

QUEENSLAND LAW REFORM COMMISSION

***THE COMMON LAW PRACTICE ACTS, 1867 TO 1964 (Section 2)
ILLEGITIMATE CHILDREN***

REPORT NO. 3

20 March 1970

A Report of the Queensland Law Reform Commission

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To the Honourable P. R. Delamothe, O. B. E., M. L. A.,
Minister for Justice and Attorney-General,
BRISBANE.

Section 10 of the Law Reform Commission Act 1968 provides that one of the functions of the Commission "shall be to take and keep under review all the law applicable to the State of Queensland with a view to its systematic development and reform, including in particular - (e) generally the simplification and modernisation of the law". In addition, Item 6 in Part A of the approved programme of the Commission requires it "to examine the provisions of "The Fatal Accidents Act" with a view to the elimination of anomalies".

Pursuant to these provisions, the Commission recommends an immediate amendment to The Common Law Practice Acts, 1867 to 1964.

Section 2 of those Acts, which is set out hereunder, gives a restricted meaning to the words "parent" and "child", whilst sections 12 and 13, also set out, give to parents and children as defined by section 2 the right to bring actions for deaths caused wrongfully:-

Section 2: The following words and expressions are intended to have the meanings hereby assigned to them respectively so far as such meanings are not excluded by the context or by the nature of the subject matter that is to say the word "parent" shall include father and mother and grandfather and grandmother and stepfather and stepmother and the word "child" shall include son and daughter and grandson and granddaughter and stepson and stepdaughter.

Section 12: Whenssoever the death of a person shall be caused by a wrongful act neglect or default and the act neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured and although the death shall have been caused under such circumstances as amount in law to felony.

Section 13: Every such action shall be for the benefit of the wife husband parent and child of the person whose death shall have been so caused and shall be brought by and in the name of the executor or administrator of the person deceased and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death

to the parties respectively for whom and for whose benefit such action shall be brought and the amount so recovered after deducting the costs not recovered from the defendant shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct.

The effect of these last two sections is to give to the child who is dependent upon his parents or the parent dependent upon the child a right to recover damages in the event of the death of the breadwinner in circumstances envisaged by section 12 above.

Unless the contrary intention is expressed in any statute or instrument the word "child" is always construed to mean a legitimate child as opposed to an illegitimate (see Dickinson v. N.E. Rly. 1864, 33 L. J. Ex. 91 and Morris v. Britannia Assurance Company 1931, 2 K. B. 125). This interpretation prevents an illegitimate child who may be totally dependent upon its parent from bringing an action pursuant to section 12 above if that parent is killed by the tortious act of another. It is a common consequence of road accidents that the issue of a de facto union or the illegitimate child of a single girl are orphaned, but the circumstances of their birth disqualifies them from suing the driver who may be clearly negligent and who can be sued by legitimate children riding in the same car.

Other jurisdictions have legislated to widen the meaning of the word "child" in this context.

The United Kingdom in the "Fatal Accidents Act 1959", section 1, extended the classes of dependants and in subparagraph (c) of subsection (2) of that section provided that "an illegitimate person shall be treated as the legitimate child of his mother and reputed father".

New South Wales in its "Compensation to Relatives Act 1897 to 1953" also included illegitimates by providing in section 7(1) as follows:-

Section 7(1): The following words are intended to have the meanings hereby assigned to them respectively, so far as such meanings are not excluded by the context or by the nature of the subject-matter, that is to say, the word "parent" shall include father and mother, and grandfather and grandmother, and stepfather and stepmother, and any person standing in loco parentis to another; and the word "child" shall include son and daughter, and grandson and granddaughter, and stepson and stepdaughter, and any person to whom another stands in loco parentis; and the word "declaration" shall include any statement of the cause of action appropriate to the court in which the action is brought.

As to the meaning of "in loco parentis" in this section, see the decision of the New South Wales Full Court in Nash v. Commissioner for Railways [1963] S. R. (N. S. W.) 357.

In Victoria the "Wrongs Act 1958" by section 15(1) defines the words "child" and "parent". Subsection 2 of that section imports into this definition any illegitimate issue as follows:-

Section 15(2): For the purposes of this Part a person shall be deemed to be the parent or child of the deceased person notwithstanding that he was related to him illegitimately or in consequence of adoption under the "Adoption of Children Act 1958" or any corresponding previous enactment; and accordingly in deducing any relationship which under the provisions of this Part is included within the meaning of "parent" and "child" any illegitimate person and any adopted person shall be treated as being or as having been the legitimate offspring of his mother and reputed father or (as the case may be) of his adopter.

The extended meaning given to "child" in the foreign legislation referred to has already been accepted in other Queensland legislation, for example, "The Workers' Compensation Acts 1916 to 1968" and "The Succession Acts, 1867 to 1968". Both make provision for illegitimate children to be regarded as though they were legitimate for the purposes of those Acts.

In the Workers' Compensation Acts "dependants" is defined and in the second paragraph of that definition the following provision appears:-

"Where the worker being the parent or grandparent of a child born out of wedlock leaves such a child so dependent upon his earnings, or being a child born out of wedlock leaves a parent or grandparent so dependent upon his earnings, the term includes such a child born out of wedlock and parent or grandparent respectively."

It will be obvious that the consideration being extended to the dependant of a worker in the Workers' Compensation Act is the same consideration which is sought to be extended to a dependant by sections 12 and 13 of the Common Law Practice Acts, but by reason of the terms of section 2 of those Acts, the protection afforded is restricted to legitimate children or their parents only.

In 1968 "The Succession Acts 1867 to 1943" were amended by Act No. 8 of 1968, "The Succession Acts Amendment Act of 1968", and a Part V dealing with Family Provisions was inserted.

Section 89 of this Part ascribes meanings to various terms and provides inter alia:-

"Child" - in relation to any person, any legitimate, illegitimate or legitimised child, stepchild or adopted child of that person.

Here again this Act is concerned to ensure an equitable distribution of the parent's substance to his surviving child and as the above definition shows, intends that illegitimate children receive equal consideration to legitimate children.

In view of the attitude of the Legislature as expressed in the Workers' Compensation Acts and the Succession Acts, it appears to the Commission that the wording of section 2 as it presently stands should be altered to include the illegitimate child and that this alteration is one of urgency. The Commission has not circulated a working paper on this topic to any persons or bodies.

Accordingly it is recommended that the words "and any person standing in loco parentis to another" be inserted after the word "stepmother" and the words "and any person to whom another stands in loco parentis" be added after the word "stepdaughter" where those words appear in section 2.

This will bring the section into line with the New South Wales provision in the "Compensation to Relatives Act" already referred to and will protect an illegitimate child who may suffer the loss of its parent or breadwinner as well as those dependent upon an illegitimate child.

W. B. Campbell Chairman

Raymond Smith Member

B. H. McPherson Member

[Signature] Member

BRISBANE
20th March, 1970.