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EXCLUSION OF BENEFITS FROM THE ASSESSMENT OF WRONGFUL DEATH DAMAGES: SECTION 15C COMMON LAW PRACTICE ACT 1867

Miscellaneous Paper No 5

Queensland Law Reform Commission
August 1993

QUEENSLAND LAW REFORM COMMISSION

Draft Report

on

EXCLUSION OF BENEFITS FROM THE ASSESSMENT OF WRONGFUL DEATH DAMAGES: SECTION 15C COMMON LAW PRACTICE ACT 1867

August 1993

PREFACE

At the end of June 1993, the Attorney-General asked the Commission to review the desirability or otherwise of continuing to exclude the type of benefits received by dependants of a deceased person listed in Section 15C of the *Common Law Practice Act 1867* from the assessment of damages in a wrongful death action. The Attorney-General requested the Commission to report to him by the end of September 1993.

The Commission has produced this Draft Report for circulation to individuals and organisations who may have a particular interest in the issues raised by this reference. Arguments for and against reform of Section 15C *Common Law Practice Act 1867* are set out on pages 37 to 42 of the Draft Report. The Commission's tentative proposal is set out on page 42. The Commission welcomes comments and submissions on the Draft Report.

Unfortunately, given the urgent nature of this reference, a relatively short time has had to be set for receipt of submissions. It may not be possible to include late submissions in our deliberations.

Submissions should be received by 27 August 1993.

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CONTENTS

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QUEENSLAND LAW REFORM COMMISSION

Draft Report

EXCLUSION OF BENEFITS FROM THE ASSESSMENT OF WRONGFUL DEATH DAMAGES: SECTION 15C COMMON LAW PRACTICE ACT 1867

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1. INTRODUCTION[1]

(a) Common law and legislative intervention

At common law "[i]n a civil Court, the death of a human being could not be complained of as an injury".[2] The result is that until a statute says otherwise, anyone who suffers loss as a result of the death of another cannot sue the wrongdoer who caused the death.

Before the enactment of wrongful death statutes, dependants could not sue the wrongdoer when they lost the support of a breadwinner. The origin of this rule appears to be in the felony-merger doctrine.[3] The policy behind that doctrine was that misconduct resulting in the death of another involved the commission of a public wrong, which extinguished all private remedies arising as a result of the death. The public interest was given more importance than that of the individuals. It could also be seen that the King's desire to obtain the felon's goods and lands (which in those days went to the Crown when the felon was convicted) was more important than the right of any individual to recover damages.[4]

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1 The terms of reference are set out on pp.7,8 of this Paper.

2 *Baker v Bolton* (1808) 1 Camp 493, 179 E.R. 1033 (Nisi Prius) per Lord Ellenborough; *Woolworths Ltd v Crotty* (1942) 66 CLR 663. See for general discussion H. Luntz *Assessment of Damages for Personal Injury and Death* (3rd ed) 1990 Ch.9.

3 See Holdsworth, W.S. '*The Origin of the Rule in Baker v Bolton*' (1916) 32 Law Q. Rev. 431. The doctrine was first described by Tanfield J in *Higgins v Butcher* (1607), Yelv. 89:

> "If a man beats the servant of J.S. so that he dies of the battery, the master shall not have an action against the other for the battery and loss of the service, because the servant dying of the extremity of the battery, it is now become an offence to the Crown, being converted into felony, and that drowns the particular offence and private wrong offered to the master before, and his action is thereby lost."

4 A mechanism did develop however, to provide the deceased's family with some funds. Any property involved in a person's death (referred to as a 'deodand') was forfeited to the King's Almoner for charity. The funds generated from the sale of deodands were often used to assist the deceased's family. As the practice developed, the owner, rather than let the goods be sold, would ordinarily pay an amount assessed by the coroner's jury that investigated the death. The money so raised would be given to the deceased's family. For a brief history of deodands, see Law Reform Commission of British Columbia, Working Paper on *Pecuniary Loss and the Family Compensation Act,*

The Alberta Law Reform Institute has described the history of the felony-merger doctrine as follows:[5]

> "At first, the felony-merger doctrine established in *Higgins v Butcher* met with strong approval. However, beginning in 1625 there were cases that held that a conviction of felony did not extinguish a cause of action in trespass. By 1873 it was clear that the fact that the conduct complained of amounted to a felony did not stop civil proceedings for damages. At most, the felony was only a defence if the action was brought against the supposed criminal before prosecution. The felony only suspended the right to sue for the wrong to the person, it did not take away the right.
>
> Logic would dictate that if the conduct complained of did not amount to a felony, the felony-merger doctrine would not apply. Also, if the felony-merger doctrine was never the law of the country or if the doctrine was discarded, it would seem that *Baker v Bolton* should not be followed. Yet, logic did not prevail in this area of the law. The result is that the rule in *Baker v Bolton* applies even though the felony-merger doctrine was never the law in a particular country or was discarded."

In the United Kingdom, the right to claim compensation for the death of another was introduced by *An Act for Compensating the Families of Persons killed by Accidents 1846*[6] (commonly referred to as *Lord Campbell's Act*[7]) in a time when fatal accidents were becoming frequent in England with the development of factories and railways. Prior to that time wrongful death usually referred to death by violence. The wrongdoer was most often the thief or highwayman. Even if found and arrested, the murderer was more often than not impecunious and not worth suing. With the industrial revolution and deaths resulting from machines, the wrongdoer was often a wealthy corporation.

All Australian jurisdictions re-enacted the United Kingdom provisions[8] although they have been subsequently varied in a number of respects, including in relation to the deduction from the assessment of damages of

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5 "*Non-Pecuniary Damages in Wrongful Death Actions - A Review of Section 8 of the Fatal Accidents Act*", Report for Discussion No 12, June 1992.

6 Cap. XC111. The preamble to the Act read:

> "Whereas no Action at Law is now maintainable against a Person who by his wrongful Act, Neglect, or Default may have caused the Death of another Person, and it is oftentimes right and expedient that the wrongdoer in such case should be answerable in Damages for the Injury so caused by him."

7 One of a number of important reforming Acts promoted or supported by Lord Campbell after he had become a member of the House of Lords. See Sir W. Holdsworthy, *A History of English Law* Vol. xv pp.220, 421.

8 Ss.12-15C *Common Law Practice Act 1867* (Qld); *Compensation to Relatives Act 1897* (NSW); Part II, *Wrongs Act 1936* (SA); *Fatal Accidents Act 1934* (Tas); Part III, *Wrongs Act 1958* (Vic); *Fatal Accidents Act 1959* (WA); *Compensation (Fatal Injuries) Ordinance 1968* (ACT); *Compensation (Fatal Injuries) Act 1974* (NT). The U.K. provision is now in the *Fatal Accidents Act 1976*. Deaths in commercial airline accidents are covered by different provisions in ss.12 and 35 of the *Civil Aviation (Carrier's Liability) Act 1959* (Cth).

benefits received by dependants as a result of the breadwinner's death. The action based on the legislation is often referred to as a *Lord Campbell's* action or a *Fatal Accidents Act* action, irrespective of the title of the legislation.

In some jurisdictions and in respect of deaths resulting from some types of accident claims for damages have been abolished entirely[9] or against particular defendants.[10]

In Queensland the *Lord Campbell's Act* provisions are found in sections 12-15C of the *Common Law Practice Act 1867*.

(b) The *Lord Campbell's* action

The *Lord Campbell's* action brought by family members of a deceased person has been described in the following way by Lord Wright in *Davies v Powell Duffryn Associated Collieries Ltd* [1942] A.C. 601 at 611-612.

> "[The Fatal Accidents Acts] provided a new cause of action and did not merely regulate or enlarge an "old one," as Lord Sumner observed in *Admiralty Commissioners v S.S. Amerika* [1917] A.C. 38 at 52. The claim is, in the words of Bowen L.J., in *The Vera Cruz (No. 2)* (1884) 9 P.D. 96 at 101, for injuriously affecting the family of the deceased. It is not a claim which the deceased could have pursued in his own lifetime, because it is for damages suffered not by himself, but by his family after his death. The Act of 1846, s. 2, provides that the action is to be for the benefit of the wife or other member of the family, and the jury (or judge) are to give such damages as may be thought proportioned to the injury resulting to such parties from the death."

The legislation restricts the action to family members of the deceased. The jury (or judge) could give such damages as may be thought proportioned to the injury resulting to such family members from the death.

The nature of the damages suffered by the family of the deceased which can be claimed under this action was not set out in the legislation although the courts have subsequently adopted the view that damages recoverable are restricted to pecuniary loss[11] and

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9 For example, *Motor Accidents (Compensation) Act 1979* (NT) s.5

10 For example, *Workers' Compensation Act 1987* (NSW) s. 149(2).

11 *Blake v Midland Railway* (1852) 18 QBD 93.

may not include anything by way of consolation for the dependants for grief or sorrow.[12]

Balkan and Davis describe the calculation of the loss suffered by family members as a result of the death of a breadwinner as follows:[13]

> If the deceased was the breadwinner for the family, the loss suffered by the surviving members is calculated by reference to the lost earning capacity [after taking account of possible beneficial or adverse contingencies] of the deceased, after deducting income tax and the proportion of the product of that capacity which he would have spent on his own maintenance. The amount to be awarded to each member of the family also depends upon the length of time for which each had a reasonable expectation of receiving a benefit, so that each child's share will be assessed on the basis that he or she will in due course achieve financial independence. In assessing the widow's share, no account is taken of the fact that she has taken up employment after her husband's death, since that fact does not diminish her expectation of financial support from her husband; if she had been earning prior to his death, the amount of her income is of relevance only in determining what proportion of the deceased's earning capacity might have been spent solely for his own benefit .... If the deceased had devoted the whole (or a large part) of her time to caring for the family, it has been recognised that the loss of the remainder of the family is the value of the services of which they have been deprived of by death. That value may be assessed by reference to the cost of providing substitute services, but such a cost is no more than a guide."

The value of the dependency can include not only that part of the deceased's earnings which he or she would have expended annually in maintaining his or her dependants but also that part of his or her earnings which he or she would have saved and which would have come to the dependants by inheritance on his or her death. There may also be included a sum in respect of loss attributable to the cessation of contributions which the deceased, and his or her employers, had made to a superannuation or other fund of which the dependants were the nominated beneficiaries.

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12 Note, in South Australia in 1940, ss 23a-23c were introduced to the *Wrongs Act 1936* providing for the payment of a sum of money "as the court thinks just by way of solatium for the suffering caused" to the parents of an infant and to the spouse of an adult who has been killed. The provisions prescribed upper limits for awards. The Northern Territory *Compensation (Fatal Injuries) Act 1974* provides in s.10(3)(f) that the "damages in an action may include ... solatium." It may be awarded to any of the persons for whose benefit the action is brought and is not subject to an upper limit.

13 Balkin RP and Davis JLR *Law of Torts* 1991 at 391-392.

2. THE QUEENSLAND PROVISIONS

(a) Liability for death caused wrongfully

The *Lord Campbell's* action for damages resulting from wrongful death was introduced in Queensland by section 12 of the *Common Law Practice Act 1867* which states:

> "Whensoever 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."

(b) Who to benefit from such an action?

Only the husband, wife, parent or child of the deceased person are entitled to benefit from such an action.[14] Section 13 of the *Common Law Practice Act 1867* states:

> "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."

(c) How many actions can be brought?

Consistent with similar provisions in other jurisdictions, section 14 of the *Common Law Practice Act 1867* states:

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14 Note, in all jurisdictions other than Queensland and Tasmania, members of the family who can bring such an action include de facto spouses. In all jurisdictions other than Queensland, members of the family include the deceased's siblings (whether of half-blood or full-blood). In Western Australia, the Northern Territory and the Australian Capital Territory, the family includes the divorced wife or husband of the deceased and, in Victoria, simply anyone who depends on the deceased can bring an action. In Queensland, the surviving spouse (if any) and the deceased's children (if any) would typically be named as plaintiffs in the action.

"Provided that not more than one action shall lie for and in respect of the same subject-matter of complaint."

(d) What is deducted from the assessment of damages?

The amount to be awarded to a particular claimant pursuant to an action under the *Common Law Practice Act 1867* can be reduced by a number of factors. For example:

1. If one of the claimants was partly at fault in causing the death, and he or she is the only person who can be sued for that death - that person is unable to claim under the Act. However, where one of the claimants was partly to blame and there are others outside the family who are also liable for the death - the share which would otherwise have gone to that claimant is to be reduced in proportion to the degree to which he or she was responsible for the death.[15] Where the deceased had been guilty of contributory negligence damages will be reduced to a degree which is just and equitable having regard to his or her share in the responsibility for his or her own death.[16]

2. Against the losses flowing from the death must be offset some of the pecuniary advantages which accrue to the dependants by reason of the death.[17] The most common pecuniary advantage which must be brought into account, in all jurisdictions except Tasmania and the Northern Territory,[18] is the acceleration of a testamentary benefaction resulting from the early death.

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15 Even if a Lord Campbell's action settles prior to trial, it appears from the Commission's review of files held at the Workers' Compensation Board of Queensland that, in general, any contributory negligence of the employee is taken into account in the settlement negotiations.

16 *Law Reform (Tortfeasors' Contribution, Contributory Negligence, and Division of Chattels) Act 1951*. Where the damages are to be reduced for the deceased's contributory negligence, the reduction must be effected after there have been deducted from the prima facie loss any benefits accruing to the dependants, otherwise the dependants would be excessively penalised. See Luntz, H. *Assessment of Damages for Personal Injury and Death* (3rd ed) 1990 para 9.8.4.

17 For discussion see Balkan R.P. and Davis J.L.R., *Law of Torts* 1991 at 393.

18 *Fatal Accidents Act 1934* (Tas) s.10(1)(b) precludes consideration of up to $10,000 of the value of the deceased's estate which passes to the family. *Compensation (Fatal Injuries) Act 1974* (NT) s.10(4)(g) prohibits the consideration of any gains or benefits consequent upon the death.

The acceleration of the benefit to a surviving spouse of owning the matrimonial home is disregarded on the basis that (in relation to a claim by a widow) she "merely continues to enjoy as owner what she previously enjoyed as wife".[19]

In all Australian jurisdictions other than the Northern Territory the prospect that a claimant will replace the pecuniary advantage provided by his or her deceased spouse with the same benefit from another person must also be taken into account.[20] That is, regard must be had to the possibility of a dependency being replaced.[21]

The legislation in all Australian jurisdictions now also precludes account being taken in the assessment of damages of the proceeds of a life insurance policy, superannuation payments or pensions or benefits payable under social security or similar legislation.[22] In all jurisdictions either by reason of legislation or judicial decisions charitable gifts are also excluded.[23] Section 15C of the *Common Law Practice Act 1867* in Queensland lists each of these exclusions.

3. TERMS OF REFERENCE

The Commission's terms of reference specifically relate to the statutory exclusions listed in section 15C *Common Law Practice Act 1867*. The Attorney-General has asked the Commission:[24]

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19 *Zordan v Metropolitan (Perth) Passenger Transport Trust* [1963] ALR 513 at 516 (HCA); *Tripodi v Leonello* 14 (1982) 231 SASR 9 at 12-13 (FC); *McCullagh v Lawrence* [1989] 1 Qd R 163 at 165-6 (FC); *Balkin and Davis* at note 177 page 393 note also: 'The same principle applies in relation to chattels such as a motor car: *Worden v Yeats* [1964] SASR 381 at 390 per Hogarth J; *Lamb v Southern Tablelands County Council* (1988) *Aust Torts Reports* 80-22- at 68, 198-9 per Campbell J (NSW SC). The ACT (s.10(4)(e) and NT (s.10(4) have given this approach legislative sanction.

20 In *Carroll v Purcell* (1961) 107 CLR 73 at 79 the rule was regarded as so well established as no longer to require justification.

21 In the Northern Territory the legislation prevents the court from taking account of 'The remarriage or prospects of remarriage of the surviving spouse' (NT s.10(4)(h). This is also now the position in the United Kingdom.

22 The names of the statutes appear in footnote 8 above. The specific provisions are: Qld. s.15C; NSW s.3(3); SA s.20(2aa); Tas s.10(1); Vic S.19; WA s.5(2); ACT s.10(4); NT s.10(4). Note, in the United Kingdom s.4 of the *Fatal Accidents Act 1976* has been substituted by the following provision (introduced by the *Administration of Justice Act 1982*):

> 'In assessing damages in respect of a person's death in an action under this Act, benefits which have accrued or will or may accrue to any person from his estate or otherwise as a result of his death shall be disregarded'.

23 The names of the statutes appear in footnote 8 above. The specific provisions are: Qld s.15C(e); SA s.20(2aa)(ii); Vic s.19(d); ACT s.10(4)(d); NT s.10(4)(d). *Papowski v Commonwealth* [1958] SASR 293; *Mockridge v Watson* [1960] VR 405. Both cases were decided prior to the enactment of the relevant provision and are therefore relevant to those jurisdictions without such statutory provision (WA, NSW, Tas).

24 By letters to the Commission dated 29 June 1993 and 2 August 1993. The letters also referred to limitations on *Griffiths v Kerkemeyer* awards in personal injury litigation. The Commission will be dealing with that matter in a separate paper. The Attorney-General requested the Commission to report to him on both matters within three months from July 1993.

to review the desirability or otherwise of continuing to exclude the benefits listed in section 15C *Common Law Practice Act 1867* from the assessment of damages in a *Lord Campbell's* action.

Section 15C of the *Common Law Practice Act 1867* states:

"In assessing damages in respect of a person's death in any such action, whether commenced before or after the commencement of the *Common Law Practice Act Amendment Act* 1972, there shall not be taken into account -

(a) a sum paid or payable on the death under any contract of assurance or insurance;

(b) a sum paid or payable on the death under a contract made with a friendly or other benefit society, or association or trade union that is not a contract of insurance or assurance;

(c) a sum paid or payable on the death out of any superannuation, provident or like fund;

(d) a sum paid or payable on the death by way of pension, benefit or allowance under any law of the Commonwealth or of any State or Territory of the Commonwealth or of any other country; or

(e) a gratuity in whatever form received or receivable on the death,

whether any such sum or gratuity is paid or payable to or is received or receivable by the estate of the deceased person or by any person for whose benefit the action is brought."

4. THE HISTORY OF SECTION 15C - *COMMON LAW PRACTICE ACT 1867*

The original section 15C was inserted into the *Common Law Practice Act 1867* in 1915[25] and read:

"In assessing damages in any such action, whether commenced before or after the first day of October, one thousand nine hundred

[25] By 6 Geo. 5 No. 22, s.2.

> and fifteen, there shall not be taken into account any sum paid or payable on the death of the deceased under any contract of assurance or insurance, whether made before or after that date."

This provision was repealed and a new, expanded provision was enacted in 1972.[26]

The original provision was based on English legislation of 1908. The history of the 1908 English provision has been described as follows:[27]

> "The story starts in 1864 when the Railway Passengers Assurance Company asked for powers under a private Bill and the House of Commons in a fit of pious resolution imposed on it a clause whereby insurance money payable by the company was not to be deducted from damages recovered under the Fatal Accidents Act, 1846. This seems to have been good for trade because two private companies then obtained Acts "contracting out of the Fatal Accidents Act." When forty more clamoured for exemption the government thought that the time had come to equalise competition by introducing the 1908 Bill making moneys payable under a contract of insurance not deductible from damages recovered under the Fatal Accidents Act.[28] But this left the anomaly that moneys payable under a pension scheme which was not a contract of insurance were deducted whereas a personal accident group policy taken out by an employer in respect of his employees ranked as a contract of insurance. The Fatal Accidents Act, 1959, was passed to deal with the situation."

The current Queensland provision (section 15C) was based upon a recommendation of the Queensland Law Reform Commission in 1971.[29] The Commission recommended that the then existing section 15C (which simply provided that no account was to be taken of any sum paid or payable on the death of the deceased person under any contract of assurance or insurance) be expanded to its current form.

The Commission noted in relation to the narrower Queensland provision in force in 1971 and the analogous United Kingdom provision:[30]

> "Conflicting decisions --- have failed to elucidate which "contracts of assurance or insurance" are not to be taken into account in the assessment of damages. Courts in Queensland give the phrase its

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26 By Act No. 34, s.2.

27 Gantz, G *Mitigation of Damages by Benefits Received* (1962) 25 MLR 559, 559-60.

28 *H.C. Debates*, 4th series, Vol. 192, Col. 261.

29 *The Provisions of the "Fatal Accidents Acts" with a View to the Elimination fo Anomalies, Report* No. 9 1971.

30 At p.5.

> generally accepted meaning and ignore the fact that any such payments have been made. In 1966, consequent upon the decision in *Parker v Commonwealth of Australia*[31] the Victorian Parliament passed an amendment to s. 19 of the *Wrongs Act 1958* (q.v) [which was in similar terms to the current, expanded section 15C]. An article on page 295 of 40 ALJ suggests that it would be appropriate for the other States to consider adopting this enactment with a view to uniformity. The Commission is prepared to recommend its adoption but, as the concept of the word "sum" has been made too narrow, paragraph (d) and the final paragraph which the recommended s.15C contain differ from the Victorian section."

In relation to "ex gratia" payments - that is, voluntary payments made by insurance companies or funds raised by voluntary subscription, the Commission in 1971 took note of Fullagar J in *Attorney-General for New South Wales v Perpetual Trustees*.[32]

> "It would surely be out of the question to reduce damages by a sum which some benevolent persons had collected for the benefit of a man crippled in an accident."

The Commission also noted that in other States, such as New South Wales and Tasmania, for many years legislation had provided that in assessing damages in a case of this nature account should not be taken (inter alia) of any sum paid or payable under any State or Commonwealth legislation by way of Widow's, Invalid or Old Age Pensions.[33] The Commission noted:[34] "Despite criticism, the Commission feels these exemptions which are in s.15C in another form should be retained.".

The Victorian Statute Law Revision Committee[35], when reviewing the Victorian equivalent of the narrower section 15C, noted that, if any exceptions were to be retained, then at least the illogical distinctions between different forms of savings set up by the Victorian provision should be eliminated. That is, why should the benefit of the provision extend to those pensions which have their origin in a scheme of insurance or assurance, but exclude pensions which emanate from some statutory or other scheme, leaving these to be taken into account to reduce awards of damages.

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31 (1965) 112 CLR 295. That case arose out of the *Voyager* disaster. Windeyer J decided that he should not regard the pension being received by the plaintiff as a sum "payable under a contract of assurance or insurance" and the damages were reduced accordingly.

32 (1952) 85 CLR 237 at p. 292.

33 S.3 *Compensation to Relatives Act 1897-1953* (NSW); s.10 *Fatal Accidents Act 1934* (Tas) as amended in 1955.

34 At p. 6.

35 *Report upon the Proposals Contained in the Wrongs (Assessment of Damages) Bill*, 1966.

Although it proved difficult to find a clear rationale on which to base the exceptions, the Victorian Committee preferred the approach of specifying the exceptions, to the approach of adopting a broad provision such as existed in New Zealand.[36] The New Zealand provision directed the Court to ignore all gains to the deceased's estate or dependants as a result of the death. The provision was the subject of a great deal of criticism by the Judiciary and the legal profession in New Zealand. It had been stated that the provision contemplated conferring more of a benefit on a surviving spouse than could be justified, and that, furthermore, it penalised the person who was responsible for the death of the deceased. It had been held that an inheritance came within the New Zealand provision - and therefore was not taken into account when assessing damages.[37]

The Victorian Committee had been asked to comment on a proposed amendment to Victorian law along the lines of the New Zealand provision. The Committee made the following comments:[38]

> "It is reasonable to assume that similar criticisms would be valid in Victoria if the suggested amendment was passed. It follows the New Zealand section in providing that there shall not be taken into account two species of gain - (i) any gain to the estate of the deceased that is consequent on his death; and (ii) any gain to any person for whose benefit the action is brought, that is consequent on the death of the deceased. The first species could only refer to insurance moneys or sums such as friendly society benefits payable to the estate of the deceased upon his death, but the second must surely be interpreted as any gain whatsoever, and include any gain to the dependant from the estate of the deceased.
>
> In these circumstances, it would appear that much of the basis for the assessment of damages is lost, as it would normally follow that all evidence regarding such gains as inheritances would be irrelevant to the inquiry, and therefore inadmissible. It is recognised, however, that the action in theory would still be founded upon compensation for loss, and that amounts would vary by considerations such as the age, occupation and earning power

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36 S.7(2) *Deaths by Accident Compensation Act 1952* -

> "In awarding damages in any such action the Court shall not take into account any gain, whether to the estate of the deceased person or to any dependant, that is consequent on the death of the deceased person."

A similar provision has been introduced in the United Kingdom, see note 22 above. New Zealand has since abolished the common law action for damages for personal injuries resulting from accidents.

37 *Alley v Alfred Buckland and Sons, Ltd* (1941), NZLR 575 per Ostler J. The judge described the cause of action as a "purely punitive action" and stated that it had nothing to do with compensation, but was punishing a man for negligently killing another. It virtually gave rise to a new fictional loss in place of the compensation for actual losses originally intended by the statute, in that even if the dependant by virtue of moneys received on death was financially better off than before the death, there was still an action for damages available which in some cases would enable the dependant to make a profit out of the loss of a breadwinner. Also see *Maskill v Attorney-General* (1959) NZLR 156 where a fairly large estate was under consideration and the Court decided that it could not take into account the benefit of this inheritance to the widow to reduce damages.

38 Victorian Statute Law Revision Committee *Report upon the Proposals Contained in the Wrongs (Assessment of Damages) Bill* 1966 at p.5.

of the deceased, and the age, earning power and degree of dependence of the claimant.

The Committee can foresee further difficulties surrounding questions of causation in the interpretation of the words "any gain consequent on the death". For instance, the situation could arise where at the time of the action being determined, a widow has remarried, and her husband is earning far more than was the deceased. The question would have to be decided as to whether this gain was one consequent on the death which must not be taken into account under the proposed amendment. If this was so, it would alter materially the type of considerations taken into account under the present method of calculating damages, and may extend beyond the intention of what was originally in the mind of the Bill's sponsor.

In sum, the Committee believes that there is much to be said for specifying what exceptions are desired, rather than to enact a blanket provision which may have unexpected and far-reaching consequences. It prefers the policy of removing, so far as is possible, the illogical distinctions produced by the operation of the present section 19, without providing for something which would be so completely out of step with the general principle of compensation which is inherent in the whole of the civil law."

5. STATUTORY EXCLUSIONS FROM THE ASSESSMENT OF DAMAGES LISTED IN SECTION 15C

Prior to the enactment of the original, narrower, section 15C of the *Common Law Practice Act 1867* the pecuniary loss suffered by dependants as a result of the death of a breadwinner through some wrongful act or neglect was determined by balancing on the one hand the loss of any future pecuniary benefit and, on the other hand, any pecuniary advantage from whatever source that emerges by reason of death.

In relation to the almost identical situation in Victoria, the *Victorian State Law Revision Committee* in 1966 observed:[39]

"Guided by the underlying principle of compensation, the courts evolved a procedure whereby a series of deductions have been taken into account at common law in assessing the extent of damages. The first group of deductions concerns general contingencies, such as the likelihood that the deceased may not have advanced very far in his trade or profession. The possibility that he may have suffered sickness or died, or sustained injury is taken into account, and although the effect would be insignificant in the greater number of cases, the damages are scaled down by reference to these factors. The likelihood of the widow's re-marriage is considered, and the compensation could be further reduced. If it can be shown that a widow has assets and means that suggest she was not dependent economically upon the deceased, this factor has a substantial bearing also in decreasing

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39 *Report upon the Proposals Contained in the Wrongs (Assessment of Damages Bill) 1966* at p.3.

> compensation. The second group of deductions taken into account prior to the enactment of [... the Victorian equivalent of section 15C] embraces gains usually concerned with the death, such as the proceeds of insurance or assurance policies, together with pensions payable under some statutory or employer's scheme, social service payments and the like. Apart from [... the Victorian equivalent of section 15C] these gains would be assessed and the damages scaled down accordingly. Finally, the matter of inheritance is examined, and the accelerated benefit to a claimant of receiving property or money is calculated, being the benefit which comes from obtaining such assets sooner than might have been expected having regard to the life tables.' **[Emphasis added]**

The effect of the current section 15C is to **exclude** from the assessment of damages certain specific payments referred to under the second group of deductions.

Each of the exclusions under section 15C is briefly discussed below.

(a) "a sum paid or payable on the death under any contract of assurance or insurance"[40]

It is unlikely that courts would find a distinction between the words "assurance" and "insurance".[41]

Before the enactment of the original section 15C and its equivalents in other jurisdictions, insurance benefits were deducted from damages awards. The full amount had to be deducted if it came from an accident policy[42] but only the accelerated benefit if it came from a life policy.[43] Richards J in *Butler v McLachlan* [1956] SASR 152 at 159 stated that the distinction is:[44]

> 'based on the fact that, although a man must die, there is no certainty, or even a reasonable probability that he will suffer an accident.'

40 S.15C(a) *Common Law Practice Act 1867*.

41 See *Gillett v Gallagher* [1963] ALR 392, and *Public Trustee (WA) v Nickisson* (1964) 111 CLR 500 - both appeals from Western Australia where only 'insurance' payments are to be excluded. The High Court excluded moneys which in both cases were most likely if not obviously the proceeds of life 'assurance.'

42 *Hicks v Newport, ex parte* Railway Co (1857) 4B - S403n.

43 *Grand Trunk Railway Co of Canada v Jennings'* (1888) 13 App Cas 800 (PC).

44 Quoted with approval by Dixon J in *Public Trustee v Zoanetti* (1945) 70 CLR 266,281. See discussion in H. Luntz, *Assessment of Damages for Personal Injury and Death* (3rd ed) 1990 at para 9.5.3.

Difficulties may arise when an insurance policy is payable upon the death of the insured person to someone other than a dependant of the deceased. In the Victorian Full Court case of *McPhee v Carlesen*[45] the company which employed the deceased took out an endowment policy in its own name on the life of the deceased, pursuant to a staff superannuation scheme. When the employee died the company paid over the money which it had received from the insurer, to the dependants.

It was argued that the deceased employee's widow received the proceeds of the policy under the deceased's contract of employment and not under the contract of insurance and that they should therefore be taken into account in reduction of the damages.

Herring CJ held that the Victorian equivalent to the original section 15C (current 15C(a)) was irrelevant since evidence of the widow's receipt of proceeds would have been properly excluded in any event because the benefit had been taken into account by deducting the premiums from the deceased's future earnings. Macfarlan and Gavan Duffy JJ held that the statutory provision excluded consideration of the money received in this case. When the employers received the proceeds of the policy of insurance, the moneys came "stamped or impressed with the obligation imposed by the scheme and therefore with the obligation to account for and apply them in accordance with the provisions of the scheme. They are, therefore, moneys paid or payable on the death of the deceased under a contract of insurance."[46]

There must be evidence before the court that a benefit was derived from a contract of insurance before it will be ignored. Thus, in *Bahr v ETSA*[47] a widow's evidence that a mortgage and a credit union loan were discharged on the death of her husband was insufficient to establish that they were discharged in consequence of a sum paid under a contract of assurance or insurance. Consequently, the accelerated benefit of the discharge was taken into account in reduction of the damages.

The question whether schemes under which the deceased and the dependants had no legal or equitable right to the proceeds of the insurance policy, though they had a reasonable expectation of benefiting from it, are covered by the insurance exclusion in section 15C, was answered in *Green v Russell*.[48] In that case it was held that the proceeds of the insurance were not to be taken into account. Subsequent cases have also adopted a wide interpretation of the provision - that is, bringing proceeds of insurance within the

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45 [1946] VLR 316.

46 *McPhee v Cantesen* [1946] VLR 316 at 320 per Macfarlan J. A similar conclusion was reached in *Bowskill v Dawson (No 2)* [1955] 1QB B(CA) 24.

47 (1985) 39 SASR 254.

48 [1959] 2 QB 226 (CA).

equivalent section to 15C(a) even if the proceeds reach the dependants by a circuitous route.[49]

Luntz notes:[50]

> "In view of the history of the statute, it is doubtful whether the legislation was in fact intended to be remedial ... but in view of its subsequent extension in most jurisdictions, it is probably correctly interpreted in as wide a manner as possible."

Strange results could occur from a wide interpretation of 15C(a) if pension and superannuation schemes[51] not dependent on insurance were not within the scope of the legislation. This happened prior to the introduction of the expanded section 15C in Queensland. In *Colebrook v Wide-Bay Burnett Regional Electricity Board*[52] as a result of her husband's death, the plaintiff had received a payment of $10,033 from a superannuation fund of which her husband had been a member. The fund was operated by trustees who took out insurance policies on members in the amount of the excess of the benefit payable on death or disablement over the sum accumulated in the fund towards the normal retirement benefit. A sum of $8,440 was provided by the insurance policy and $1,593 was the sum accumulated in the fund in the deceased's name. Since insurance policies were used only to cover the possible excess liability of the fund over the value of the contributions received, the longer an employee was in the service of the employer the greater would be the deduction, although the benefit was always 3.4 times the employee's annual wage at the time of death.

Even the broader view of the original section 15C (current section 15C(a)) could not assist in the Queensland case of *Gronow v SGIO*[53], where a husband and wife were killed in the same accident and it was held that there had to be deducted from the children's claim for loss of the mother's services the accelerated benefit of the proceeds of a policy, on the life of the

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49 In *Green v Russell*, two views were expressed. Pearce LJ was of the opinion that no matter how many hands the proceeds passed through or by what route it reaches the dependant if it can still be described as paid or payable on the death of the deceased, then it should not be deducted from the assessment of damages. Hodson and Romer LJJ simply held that (at p 244 per Romer J):

> "if sums are received by an employer under a scheme which was designed for the benefit of the employees, but without conferring any enforceable right on them, and he pays the sum over to the estate or dependants of the men when the risk matures, then the provisions of the Act apply"

The broader view of Pearce LJ was preferred by Lucas J in *Colebrook v Wide-Bay Burnett Regional Electricity Board* [1971] QWN 8.

50 Luntz H. *Assessment of Damages for Personal Injury and Death* (3rd ed) 1990 at para 9.5.7.

51 See ss.15C(c), 15C(d).*Common Law Practice Act 1867*.

52 [1971] QWN 8.

53 [1980] Qd R 425.

father, which passed to the mother's estate and then to the children. The policy in this instance was not 'payable on the death of the deceased person' i.e. the mother, but on the death of the father, in respect of whose death the children had no claim because the accident was due to his negligence."

A significant problem which is not specifically dealt with by the Queensland provision relates to the premiums paid on the insurance policy. In the Territories' legislation[54] and under the *Civil Aviation (Carriers' Liability) Act 1959* (Cth)[55] it is provided that there shall not be taken into account by way of reduction of damages a premium that would have become payable under a contract of insurance in respect of the life of the deceased person if he/she had lived beyond the time at which he/she died. Luntz suggests that:[56]

> "[p]resumably, this requires the court to take such premiums into account in considering the expenditure which the deceased would have made for the benefit of the dependants, so increasing the damages."[57]

In *Glen v Philpott*[58] Norris J said that in considering the proportion of the deceased's income that would have been expended for the benefit of the family:

> "allowance has to be made for life insurance premiums which cannot ... really be regarded in the circumstances of this case as expenditure by the deceased upon himself."

However, in *Nominal Defendant v Littlewood*[59] it was held that what deceased persons spent on their own life insurance should not come into the calculation of the benefits of which the dependants had a reasonable expectation if the deceased had not been killed.

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54 S.10(4)(f) in each case.

55 Ss 15(e) and 38(e).

56 Luntz H. *Assessment of Damages for Personal Injury and Death* (3rd ed) 1990 at para 9.5.8.

57 Luntz at f/n 7 states that before the enactment of legislation prohibiting the taking into account of sums paid or payable under contracts of insurance, it had been held that in the case of a life policy only the accelerated receipt had to be allowed for and this could be sufficiently done by deducting future premiums from the estimated future earnings of the deceased (*Grand Trunk Railway Co of Canada v Jennings* (1888) 13 App Cas 800 (PC)). The legislative prohibition on taking account in reduction of damages premiums that would have been payable on life insurance policies must have been intended to make any such deduction improper.

58 *Jennings* (1888) 13 App Cas 800 (PC)). The legislative prohibition on taking account in reduction of damages premiums that would have been payable on life insurance policies must have been intended to make any such deduction improper.

59 NSW CA, 21 Aug. 1980, unreported.

Luntz suggests:[60]

"Once there is a legislative prohibition on taking into account sums paid or payable under contracts of insurance, there is no need to try to arrive indirectly at the value of the accelerated receipt of the benefit, since such receipt is to be ignored, and there is no longer any justification for deducting the premiums from the expenditure which would ultimately have benefited the family unless the proceeds of the policy would probably not have been received by them if the deceased had not been killed when he or she was. ... [A] dependant might have had an expectation of benefit from the policy if the deceased had not been killed whether the policy itself gave the dependant a legal right to the proceeds, or the estate into which the proceeds would have fallen would have devolved on the dependant ... . The onus apparently rests on the plaintiff to show that the dependants would probably have benefited from the proceeds of the policy before any portion of the premiums paid by the deceased will be included in the calculation of the loss. In *Bahr v ETSA*[61], therefore, the premiums paid by the deceased for a whole of life policy of which the widow was the owner were taken into account as being for her benefit, as were the premiums payable on a health insurance policy, which was for the benefit of the whole family; whereas premiums on another life policy, as to which there was no evidence, and a sickness and accident policy were regarded as expended entirely for the benefit of the deceased. The judge would have been prepared to take the second policy into account if it had been shown to be a whole of life one, even though owned by the deceased, since the family members would have probably inherited the proceeds on death, despite the owner's right of surrender, borrowing and conversion. On the other hand, in his view, an endowment policy was like any other asset, such as shares, purchased by the deceased. This does not necessarily mean that the survivors did not have a reasonable expectation of benefiting from the accumulation of assets by the deceased and allowance should be made for that ..."

(b) "a sum paid or payable on the death under a contract made with a friendly or other benefit society, a trade union or association that is not a contract of insurance or assurance."

The Queensland Law Reform Commission in its Report No. 9[62] recommended a new section 15C in the following terms:

"In assessing damages in any such action, whether commenced before or after the commencement of the Common Law Practice Act Amendment Act 1971, there shall not be taken into account -

60 Luntz H. *Assessment of Damages for Personal Injury and Death* (3rd ed) 1990 at para 9.5.8.

61 (1985) 39 SASR 254.

62 *An Examination of the Provisions of The Fatal Accidents Acts with a View to the Elimination of Anomalies*, 1971.

> **(a) a sum paid or payable on the death of the deceased person under any contract of assurance or insurance (including a contract made with a friendly or other benefit society or association or trade union);**
>
> (b) a sum paid or payable out of any superannuation provident or like fund;
>
> (c) a sum paid or payable by way of pension benefit or allowance under any law of the Commonwealth or the State or under the law of any other State territory or country; or
>
> (d) any gratuity in cash or otherwise received or receivable - whether any such sum is paid or payable by the estate of the deceased person or is paid or payable to or received or receivable by any person for whose benefit the action is brought." **[Emphasis added]**

When section 15C was amended in 1972, the Commission's recommended 15C(a) was broken down into two subsections (15C(a) and 15C(b)). This would imply that there may be benefits accruing to dependants from contracts made with a friendly or other benefit society or association or trade union which are distinguishable from benefits payable by way of assurance or insurance (15C(a)) and which are also distinguishable from benefits payable by way of any superannuation, provident or like fund (15C(b)).

The Commission's 1971 Report based its recommendations on similar amendments to section 19 of the Victorian *Wrongs Act 1958* and on the basis of uniformity between the various States. It is unclear why the Queensland Parliament departed from the recommendation of the Law Reform Commission by splitting the proposed section 15C(a) into two subsections. It is also unclear what the nature of the benefits referred to in section 15C(b) are.[63]

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63 *Hansard* does not shed light on the reason for the split.

(c) "a sum paid or payable on the death out of any superannuation, provident or like fund."[64]

All Australian jurisdictions have provisions similar to section 15C(c) prohibiting the taking into account of actual benefits received from such a fund as a result of the death.[65]

The phrase "any superannuation, provident or like fund" has been held not to be confined to cases where the deceased contributed on a contractual or wholly voluntary basis.[66] It also includes a statutory scheme.

Were it not for section 15C(c) a superannuation benefit payable in consequence of the death may have to be taken into account, whether it is payable as of right or at someone's discretion.[67]

Before the introduction of section 15C(c) and its equivalents in other jurisdictions, attempts were sometimes made to bring the benefits received and to be received from such funds, where the deceased made contributions to them, within the concept of insurance payments so as to exclude them under the equivalents to the original, narrower section 15C (the current section 15C(a), which simply excludes from consideration benefits paid or payable from insurance or assurance). However, notes Luntz:[68]

> "The cases recognised that, as with insurance, to deduct both the benefits received on the premature death and the deceased's contributions was to make a double deduction if the beneficiaries could reasonably have expected to derive some benefit ultimately from the contributions to the fund. Thus, although the acceleration of the benefits had to be allowed for by way of deduction, portion of the deceased's contributions to the fund could be taken into account as expenditure for the benefit of the dependants, so augmenting their damages."

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64 S.15C(c) *Common Law Practice Act 1867*.

65 The names of the statutes appear in footnote 8 above. The specific provisions are: Qld s15C(c); SA s20(2aa)(iii); Tas s10(1)(c); Vic s19(b); WA s5(2)(b); ACT s10(4)(b); NT s10(4)(b); *Civil Aviation (Carrier's Liability) Act 1959* ss15(b) and 38(b).

66 *Peipman v Turner* [1961] NSWR 252 (FC).

67 *Baker v Dalgleish Steam Shipping Co* [1922] 1 KB 361 (CA); *Lincoln v Gravil* (1954) 94 CLR 430; *Pannell v Fischer* [1959] SASR 77 (FC); *Ylitalo v Mount Isa Mines Ltd* [1969] Qd R 406 (FC); *Colebrook v Wide-Bay Burnett Regional Electricity Board* [1971] QWN 8; *Sinclair v Bonnefin* (1968) 13 FLR 164 (N.T.).

68 Luntz H. *Assessment of Damages for Personal Injury and Death* (3rd ed) 1990 at para 9.5.13.

Legislation such as the *Common Law Practice Act 1867* now prohibits the taking into account of sums paid or payable out of any superannuation, provident or like fund. It remains unclear, however, whether the dependants should continue to be regarded as having had a reasonable expectation of deriving a benefit from a portion of the contributions. To do so would be consistent with the view relating to the consideration of insurance premiums referred to earlier.[69] Thus a portion of the contributions should be regarded as expended for the benefit of the dependant, so increasing the damages.[70] However, in *Nominal Defendant v Littlewood*[71], it was held that the superannuation contributions had to be deducted. Luntz suggests that:[72]

> "The explanation for this may be that the court took into account directly the expectation of benefit that the dependants had from the superannuation scheme, referring to the fact that the deceased would have received 52.5 per cent of his final salary on retirement and could have been expected to continue to support his wife thereafter (cf *McIntosh v Williams* [1979] 2 NSW LR 543 (CA), 555-7, where specific sums were allowed for superannuation that would have been received during the period after the retirement of the deceased."

Luntz suggests that it would be wrong, in assessing the value of the expected benefit, to allow both for the deceased's contributions to the fund and for the proceeds of the fund:[73] "But one or the other should be allowed for, while actual benefits received from the fund as a result of the death must be ignored, as required by the statutes."[74]

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69 See p. 16 above.

70 Luntz H *The Assessment of Damages for Personal Injury and Death* (3rd ed) 1990 at para 9.5.13 footnote 16 notes that in most cases the portion would be a major one. Even if the superannuation benefits would ultimately have been paid to the deceased personally on retirement, had the premature death not occurred, the support for the dependants would usually have come out of the money so paid. (See *Singapore Bus Service (1978) Ltd v Lim Soon Yong* [1985] 3 All ER 437 (PC).)

71 NSW CA, 21 August 1980, unreported.

72 Luntz H. *The Assessment of Damages for Personal Injury and Death* (3rd ed) 1990 at para 9.5.13 .

73 Ibid.

74 Id. at para 9.5.13, footnote 18, Luntz notes:

> "See, however, *Auty v National Coal Board* [1985] 1 All ER 930 (CA), which holds that only the net loss of superannuation benefits may be recovered, a decision which in terms of a policy of not over-compensating plaintiffs is understandable, but is perhaps difficult to reconcile with the policy of the legislation in prohibiting the deduction of benefits received . A less justifiable decision is *Bahr v ETSA* (1985) SASR 254, where the judge refused to take account of the contributions of the deceased as being for the benefit of the survivors and in the calculation of their expectation of benefit adopted for guidance an actuary's certificate which gave the value of $1 per week terminating when the deceased would have reached 65 or prior death. Almost certainly in such a case the survivors would have had a reasonable expectation of benefiting from the superannuation payments to the deceased after retirement in the normal course, yet this was not mentioned even among the contingencies considered."

Section 15C(c) is, to the Commission's knowledge, the only statutory 'exclusion' from the assessment of damages in *Lord Campbell's* actions which is causing concern to segments of the community. In particular, the Workers' Compensation Board has expressed concern, on behalf of the Workers' Compensation Fund and on behalf of employers, that the practical effect of section 15C(c) is that negligent employers are in effect forced to pay twice for the same damages resulting from the death of an employee. Set out below is an analysis of the argument.

(i) Superannuation

- **Superannuation Funds and death benefits:**

There are a variety of superannuation schemes operating in Australia and the benefits paid or payable to the dependants of a deceased superannuant will depend on the type of scheme or schemes to which he or she belonged.

The primary purpose of superannuation is to ensure that the permanent departure of an employee from the workforce does not result in financial hardship for the employee and/or his or her family. However, the level and sufficiency of benefits payable to the deceased's dependants will depend on a large number of factors.

If each case could be considered separately, a reasonable objective of any superannuation plan might be to ensure that the dependants were no worse off financially than before the employee died. In practice, however, a broader approach is adopted by the plans due to the wide variation in the circumstances of employees. Dependants of some employees may be as well off financially as a result of receiving the superannuation benefits as they were before the employee died. Dependants of other employees may be better off - whilst another employee's dependants may be significantly worse off. Each case will be different - due to such factors as: the type of superannuation plan; the age of the deceased at time of death; the length of time he or she had been contributing to the plan; the level of contributions (if any) the employee had made; the level of contributions the employer had made; whether or not a life insurance benefit is included in the superannuation benefit; the circumstances of the dependants (e.g. number of dependants; whether there is a mortgage on the family home; whether they own or rent the family home; whether there are outstanding debts, etc).

Most Australian superannuation plans are either Accumulation plans or Defined Benefit plans (lump sum or pension).

* Accumulation plans

Superannuation plans which provide retirement benefits equivalent to the accumulation, with interest, of member and employer contributions generally provide for the payment of total accumulation on exit for any reason (other than resignation) or death. The Queensland Government superannuation plan *Go Super* is such a plan. The benefits payable to dependants on the death, particularly of younger members, would in many cases be insufficient to support the dependants. There is no provision for loss of future contributions or future benefit. It may be difficult to justify the deduction of any portion of such benefits from any subsequent assessment of damages under a *Lord Campbell's* action.

It is common for accumulation plans to provide additional lump sum benefits on death.[75] The additional benefits are usually provided by way of an insurance cover (the premiums of which are usually deducted from the employer's contributions).[76] The additional lump sum may take a number of forms, for example:

* An additional lump sum calculated as a multiple of salary at the date of death. This multiple may reduce at higher ages.
* A minimum death benefit. For example, the death benefit could be the greater of the current accumulation balance and three times salary at the date of death.
* A fixed dollar amount, based on the member's age at the date of death.[77]
* An additional lump sum calculated as: *total contribution rate x salary x period to normal retirement age*.

It is likely that the additional benefit provided to the dependants pursuant to a life insurance policy attached to the accumulation plan would fall within section 15C(a) of the *Common Law Practice Act 1867* and thus be excluded from consideration in the assessment of damages in a *Lord Campbell's* action.

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75 It is unusual for an accumulation plan to provide a pension benefit on death although an annuity could be purchased from a life insurance company.

76 For example, *Sun Super* and *Go Super*.

77 For example, *Sun Super's* insurance cover pays $36,000 if the employee was under 41 at date of death, and $6,000 if the employee was 60 at date of death. *Go Super* pays $37,500 if the employee was 35 or younger at date of death (for $1 per week contribution) and nil if the employee was 60 at date of death (for $1 per week contribution).

* **Defined benefit plans**

Defined benefit superannuation plans generally provide lump sum retirement benefits defined by a formula such as: *benefit rate x period of membership x final average salary.*

Death benefits are usually calculated in a similar manner although in the death benefit formula "potential membership period" (the period from joining the plan to normal retirement age) is usually used in place of accrued membership period. The death benefit is then the same multiple of salary as the member's expected benefit on retirement at the normal retirement age (some schemes use the most common early retirement age).

Some defined benefit plans fix the death benefit multiple at a level that the employer considers reasonable - for example, four times salary, irrespective of the age or needs of the member. The benefit would usually be gradually reduced from age 55 or so, if necessary, to ensure that it does not exceed the normal retirement benefit.

A defined benefit pension plan would normally provide pensions for both the surviving spouse and any dependant children of a member who dies before retirement.

The Queensland Government Superannuation *Q Super* is a defined benefits plan. Employees normally contribute 5% of their wages[78] into the plan and the Government contributes 14.55% (total contributions 19.55%). The benefit rate has been actuarially calculated at 21% per annum. If an employee dies after ten years, the benefit payable will therefore be *2.1 x final contribution salary* (which is the annual salary at the previous review). Where the deceased leaves children under 16 or under 25 and in full-time education, an indexed pension for each child is also payable.

The benefit is payable to the deceased's estate although in some circumstances it can be paid directly to the spouse. Additional death insurance can be taken out by employees. The premiums are deducted from any voluntary contributions made by the employee.

It may be difficult to determine what portion of death benefits payable under a scheme such as *Q Super* could be attributable to the compulsory contributions the employer (Government) has made or would have made in the future had the employee survived to retirement. It would be that component which would be affected by the repeal or amendment of section 15C(c) of the *Common Law Practice Act 1867*.

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78 There is also provision in *Q Super* for employees to place additional, voluntary contributions into the scheme. These contributions plus interest would be payable to the employee's estate on death.

Additional insurance benefits would be covered by section 15C(a) *Common Law Practice Act 1867* and, in any event, premiums would have been paid by the employee.

The benefits which would be affected by the repeal or amendment to section 15C(c) would be the difference between the sum of the accumulated compulsory contributions plus interest to date of death and the defined death benefits. That difference could be seen to be paid for by the employer's contributions above the compulsory level of contributions (currently 5%). But administrative and management costs of the fund are also covered by the contributions (employers and employees) and may have to be considered by the courts during the assessment of damages.

*** The role of trustees**

The trustees of the superannuation plan will need to determine who should be paid the death benefits. An employee's nomination during his or her lifetime of a dependant or other person to benefit from the superannuation may or may not be the appropriate person to whom to pay the benefit. The deceased may have recently divorced his wife, leaving her with a number of children, to live in a de facto relationship. Although the trustees will take the member's wishes into account, they are not bound to distribute the benefit as the member has requested.

The administrator of the plan will have to deduct tax from the death benefit. Lump sums paid to dependants on the death of a member are tax-free whilst lump sums paid to non-dependants (including the estate) are taxed as eligible termination payments and pensions are taxed as earned income.

. Compulsory contributions

In 1986 the Australian Conciliation and Arbitration Commission introduced the concept of award-based superannuation.[79] Although the Commission was at that time opposed to granting a 3% wage equivalent to approved superannuation schemes in favour of employees it was prepared to certify agreements or make consent awards providing for employer contributions to approved superannuation schemes for employees covered by such agreements or consent awards provided those agreements or consent awards:[80]

"(i) operate from a date determined or approved by the Commission in accordance with the Commission's phasing in procedure but not before 1

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79 *The National Wage Case June 1986*, Commonwealth Arbitration Reports 1986 p.611.

80 P.665.

January 1987 except in special and isolated circumstances approved by the Commission;

(ii) do not involve retrospective payments of contributions;

(iii) do not involve the equivalent of a wage increase in excess of 3% of ordinary time earnings of employees;

(iv) are consistent with the Commission's Principles and determinations by the Full Bench referred to in our decision;

(v) are in accordance with the Commonwealth's Operational Standards for Occupational Superannuation Funds; and provided that

(vi) the consent of the employers is genuine; and

(vii) there is ambit.'

In 1987 the Commission modified its approach to superannuation in light of the level of industrial action occurring in support of superannuation claims.[81] The Commission decided to continue to certify agreements or make consent awards. It was also prepared, as a last resort, to arbitrate on superannuation in instances where regulations and conciliation are exhausted.

'In any such arbitration the Commission will award new or improved benefits not exceeding the equivalent of 1.5 per cent of ordinary time earnings, to operate no earlier than 1 January 1988 and no more than a further 1.5 per cent to operate no earlier than 1 January 1989. Ordinary time earnings for an employee in this context means the classification rate, including supplementary payment where relevant, over-award payment and shift loading. Consistent with this change, superannuation matters may be dealt with by individual members of the Commission. The principle will therefore be amended to remove mention of the superannuation Full Bench established in accordance with the 26 June 1986 *National Wage* case decision.'[82]

The Commission chose this course for two reasons:

'[The reasons] lie in the nature and intent of the package we have decided to introduce. That package is designed to assist in providing a workable industrial relations and wage fixation environment in order to assist in the achievement of an improved economic situation. The superannuation issue has the potential to destroy those efforts, both industrially and economically. We are not confident that individual parties will not continue to act in the manner that some have already acted, thus causing frustration, poor industrial relations and inevitable disputation. Under the

81 *The National Wage Case March 1987*, Commonwealth Arbitration Reports 1987, p.65.

82 P.87.

modified approach there can be no excuses for industrial action."[83]

In 1991 it was shown to the Commission[84] that there was a considerable diversity of superannuation provisions in 4% federal awards. Those awards were estimated to cover between 80 and 90 per cent of federal award employees. A significant number of awards prescribed a qualifying period of employment and a significant number excluded casuals who fail to meet qualifying requirements. There was also a high level of non-compliance with awards in some areas. The ACTU was pressing for a claim for increased superannuation contributions of a further 3 per cent. The Commonwealth Government supported the claim:[85]

> "... occupational superannuation is a key element in the Government's retirement income policy of encouraging retirement provision by employees during their working lives to achieve adequate living standards. ... The key to providing better income for the growing number of old people in the future is to increase savings now. Improved access to superannuation is the best way of achieving this."

The Commonwealth said that the Commission's 1986 decision to introduce award-based superannuation had been the main impetus to the growth of superannuation coverage and improvements. However, contributions of only 3 per cent as provided by awards did not provide an adequate retirement benefit.[86]

The Commission considered it essential that a national conference be convened to review and clarify a number of vital issues about superannuation and award-based superannuation. The claim for increased contributions was adjourned until that happened.[87]

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83 P.87.

84 *National Wage Case, April 1991*, Commonwealth Arbitration Reports, 1991 p.205.

85 P.263.

86 The Commission agreed with this - p.264.

87 The conference has not proceeded. The need for the conference may have been displaced by subsequent Commonwealth legislation.

In 1992 the Commonwealth Government enacted the *Superannuation Guarantee (Administration) Act*[88] to encourage employers to provide a minimum level of superannuation support for employees. Where employers provide less than the minimum level of support they will be liable for a superannuation guarantee charge. The charge will be used to meet the superannuation contribution entitlement of the relevant employee and will be used to fund administrative costs.

The level of superannuation support an employer is expected to provide will depend on the employer's annual payroll. For 1992-93, employers with an annual payroll of over $500,000, will be expected to contribute 5% of an employee's earings base to a superannuation fund. This percentage will increase over the next nine years to 9%. Employers with an annual payroll of $500,000 or less will be required to contribute 3%, increasing on a slower transition schedule to 9%. Existing employer contributions are included in these rates. The Commonwealth Government has decided to support the inclusion in existing superannuation award provisions of the rates of contribution required by the scheme, as they become operative.[89]

> "The Government believes these measures represent a major step forward in the development of retirement income policy and will lay the foundation for income security and higher standards of living in retirement for virtually all workers."

The Commonwealth Government's apparent aim is to significantly reduce the cost to taxpayers of Commonwealth dependant and age pensions by encouraging superannuation savings. Commonwealth pensions payable to dependants are currently excluded from the assessment of damages in Lord Campbell's actions.[90] To the extent that superannuation benefits replace Commonwealth pensions as retirement or dependant's income, both could be regarded as income worthy of special protection.

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88 No. 111 of 1992. Also see Commonwealth House of Representatives *Hansard* , second reading speech by the Federal Treasurer, Mr Dawkins, 2 April 1992 from p.1763 and 5 May 1992 from p.2432. Note: *Superannuation Guarantee Charge Act 1992* (No 93 of 1992) by s.3 stated:

> "The Superannuation Guarantee (Administration) Act 1992 is incorporated and is to be read as one with this Act."

89 Certain exemptions apply. For example, no superannuation support is required in relation to part-time employees under 18 years of age nor for employees earning less than $250 per month nor for employees 65 years of age or older. The scheme only applies to the first $80,000 of salary. There is also an income tax exemption for certain payments made by the Commissioner of Taxation in the event of an employee's death or early retirement due to illness. Where the Commissioner pays the 'shortfall component' of the superannuation guarantee charge to an employee under 55 years of age who has retired from the workforce due to illness, or to the local personal representative of an employee who has died, the payment is exempt from income tax.

90 Section 15C(d) *Common Law Practice Act 1867*.

. The treatment of superannuation benefits in common law actions by injured plaintiffs:

Where a person is injured to an extent that his or her employment terminates and he or she thereby becomes entitled to payment of superannuation benefits from the employer or a private or statutory fund, in general the courts will ignore such payments when assessing damages for loss of earning capacity.

The Courts disregard any distinction between contributory and non-contributory schemes. Brereton J in *Watson v Ramsay* [1960] NSWR 642:[91]

> "The existence of a superannuation scheme to which both parties contribute is one of the incidents of the employment offered by the employer which has the effect of making terms of employment more attractive and of encouraging continuity of employment. The same result could perhaps be achieved by the payment initially of a larger salary with no superannuation fund, thus enabling the employee to make his own arrangements to provide for the event of his retirement, or with a fund to which the employee only contributes, but in that event the removal of the contingency upon which the employer's share is payable removes the inducement to continue in the employer's service. Looked at in this way the entitlement to a pension is an entitlement to money earned or saved day by day during the employee's active service, earned day by day but not to be paid until he retires."

Luntz observes that:[92]

> "The encouragement by the Government in recent years of occupational superannuation which is 'portable' so as to relieve the pressure on aged pensions under the Social Security Act 1947 (Cth) as the population includes a larger and larger proportion of elderly people, makes the reasons given by Brereton J less cogent. However, taxation advantages make it attractive for employers to contribute to such schemes rather than to pay higher wages and the Arbitration Commission has required employers to contribute to the schemes in lieu of increases in wages."

91 Affirmed [1962] SR (NSW) 359 (FC); and sub nom *Ramsay v Watson* (1961) 108 CLR 642, and approved by Windeyer J in *National Insurance Co of NZ Ltd v Espagne* (1961) 105 CLR 569, 598. Luntz, at para 8.4.3 suggests that Brereton J's arguments are true and justify the treatment of contributory and non-contributory pensions in the same way. See also Balkin R.P. and Davis J.L.R., *Law of Torts* 1991 at p.379.

92 Luntz H. *The Assessment of Damages for Personal Injury and Death* (3rd ed) para 8.4.3 footnote 3.

Lord Pearce, one of the majority in the U.K. House of Lords case of *Parry v Cleaver*[93] introduced a possible qualification to the decision that a pension/superannuation benefit is not deductible from the assessment of damages:

> "It seems to me possible that ... there might be some difference of approach where it is the employer himself who is the defendant tortfeasor, and the pension rights in question come from an insurance arrangement which he himself has made with the plaintiff as his employee."

Luntz[94] notes that most relevant Australian authorities have been concerned with actions against the Crown, where the pensions were payable out of general public superannuation funds or those applicable to defence personnel. In those cases the pensions received were <u>not</u> deducted.[95]

In the one case involving a private employer-defendant, *Grego v Mount Isa Mines Ltd*,[96] Lucas J also disregarded a superannuation payment; though the scheme was established and contributed to by the defendant, Lucas J stated:

> "It does not seem to me that the superannuation payment was intended to generate, or should be regarded as operating, in diminution of the defendant's liability as tortfeasor."

Rather, the scheme was described as being offered to the plaintiff employee as an incident of his employment.

Cases under *Lord Campbell's Act* prior to the introduction of the equivalent of section 15C(c) had taken a different turn and, unlike the cases under the common law, had brought pensions into account. Lord Pearce, in *Parry v Cleaver* commenting on the introduction of the United Kingdom equivalent to section 15C(c) states:[97]

> "The Fatal Accidents Act, 1959, directed that pensions should *not* be taken into account. It may have done this, regardless of what should be the fair and just principle, simply in order to bring cases under that Act into line with common law cases. If so, it would be

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93 [1970] 1 A.C. 1 at 37.

94 Luntz H. *The Assessment of Damages for Personal Injury and Death* (3rd ed) 1990 at para 8.4.13.

95 *Ramsay v Watson* (1961) 108 CLR 642; *State of South Australia v Heaven* (1978) 77 LSJS 18 (FC); *Gee v Commonwealth of Australia* [1982] ACLD 786 (ACT SC).

96 [1972] QWN 33 at p.79.

97 [1970] 1 A.C.1 at 38.

> unfortunate that the common law cases should now change direction and get out of line once more. It is, however, far more likely that Parliament excluded the taking into account of pensions because it thought that the principle of exclusion laid down in common law cases was fairer and more in accordance with public policy and that, therefore, cases under *Lord Campbell's Act* should be brought into line with it."

The principal reason for the courts refusing to reduce awards of damages to an injured plaintiff by benefits received from other sources appears to be the feeling that a tortfeasor ought not to benefit from the fact that a plaintiff has received a charitable subvention, or has had the prudence to make his or her own provision for his or her possible future injury.[98]

As Balkin and Davis have summarised:

> "While it is difficult to extract any clear principle from the decisions, it can be said that, in practice, very few monetary benefits received by a plaintiff from other services will be taken into account in reduction of his damages."[99]

(ii) Workers' Compensation

All Australian jurisdictions have established legislative schemes to provide compensation for industrial injuries and diseases. In Queensland, the scheme is found in the *Workers' Compensation Act 1990*.[100] For an injury or death to be compensable it must have arisen "out of or in the course of the worker's employment" (section 5.1) - that is, there must be either a causal or temporal link between the injury and the employment. The employer does not have to have been negligent towards the employee for compensation to be payable.

Every employer in Queensland is legally liable to pay the compensation which the Act prescribes that the worker employed by

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98 Balkan R.P. and Davis J.L.R., *Law of Torts* 1991 at 379.

99 Note however, under Pt XVII of the *Social Security Act 1947* (Cth) the amount of any pension or benefit under the Act will be recouped out of damages paid or payable to the plaintiff. The only type of payment from another source which, at common law, is to be brought into account in reduction of the plaintiff's damages is sick pay which his/her employer was contractually bound to pay him. In New South Wales damages payable to a motor vehicle accident victim must be reduced to the extent to which a retirement or similar benefit is increased or accelerated because of the accident [*Motor Accidents Act 1988* (NSW) s.78]. In Queensland and a number of other States, Workers Compensation legislation provides for a reduction in the damages payable in an action by an employee against his/her employer for pecuniary loss arising out of an industrial injury, to the extent of the benefits paid or payable under the legislation.

100 In 1978 the administration of the Workers' Compensation Fund was placed with the newly constituted Workers' Compensation Board.

it shall be entitled to receive (out of the Workers' Compensation Fund).[101]

The Act directs every employer to insure itself and keep itself insured with the Workers' Compensation Board of Queensland against all sums for which, in respect of injury to or death of any employee employed by it, it may become legally liable by way of compensation under the Act and against damages arising out of circumstances creating a legal liability in the employer, independently of the Act (such as negligence by the employer resulting in the worker's injury or death), to pay damages in respect of that injury or death.[102] The Board is a monopoly insurer for the purposes of workers' compensation in Queensland.

The amount of premium payable by an employer is assessed by the Board and is calculated on payments estimated by the employer to be made to all employees in respect of wages, salaries and other earnings during the period of insurance. Currently, Queensland employers pay to the Board a premium of 1.6% of such earnings.[103] For an employee's average earnings of $450 per week, an employer might expect to pay an extra $7 to the Board by way of workers' compensation premium.

Death benefits are payable to an employee's (total and partial) dependants under the Queensland legislation.[104] The maximum amount which can be awarded is $89,000 and a weekly amount (10% of a prescribed base rate) for young dependants and an additional amount of up to $5,000 for each dependant as well as reasonable expenses of medical treatment or attendance on the employee, and reasonable expenses for the funeral of the employee[105]. There are provisions for the reduction in the amounts paid to dependants in certain circumstance.[106]

Although the deceased employee's dependants may be entitled to benefits under the *Workers' Compensation Act 1990*, they are not prevented from pursuing a *Lord Campbell's* action against the employer for the wrongful death. However, the workers compensation paid or payable to the dependants will have to be

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101 S.4.9 of the Act.

102 S. 4.9(2) of the Act.

103 Until 1 July 1993 premiums were set at 1.4%. The net premiums received by the Board for the 1991/92 assessment was $299,711,623.00.

104 Sections 7.9 and 7.10.

105 Section 8.13.

106 See sections 8.14 and 8.15.

either deducted at the time of judgment or paid over to the employer.[107] Even in the absence of a statutory direction the court will allow the workers' compensation payments to be taken into account in the assessment of damages unless it is clear that the beneficiary will have to repay the employer or insurer when successful in recovering damages.

(iii) The *Lord Campbell's* Action, Workers' Compensation and Superannuation

If a worker dies as a result of the negligence of his or her employer his or her dependants may be entitled to the following payments and compensation:

1. Death benefits pursuant to the *Workers' Compensation Act 1990*. This compensation is paid by the Workers' Compensation Board from the Workers Compensation Fund. The deceased's employer would normally have made premium payments into the Fund over the time the deceased was employed by the employer.

2. A benefit from a superannuation policy held in the name of the deceased or his or her nominated beneficiaries. Contributions to the superannuation fund may have been made by the deceased during the period of his or her employment. Contributions would also have been made by the employer - including compulsory contributions.

3. Other benefits, such as payments from any life insurance policy taken out on the life of the deceased which falls to the benefit of his or her dependants.

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107 S. 10.1 of the *Workers' Compensation Act 1990* states:

"(1) If an injury in respect of which compensation under this Act is payable is suffered by a worker in circumstances creating, independently of this Act, a legal liability in the worker's employer who is -
(a) indemnified by the Board under a policy in respect of the injury; or
(b) required by this Act to be so indemnified;
to pay damages in respect of the injury, then -
(c) the amount of such damages that the employer is legally liable to pay is reduced by the total amount paid or payable from the Fund, by way of compensation under this Act in respect of the injury; and
(d) subject to this Part, the worker is, or the worker's dependants are, to receive from the Fund such reduced amount...."

4. The dependants would also be entitled to bring a *Lord Campbell's* action against the employer for damages resulting from the death of the deceased pursuant to the *Common Law Practice Act 1867.*

If the dependants are successful in their *Lord Campbell's* action against the employer, at least the following deductions would have to be made from the assessment of damages - thus reducing the amount of the damages recoverable from the negligent employer's insurer, the Workers' Compensation Board:

1. The workers' compensation benefits (deduction made pursuant to section 10.1 of the *Workers' Compensation Act 1990* and would probably have been deducted under the common law in any respect[108]);

2. Any other benefits paid or payable to the dependants as a result of the death of the deceased not referred to in section 15C of the *Common Law Practice Act 1867.* Other benefits which may be excluded, such as the matrimonial home and the family car are referred to above.[109]

The benefits referred to in section 15C of the *Common Law Practice Act 1867*, including life insurance and superannuation benefits paid or payable to the dependants upon the death of the deceased must be ignored by the court in the assessment of damages.

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108 In *Mataic v Milinga* ([1970] VR 862) it was argued that a certain workers compensation benefit came with the Victorian equivalent to section 15C(d) of the *Common Law Practice Act 1864* (the Victorian phrase was "a sum paid or payable by way of pension, benefit or allowance under any law of the Commonwealth or the State."). The argument was rejected. Luntz (at para 9.5.15) notes, however, that:

"The reasons that led to that conclusion may have been weakened by subsequent legislation in a number of States which establishes a public fund out of which workers' compensation is paid, which does not place liability on the employer to make the payments, except in limited circumstances, or which provides for periodical payment of benefits. Nevertheless, the view would probably still be taken that it would be startling to find workers' compensation among the types of State benefit envisaged by that particular exclusion. In most instances the question will be comprehensively dealt with in the relevant workers' compensation legislation."

109 P.7.

(iv) Effect of a repeal or amendment of section 15C(c) on the Workers' Compensation Board of Queensland

. Frequency of *Lord Campbell's* claims

For the period from 1 July 1989 to 30 June 1993 there were 35[110] *Lord Campbell's* claims for damages resulting from the death of an employee. The claims were made on the Workers' Compensation Board of Queensland in its role as the compulsory insurer of employers. Seven of these 35 claims have been finalised (either by settlement or judgment). Three of those seven cases were finalised for nil payment to the dependants. During the same period, 470 claims other than *Lord Campbell's* claims were made on the Board for fatal injuries occurring on or after 1 July 1989.

For the period 1 July 1989 to 30 April 1993, *Lord Campbell's* claims only make up 6.9% of the claims for compensation at the Workers' Compensation Board which arose when an employee died as a result of injuries sustained "out of or in the course of the worker's employment".[111] In most *Lord Campbell's* claims there would be a substantial delay between the date of injury causing death and the date the claim is settled or goes to trial. Factors which may contribute to the time delay include:

* awaiting the findings of the Coroner's inquiry;

* the injury causing death may have taken place in an isolated part of Queensland (for example, a mining site) thus causing delays in taking statements from witnesses, etc;

* the procedural delays involved in litigation.

The Commission understands that very few *Lord Campbell's* claims are decided judicially.[112] Most claims settle. Some are not pursued by the dependants.

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110 These statistics have been provided by the Workers' Compensation Board of Queensland. Existing claims comprise claims where the injury causing death was on or after 1 July 1989, up to and including 30 June 1993. The total number of common law claims (injuries and death) made on the Board, including Lord Campbell's claims between 1 July 1989 and 30 June 1990 was 5,595 (at a steadily increasing rate each year). The number of statutory claims for workers' compensation benefits over the same period totals 323,586. The percentage of statutory claims which proceed to common law has risen steadily over that period:

1989-1990	...	1.36%
1990-1991	...	1.63%
1991-1992	...	1.94%
1992-1993	...	1.97%

111 Section 5.1 of the *Workers' Compensation Act 1990*.

112 In recent years, there have only been two cases where the Workers' Compensation Board has been the insurer where judgments have been handed down in relation to Lord Campbell's claims. This information was provided by the Workers' Compensation Board of Queensland.

Future loss of a superannuation benefit

In *Lord Campbell's* claims made to the Board to date it is very rare for the claim to include a component relating to future loss of a superannuation benefit. For example, part of the claim could include the benefit to the dependants of the employer's compulsory contribution to the employee's superannuation fund from the date of death of the deceased to his or her projected retirement age or the estimated benefit to the dependants of the future superannuation payout which the employee would have received had he or she lived to retirement age. The Commission understands that there has been a trend developing over the last 12 to 18 months for personal injury damages claims for negligence (excluding *Lord Campbell's* claims) to include a superannuation component. This trend may be linked to the relatively recent introduction of compulsory employer contributions to superannuation funds to provide a minimum level of retirement support for employees.[113] The trend of including a future loss of a superannuation benefit may well develop in *Lord Campbell's* claims.

If an employee were a member of an accumulation plan for superannuation, it would be difficult to justify the deduction of any portion of such benefit payable to dependants on the death of the employee from any subsequent assessment of damages under a *Lord Campbell's* action. On the other hand, if the employee were a member of a defined benefit plan for superannuation, then a portion of the death benefit payable could be attributed to the compulsory contribution the employer has made and would have made in the future had the employee lived to retirement age. As noted on page 23 of this Report, this portion may be difficult to quantify.

If section 15C(c) of the *Common Law Practice Act 1867* did not apply to a *Lord Campbell's* action against the employer for damages resulting from the death of an employee, then it would appear from information available to the Commission that there would be negligible savings to the Workers' Compensation Board as the compulsory insurer of the employer in the foreseeable future.

(v) The concern with section 15C(c) in light of the above analysis

The major concern that negligent employers and the Workers' Compensation Board of Queensland could have with the continued existence of section 15C(c) of the *Common Law Practice Act 1867* in its present form is that, as a result of the operation of that provision, employers are in effect required to pay dependants of a deceased employee compensation for a portion of the same loss, twice. An employer who wrongfully causes the death of an employee is the only type of tortfeasor who would have:

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113 See pp. 24-27 above.

1. contributed to the deceased person's superannuation fund, and

2. indirectly paid for (by way of compulsory Workers Compensation premiums) the damages assessed by the Court in a *Lord Campbell's* action brought by the deceased person's dependants for the wrongful death.

The overlap in compensation occurs if any part of the superannuation benefits paid or payable to the dependants upon death of the employee is also included in the assessment of damages. An assessment of damages may include consideration of the benefit to the dependants that would have been derived from contributions which the employer would have made in the future had the deceased lived and worked to retirement age. Alternatively, the assessment may include consideration of the benefit to the dependants that would have been derived from the superannuation payout the deceased would have received had he or she lived and worked to retirement age. In either event, by reason of section 15C(c) the Court must ignore any superannuation benefit paid or payable to the dependants on the death of the employee.

(d) "a sum paid or payable on the death by way of pension, benefit or allowance under any law of the Commonwealth or of any State or Territory of the Commonwealth or of any other country."

A similar provision exists in all other Australian jurisdictions.[114] It has been held that Supporting Parent's Benefit under the Commonwealth *Social Security Act 1947* (Cth) falls within this provision[115]and that such benefit should not be taken into account in assessing the damages recoverable by the deceased's ex-nuptial children even though the benefit was payable to their mother, rather than to them. The mother's loss of support was indirectly taken into account in the children's damages.

Luntz has noted:[116]

> "[T]he statutes will generally be construed as directing that a particular pension or allowance should not be taken into account only when consideration is given to the benefits accruing to the dependants in consequence of his death. When the dependants claim to have lost the benefit of a pension owing to the premature death of the deceased, evidence will be admissible of such a pension or allowance which would have been payable if the

114 The names of the statutes appear in footnote 8 above. The specific provisions are: s.3(3)(c) NSW; s.10(1)(d) Tas; s.5(c) WA; s.20(2aa)(v) SA; s.19(c) Vic and s.10(4)(c) Territories.

115 *Radanovic v MVIT* [1986] WAR 105 (FC)).

116 Luntz H. *The Assessment of Damages for Personal Injury and Death* (3rd ed) 1990 at para 9.5.11.

> deceased had not been killed.[117] According to *Auty v National Coal Board* [1985] 1 All ER 930 (CA), where the plaintiff claims the loss of a benefit by way of pension, credit must be given for any part of the pension which the plaintiff will still receive; the legislation does not require such part to be ignored. In other words, the plaintiff is entitled only to the net loss - or the amount by which the pension has been reduced in consequence of the death - not the full amount that would have been payable if the deceased had not been killed, without regard to the amount payable as the result of the death at this time."

Although the receipt of damages from a *Lord Campbell's* action does not at present preclude payment to dependants of relevant Commonwealth benefits (widow's pension, supporting parent's benefits and orphan's benefits) - the ordinary means tests will apply in the future if the proceeds of the *Lord Campbell's* action are retained or invested.[118]

(e) "a gratuity in whatever form received or receivable on the death."

In assessing the amount to be awarded, Courts are prevented from considering any amount paid or payable to the deceased's dependants on a gratuitous basis - for example, a sum paid by a charity or as a result of a public appeal to assist the deceased's family. The gratuity may be paid to or received by the estate of deceased or any person for whose benefit the *Lord Campbell's* action is brought.

However, voluntary payments made by a defendant such as the negligent employer, may be taken into account in assessing damages.[119]

6. ARGUMENTS FOR REPEAL OF ANY OR ALL STATUTORY EXCLUSIONS LISTED IN SECTION 15C

1. There is no logical basis for the exclusions, as shown by the history behind the introduction of the original section 15C. A court should not be expected to ignore benefits accruing to dependants as a result of the wrongful death of a breadwinner when assessing damages against the wrongdoer. Any benefit ignored in the assessment could be seen as a penalty imposed upon the wrongdoer. The wrongdoer

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117 *Mangan v Cornish* [1962] NSWR 1296 (FC); *Watson v Dennis* [1968] 3 NSWR 60 (CA); *Wright v Dwyer* [1977] Tas SR (NC) 2; and the cases cited in [9.3.7]. The same applies to a superannuation benefit which would have been received if the deceased had not been killed (*McIntosh v Williams* [1979] 2 NSWLR 543 (CA), 547).

118 Luntz H. *The Assessment of Damages for Personal Injury and Death* (3rd ed) 1990 at para 9.5.12.

119 *Jenner v Allen West & Co Ltd* (1959) 2 All ER 115.

should be required to pay compensation by way of damages actually suffered by the dependants. He or she should not, in addition, be penalised simply on the basis that certain benefits accruing to the dependants as a result of their breadwinner's death fall within one of the statutory exclusions listed in section 15C.

2. Section 15C(c) forbids the Court from taking into account during the assessment of damages, the benefit to dependants of the accelerated payment of superannuation entitlements upon the early death of the breadwinner. As a result, dependants may be financially better off as a result of the breadwinner's death than had he or she lived to normal retirement age.

The dependants may include in their claim the benefit to them of compulsory contributions to the superannuation fund that the deceased's employer would have made had the deceased lived and worked to normal retirement age. Alternatively, the dependants may claim the projected benefit to them of the superannuation payout that would have been made to the deceased had he or she lived and worked to normal retirement age. Whatever the dependants' claim, the Court must, by reason of section 15C(c) ignore the accelerated benefit to the dependants of the superannuation payment made upon the death of the deceased.

Where the tortfeasor is also the employer, the tortfeasor will be required to pay the assessed damages (either directly or indirectly by the payment of premiums to the Workers' Compensation Board). Where the employer was a compulsory contributor to the deceased's superannuation fund, there could be an overlap between the employer's contributions to the superannuation benefits payable to the dependants on the death of the deceased, and the damages the employer (or his/her indemnifier) is required to pay as a result of the *Lord Campbell's* action. It is unfair that an employer should in effect be required to pay more to the dependants of the deceased than the pecuniary damages resulting to them from the employer's negligence.

As the employer's compulsory contributions to employee superannuation increase, the cost to employers and their indemnifiers of the overlap between superannuation death benefits and damages assessed pursuant to *Lord Campbell's* actions will become more significant.

3. Section 15C(c) virtually elevates one form of saving (superannuation) to a preferred position over all others. Why should the family of a person who invests in a superannuation scheme be in a preferred position to the family of a person who invests in property. The court will have to ignore the payment to the first family of any superannuation payment in the assessment of damages. The court will deduct the benefit to the second family which result from the death of the deceased of property investments made by the

deceased. The same argument could apply to insurance and assurance which are referred to in section 15C(a).

Harold Luntz suggests:[120] (para 9.5.1)

> "These statutory exclusions have probably been due to a legislative reaction to the court's parsimony in refusing to award damages for non-pecuniary loss. On the whole, they have been ill-thought out and can result in practice in a further regressive redistribution of wealth. Thus the surviving spouse and children of a wealthy person, who not only provided for them generously while alive but also made provision for them by means of insurance and superannuation, are doubly rewarded when their damages come to be assessed; whereas the survivors of a poor person who could make little such provision receive neither solatium nor excluded benefits - except perhaps a social security pension - in addition to the damages for loss of support."

4. An appropriate amendment to section 15C(c) could result in a saving to the Workers' Compensation Board and, in turn, result in stemming increases to employers' premiums to the Board. The repeal of section 15C would also result in savings to other wrongdoers which may have a beneficial flow-on effect to the community. For example, if motor vehicle accident insurers were not required to pay compensation for damages to dependants resulting from the wrongful death on the roads of a breadwinner - to the extent of any section 15C-type accelerated benefits received by the dependants (for example, gratuitous payments; life insurance benefits; superannuation benefits; Commonwealth pensions, etc payable on the death of the breadwinner) - then there may be a cost saving to all motorists by way of reduced premiums. For uninsured wrongdoers, the repeal of section 15C might prevent severe, unnecessary financial hardship to the wrongdoer and his or her family.

5. If Courts were able to take into account the 3% compulsory employer contributions to employee superannuation in the assessment of damages resulting from the death of an employee due to the employer's negligence, it is unlikely that dependants would be adversely affected. Commonwealth social security benefits would invariably have to be relied upon in any event by dependants whose only "provision for retirement" was the 3% compulsory contribution made by the employer to the deceased's superannuation fund.

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120 Luntz H. *The Assessment of Damages for Personal Injury and Death* (3rd ed) 1990 at para 9.5.1.

7. ARGUMENTS AGAINST REPEAL OF ANY OR ALL STATUTORY EXCLUSIONS LISTED IN SECTION 15C

1. To continue uniformity with other Australian jurisdictions, all of which provide that each of the benefits referred to in the equivalents to section 15C are not to be deducted from awards in actions for damages for wrongful death brought by dependants of the deceased.

2. It would be anomalous to permit superannuation payments (section 15C(c)) to be deducted and to continue to prevent insurance, pensions etc from being deducted from *Lord Campbell's* damages awards. As with private life insurance, people who contribute to non-compulsory superannuation, or who contribute more to a compulsory superannuation scheme than required to, could be seen as careful financial planners whose dependants should not be deprived of higher damages than dependants of people who did not so plan.

   If section 15C(c) were repealed, dependants of people who invest in life insurance policies would be in a more advantageous position than dependants of people who voluntarily, or compulsorily, invested in superannuation schemes.

3. It would be anomalous to permit superannuation payments to be deducted in actions brought on behalf of the deceased's dependants when, for cases brought by injured people who are entitled to a superannuation payment - those payments are ignored by Courts when assessing damages at common law. A similar argument exists in relation to each of the other statutory exclusions under section 15C.

4. Superannuation entitlements could be considered an incident of a person's past employment. Superannuation investments are intended to provide for a worker's and his or her family's retirement and are not intended to be compensation for damages resulting from the wrongful death of the superannuant. The employer's contribution to superannuation pursuant to award obligations could be seen as being made in lieu of wages to the worker. If the contribution had been paid to the worker as wages during his or her life time the worker could have spent it or invested in a way that would have avoided it being deducted from any subsequent *Lord Campbell's* award to his or her dependants.

5. It would be difficult to justify an amendment of section 15C(c) so as to permit superannuation payments to be taken into account only in those cases where an employer was the defendant and to continue to ignore superannuation payments in all cases where the employer was not the defendant (for example, the driver of a motor vehicle responsible for the death of a breadwinner).

6. Some people invest excess money in investments other than superannuation. Should they die due to the wrongful actions of another, their investment may or may not be taken into account in the assessment of the dependants' damages. For example, money put into the matrimonial home would not be deducted from an award of damages to the surviving spouse. The New South Wales Law Reform Commission in its Report on Accident Compensation: A Transport Accidents Scheme for New South Wales was of the opinion:[121]

> "The prudent claimant should be allowed to enjoy the fruits of his or her own contributions to financial security. In addition, the practical difficulty, if not impossibility, of devising a satisfactory set-off rule to apply to the wide variety of superannuation schemes which exist, is sufficient reason in itself to refrain from any attempt at setting off superannuation payments."

7. If 15C(c) were to be repealed, what parts of the various types of superannuation payouts should be taken into account? A superannuation payout may consist of an insurance payout which, presumably, could continue to be ignored by the Courts pursuant to section 15C(a). There might also be an amount voluntarily contributed to the fund by the deceased. It may be extremely difficult for a Court to identify the appropriate, deductible accelerated benefit without expert actuarial advice.

8. Some part of a superannuation payment could be considered to relate to non-pecuniary damages such as pain and suffering suffered by dependants of the deceased. Such damages would not otherwise be available to dependants in a *Lord Campbell's* action. Similarly, the exclusion of all matters listed in section 15C would be seen as an indirect method of compensating dependants for the non-pecuniary damages suffered by reason of the death of their breadwinner. Of course, this indirect compensation is only available to dependants who would be entitled to one or more of the benefits referred to in section 15C.

9. Even though the deceased's dependants may receive by way of damages an amount equivalent to the future superannuation contributions the employer would have made had the employee lived and worked until normal retirement it is unlikely that the dependants would have the same investment power as the Superannuation Fund. Therefore the retirement benefits the family would have received had the deceased lived and worked until retirement age is likely to be more than the investment return on any superannuation benefit and

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[121] 1984 at para 14.103.

future superannuation component of a Court award received by the family subsequent to the death of the breadwinner.

10. If a deduction from damages could be justified in respect of the compulsory contributions an employer would have made to a deceased employee's superannuation fund had he or she lived and worked to retirement age, account may need to be made of administration, management, taxation and other fees deducted from the superannuation investment. This would add complexity to the actuarial assessment to be made by the Court.

11. Section 15C costs wrongdoers and their indemnifiers relatively little when compared to other more substantial costs in the adversarial system - such as legal fees, experts' reports.

12. The dependants may very well have to rely on superannuation death benefits, life insurance benefits, gratuitous payments, etc to fund a *Lord Campbell's* action. If these benefits could be taken into account during the assessment of damages some dependants may be deterred from pursuing their rights under the *Common Law Practice Act 1867.*

13. 15C has had a long and widespread acceptance.[122]

8. THE COMMISSION'S TENTATIVE PROPOSAL

There should be no amendment to section 15C of the *Common Law Practice Act 1867.*

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122 Victorian Statute Law Revision Committee *Report upon the Proposals Contained in the Wrongs (Assessment of Damages) Bill, 1966* at p.4.