of situations, e.g. to a mother for the death of a newly born child, to parents of an older child irrespective whether he was a comfort or a trial to his parents, and to a spouse irrespective of the age, state of health, or even relationship to the other spouse. The same sum would, indeed, be payable to a wife whose husband had deserted and refused to maintain her, as to a devoted and faithful husband still living with her - though in this latter case there would of course be a substantial difference in the sums awarded under the *Fatal Accidents Act*. Apart from all these criticisms, there is the further fundamental point that damages by way of solatium ought to be a very low priority in any legal system which still denies adequate compensation for loss of income to so many of those injured in accidents or crippled by disabling illness.”

Later, when speaking of this type of compensation (solatium), the author points out that the compensation will be paid by parties other than the wrongdoer himself, such as the road traffic premium payers, or some other wide public group like a local authority.⁴¹

“...let us remember that the premium payers, the local authority and so on are merely the public at large, grouped into notional and overlapping categories. The public at large has to remember all the other claims to compensation which may be made on it,

³⁸ See *Benson v Lee* 1972 VR 879 and *Andrews v Williams* 1967 VR 831. See also Fleming, *Law of Torts* (5th ed. 1977) at 152 to 157.

³⁹ (2nd ed. 1975).

⁴⁰ Page 85.

⁴¹ Page 485.

so that the more that is paid to one class of victims, the less there may be available for another class. All this may be thought to justify placing this type of compensation in a low priority category”.

6.26 The Commission at this stage has no firm view on whether there should be a provision for solatium but invites comment on this and on the other issues which have been raised in this part of the working paper.⁴²

⁴² See paragraph 7.1 below.

CHAPTER 7 - QUESTIONS AT ISSUE

7.1 The Commission invites comment on the issues raised in this paper or on any other matters within the terms of reference. In particular, the Commission invites answers to the following questions. It would be helpful if reasons were given, where appropriate, for the views expressed.

Class of claimants

- (1) Should the class of persons entitled to claim under the *Fatal Accidents Act* be extended?
- (2) If the answer to (1) is "yes", should this be done -
 - (a) by enacting that any person is entitled to claim who can show a familial relationship of dependency upon the deceased;
 - (b) by enacting that any person is entitled to claim who can show a relationship of dependency upon the deceased (excluding commercial relationships); or
 - (c) by extending the class of those entitled to claim by adding new members (who would be specified) to the class?
- (3) If the proposal referred to in (2)(c) is adopted, what new members should be added to the present class of claimants?
- (4)
 - (a) Should s.6(3) of the *Fatal Accidents Act* (relating to illegitimates) be modified, and if so, in what way?
 - (b) Should the remarriage or prospects of remarriage of a surviving spouse be disregarded in assessing damages?
 - (c) Should the remarriage or prospects of remarriage of a divorcee (if he or she is to be covered by the legislation) be disregarded in assessing damages?

Solatium

- (5) Should there be provision for solatium?
- (6) If the answer to (5) is "yes", then in the event of a death by accident who should be able to recover solatium?
- (7) If the answer to (5) is "yes", then what should the damages cover?
- (8) Should the damages be -
 - (a) a fixed sum or sums?
 - (b) left to the court to determine with a maximum prescribed by the legislation ? or
 - (c) left to the court to determine with a minimum and maximum prescribed by the legislation? or
 - (d) left to the court to determine with no minimum or maximum prescribed by the legislation ?
- (9)
 - (a) If the answer to 8(a) is "yes", what should the fixed sum or sums be?
 - (b) If the answer to 8(b) is "yes", what should the maximum sum be?
 - (c) If the answer to 8(c) is "yes", what should the minimum and maximum sums be?
- (10) If the parents are to be able to claim solatium in the case of a deceased child, and both parents join in bringing the action, how should the amount awarded be divided between them?

- (11) If the parents are to be able to claim solatium in the case of a deceased child, what should be the position where one of two surviving parents does not join in bringing the action?
- (12) If new legislation is to contain references to fixed, maximum, or minimum amounts, should it contain provision permitting the variation of these amounts, and if so, how should the variation be?
- (13) Should a subsisting claim for solatium survive for the benefit of the estate of the claimant?

APPENDIX

COPY OF THE SECTIONS RELATING TO SOLATIUM IN SOUTH AUSTRALIA'S WRONGS ACT 1936-1975

Liability to parents of person wrongfully killed.

23a. (1) Whenever the death of an infant 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 infant to maintain an action to recover damages, the person who would have been liable if death had not ensued shall be liable to pay to the surviving parents or parent of the child such sum -

(a) where the death occurred before the commencement of the *Wrongs Act Amendment Act, 1974* - not exceeding one thousand dollars;

or

(b) where the death occurred after the commencement of the *Wrongs Act Amendment Act, 1974* - not exceeding three thousand dollars,

as the court thinks just by way of solatium for the suffering caused to the parents or parent by the death of the child.;

(2) Where both parents bring an action to recover any sum of money payable under this section, the amount recovered after deducting the costs not recovered from the defendant, shall be divided between the parents in such shares as the court directs.

(3) Where both parents survive the child and either of them does not join in bringing an action under this section, the other may bring an action for such amount as he claims to be due to him or her.

(4) In this section "parent" means the father or mother of a child.

Liability to surviving spouse of person wrongfully killed.

23b. (1) Whenever 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 that person to maintain an action to recover damages, the person who would have been liable if death had not ensued shall be liable to pay to the surviving spouse of the deceased person such sum -

(a) where the death occurred before the commencement of the *Wrongs Act Amendment Act, 1974* - not exceeding one thousand four hundred dollars;

or

(b) where the death occurred after the commencement of the *Wrongs Act Amendment Act, 1974* not exceeding four thousand two hundred dollars,

as the court thinks just by way of solatium for the suffering caused to the spouse by that death.

(2) Where the deceased person is survived by a lawful spouse and a putative spouse, they may both claim solatium under this section, but the total amount awarded by way of solatium in any such case shall not exceed the amount that could have been awarded if the deceased had been survived by a single spouse.

(3) Where, in any proceedings under this section, a lawful spouse and a putative spouse both claim solatium under this section, any solatium awarded by the court shall be apportioned between the claimants in such manner as the court thinks just.

(4) In any proceeding by a lawful spouse for solatium it is not necessary for the court to inquire if the deceased was also survived by a putative spouse, but any such spouse may, at any time before the proceedings are finally determined, apply to the court to be joined as a party to the proceedings.

Further provisions as to ss.23a and 23b.

23c. (1) The rights conferred by sections 23a and 23b shall be in addition to and not in derogation of any rights conferred on the parent, husband or wife by any other provision of this Act.

(2) In an action brought to enforce any right given under section 23a or 23b of this Act the court may in its discretion refuse to order the payment of any sum by way of solatium if, having regard to the conduct of the plaintiff in relation to the deceased person, or to the relations which existed between the plaintiff and the deceased person, or for any other sufficient reason, it considers that no such payment should be made.

(3) Any cause of action conferred on any person by section 23a or 23b of this Act shall not, on the death of that person, survive for the benefit of his estate.

(4) A cause of action conferred on a person by section 23a or section 23b of this Act is exercisable notwithstanding that the death of the person injured by the wrongful act, neglect or default was caused in circumstances which in law amount to felony.