AN EXAMINATION OF THE PROVISIONS OF THE "FATAL ACCIDENTS ACTS" WITH A VIEW TO THE ELIMINATION OF ANOMALIES

Working Paper 7

Queensland Law Reform Commission
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QUEENSLAND

LAW REFORM COMMISSION

CONFIDENTIAL

WORKING PAPER IN RELATION TO AN EXAMINATION OF THE PROVISIONS OF THE "FATAL ACCIDENTS ACTS" WITH A VIEW TO THE ELIMINATION OF ANOMALIES

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PREFACE

The Law Reform Commission has been functioning since 1st March, 1969 and has been constituted by the Law Reform Commission Act, 1968. The members are:-

The Honourable Mr. Justice W.B. Campbell, Chairman
Mr. P.R. Smith
Mr. B.H. McPherson
Mr. J.J. Rowell.

The Secretary of the Commission is Mr. K.J. Dwyer. The office of the Commission is at William Street, Brisbane.

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LAW REFORM COMMISSION

WORKING PAPER IN RELATION TO AN EXAMINATION OF THE PROVISIONS OF THE "FATAL ACCIDENTS ACTS" WITH A VIEW TO THE ELIMINATION OF ANOMALIES

The first programme of the Law Reform Commission of Queensland on reform as approved by the Honourable the Minister for Justice and Attorney-General includes an examination of the law in relation to the above.

The enclosed working paper contains suggestions for eliminating certain anomalies and other explanatory matter and is being circulated to persons and bodies known to be interested, from whom comment and criticism is invited. Recipients of the working paper will appreciate that it does not necessarily represent the concluded view of the Commission, nor is it intended that any implications be drawn as to Government Policy.

This paper is circulated on a confidential basis and recipients should bear in mind that any recommendations for the reform of the law which may ultimately be formulated by the Commission are required to be submitted to the Minister and must have the approval of the Governor in Council before being laid before Parliament.

It is requested that any comment you care to make be forwarded to the Secretary, Law Reform Commission, P.O. Box 312, North Quay, Queensland 4000, so as to be received no later than Monday, 1st March, 1971.

W. B. Campbell

(W. B. Campbell)
CHAIRMAN.

Dated: 4/1/71
BRISBANE.

WORKING PAPER

ON

FATAL ACCIDENTS ACTS

The provisions in Queensland legislation referred to as the "Fatal Accidents Acts" are to be found in "The Common Law Practice Acts 1867 to 1940" as amended - ss. 12 to 15D(5). These provisions are analogous to the English Acts - Fatal Accidents Act 1846, Fatal Accidents (Damages) Act 1908 and Law Reform (Miscellaneous Provisions) Act 1934.

Claims for damages fall under the following heads:-

(a) the dependants' claim - ss. 12 to 15C;

(b) the claim for the benefit of the estate - ss. 15D, et. seq.

Dealing first with the dependants' claim, reference to s. 12 shows that to maintain an action it must be proved:-

(a) that the deceased was injured through the wrongful act, neglect or default of the defendant;

(b) that he died in consequence of such injury;

(c) that at the time he died he had a right to maintain an action to recover damages;

(d) that the beneficiaries have suffered pecuniary loss from his death.

With respect to (c) it must be borne in mind that the damages under the Act can be reduced to a proportionate extent where it is found that death has resulted partly from the fault of the deceased [see s. 10(4) of "The Law Reform (Tortfeasors Contribution, Contributory Negligence and Division of Chattels) Act of 1952]. In (d) the action can be maintained only upon proof of pecuniary damage and a verdict for nominal damages cannot be entered.

If the deceased would have had a maintainable cause of action if he survived, damages may be claimed under ss. 12 to 15. Dependants' action is not the same action as the deceased had, but a separate action in which damages are assessed on different principles from those in any action the deceased could have brought personally in his lifetime. The usual form of action is brought by the widow and children on the death of the husband and father. However, other actions are available, viz.:-

(i) Husband on death of wife:

A wife is not generally a breadwinner and will not in most cases be bringing tangible contributions into the household in the form of money or goods. It is therefore the loss of services gratuitously rendered in the household that form the principal and perhaps only pecuniary loss on her death. Such damages are only recoverable if they are attributable to the relationship of husband and wife (Burgess v. Management Committee of the Florence Nightingale Hospital for Gentlewomen [1955] 1 All E.R. 511). However, damages for loss of a wife's services were held not recov-

erable in the case where it was impossible to place a monetary value on the future services of the wife, the husband not intending to replace his wife's gratuitous services (Seymour v. British Paints (Aust.) Pty. Ltd. (1967) Qd. R. 227).

(ii) Children on death of mother:

Usually where the husband is alive and claiming the loss of the children is not considered. As to gratuitous services, the amount will generally go to swell the husband's loss as he remains under an obligation to maintain the children. In certain circumstances only the children's dependency will fall for consideration as, for instance, where the mother was already deceased at the time of the father's death or both parents are killed in the same accident. According to Mayne & McGregor on Damages, 12th ed., para. 824: "Where the mother has died in the same accident as the father, money passing to the children from the mother's estate is not an element to be taken into consideration in assessing damages". (See Public Trustee (W.A.) v. Nickersson 111 C.L.R. 500).

(iii) Parent on death of child:

(a) Married child - parent would not be likely to have a claim unless the child had previously been making regular contributions towards the support of the parent;

(b) Unmarried child - the fact that no contribution is being made at the time of death does not rule out all loss to the parent. However, the possibility of the child marrying would be taken into account;

(c) Infant child - as was held in Barnett v. Cohen [1921] 2 K.B. 461, in denying the father's claim there is usually no reasonable probability of pecuniary benefit, only a speculative possibility.

Only one action can be brought and that by and in the name of the deceased's executor or administrator for the benefit of the widow, husband, parent or child commenced within three years of the death. If the action is not brought by the executor or administrator within six months of death, the action may be brought in the names of all the persons who benefit. The loss to the family as a whole is assessed and then apportioned between the various dependants. Under s.15C no account is to be taken of any sum paid or payable on the death of the deceased under any contract of assurance or insurance.

Courts restrict recovery to damages for the loss of the pecuniary benefit arising from the relationship which would have been derived by the continuance of life. This consists of money, property or services. No more than this, except for funeral expenses since 1940, can be recovered. As Lord Wright said in Davies v. Powell Duffryn Collieries [1942] A.C. 601, at page 617: "There is no question here of what might be called sentimental damages, bereavement or pain and suffering. It is a hard matter of pounds, shillings and pence". Damages are to be calculated in reference to reasonable expectation of pecuniary benefit as of right or otherwise from the continuance of life (Franklin v. South Eastern Ry. Co. (1858) 3 H & N 211 - 157 E.R. 448). This entails two consequences of importance:-

(1) The need to show deceased was under a legal liability to support him or her; and

(2) The need to show the dependant was receiving pecuniary benefit at the time of the death (a purely prospective loss is sufficient - Taff Vale Ry. Co. v. Jenkins [1913]A. C. 1).

The pecuniary benefit may be calculated by taking the annual figure of the dependency whether stemming from money or goods, property or services rendered and multiplying it by the number of years the dependency was expected to last. Lord Wright (supra) continued: ".....The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employment. Then there is an estimate of how much was required or expended for his own personal and living expenses. The balance will give a datum or basic figure which will generally be turned into a lump sum by taking a certain number of years' purchase. That sum, however, has to be taxed down by having due regard to uncertainties, for instance, that the widow might have again married and thus ceased to be dependent, and other like matters, of speculation and doubt". In Lincoln v. Gravil, 94 C. L. R. 430, the judgment speaks with approval of decisions fixing a figure of sixteen years purchase (page 448). However, the amount of damages to be awarded is likely to be affected by such contingencies as death, marriage (in the case of a child) or remarriage.

Causes of action for the benefit of the estate survive by s. 15D. Thus a claim for damages could be brought by the executor or administrator of the deceased (cf. English Law Reform (Miscellaneous Provisions) Act 1934). The estate is entitled to claim medical expenses, loss of earnings, pain and suffering and loss of amenities of life, all being limited to the period between injury and death. Often death will follow reasonably speedily and the period involved will be so short that little is recovered under these heads (see Rose v. Ford [1937] A. C. 826 and Benham v. Bambling [1941] A. C. 157).

In Davies v. Powell Duffryn Collieries (op. cit.) it was held that any benefit accruing or likely to accrue to the dependant from an award to the deceased's estate under these provisions falls to be deducted from the damages awarded under ss. 12 and 13. It is the right of action not the assessment of damages which is said by s. 15D(5) to be in addition to and not in derogation of the rights conferred by other provisions. A deduction was proper but the award under s. 15D must reduce the award under s. 13, but not vice versa. Damages awarded under s. 13 must, subject to statutory exceptions, take into account any pecuniary benefit derived from the death of the claimant but the award under s. 15D is not affected by what the dependants may claim independently. Section 15D(2)(c) says damages shall be calculated without reference to any gain to the estate consequent upon death.

Where an action by a personal representative combines claims under ss. 12 and 13 and s. 15D, the damages must be so assessed as not to be duplicated in favour of those entitled to benefit under both heads of claim (see Shelton v. Collins, 39 A. L. J. R. 480 at page 488). Where there is no claim under the latter section the court can estimate what damages might have been awarded and deduct them from the award under the former. A deduction would be made only when the damages are paid or payable to the dependant,

not, for instance, where the dependant does not benefit under the will or the estate is insolvent. There should be no deduction for amounts paid for estate or administration expenses, funeral expenses or medical expenses paid before death. In short, only that part of the award under s. 15D which represents non-pecuniary loss and which indeed generally forms the main part, if not the totality, of the award should be available for deduction.

Difficulties or anomalies have been known to present themselves in actions arising under these Acts. One of the first stems from the words "wife, husband, parent and child" in s. 13, but it is hoped that the Commission's proposed amendment to s. 2 will stabilise the position for both illegitimate children and children adopted subject to provisions other than "The Adoption of Children Act, 1964 to 1967".

When damages are being awarded certain factors enter into consideration as to whether the award should be reduced, for instance:-

(a) reduction because of acceleration (see Smith v. Smith (1960) Qd. R. 356 and Gillette v. Callaghen, 36 A. L. J. R. 72);

(b) remarriage of widow (see Nance v. British Colombia Electric Railway Co. [1951] A.C. 601, 615: cited in Parker v. Commonwealth of Australia, 112 C. L. R. 295, 315);

(c) child acquiring generous stepfather on remarriage of widow (Mead v. Clarke Chapman & Co. Ltd. [1956] 1 W. L. R. 76).

It has been held proper to regard the widow's prospects of remarriage in arriving at an assessment of damages. However, in Buckley v. John Allen & Ford (Oxford) Ltd. [1967] 2 W. L. R. 759, Phillimore J. at page 763 said: "In the absence of some yardstick I question whether .... any Judge is qualified to assess whether or not she is likely to remarry". One solution would seem to be to award the widow an annual sum which would be subject to alteration if her circumstances changed in any material regard. However, in a working paper which included, inter alia: "The relevance of remarriage or prospects of remarriage in an action under Lord Campbell's Act," the Law Reform Commission of New South Wales states that it does not favour deferment of the assessment of damages as an attempt to overcome this problem. It expresses itself as being in favour of the bolder course of making the remarriage or the possibility of remarriage of the widow an irrelevant consideration.

The Report of a Committee under the chairmanship of the Right Honourable Lord Justice Winn on Personal Injuries Litigation (Cmnd. No. 3691) presented to Her Majesty's Parliament in July 1968 says at paragraphs 378 and 379 that the law should be changed so as to obviate the need for the trial judge to take into account the widow's prospects of remarriage when assessing damage.

Section 15C provided a sum paid or payable on the death of the deceased under any contract of assurance or insurance would not be taken into account when assessing damages. This section, inserted by amendment in 1915, is analogous to the English Fatal Accidents (Damages) Act 1908. Conflicting decisions thereafter 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 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 (supra) the Victorian Parliament passed an amendment to s. 19 of the Wrongs Act 1958 (q.v.). An article on page 295 of 40 A.L.J. suggests that it would be appropriate for the other States to consider adopting this enactment with a view to uniformity. The Commission approves of this suggestion and recommends its adoption.

Legislation existing in other Australian States, such as s. 3 of the Compensation to Relatives Act 1897-1953 has for many years in New South Wales 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. This has also been the case in Tasmania since s. 10 of the Fatal Accidents Act 1934 was amended in 1955.

A question has been raised regarding the effect of "ex gratia" payments by insurance companies or funds raised by voluntary subscription on the assessment of damages. However, as Fullagar J. said in Attorney-General for New South Wales v. Perpetual Trustees, 85 C.L.R. 237 at page 292: "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". (See also Redpath v. Belfast and County Down Railway Co. [1947] N.I. 167, Peacock v. Amusement Equipment Co. Ltd. [1954] 3 W.L.R. 288 and Mockridge v. Watson (1960) V.R. 405).

The English 1934 Act, which was adopted in Queensland as ss. 15D, et. seq., has not been without its critics. The general criticism is that damages under these provisions are intended to compensate for the loss of the deceased and to prevent the delinquent motorist deriving advantage from the fact that he has killed his victim rather than maimed him. The damages go into the pockets of the living and it is they who are being compensated and it is anomalous and against the whole conception of common law to compensate a person who has not suffered. Such non-pecuniary losses as pain and suffering, loss of expectation of life, are in a sense personal to the victim and do not represent a loss to the estate (see Fleming: "The Law of Torts" (3rd ed.) page 697).

When death was actually caused by the injury in question claims for damages under such heads as pain and suffering, bodily or mental harm or for curtailment of expectation of life are disqualified under the New South Wales and Victorian legislation (see Law Reform (Miscellaneous Provisions) Act 1944 (N.S.W. Statutes, vol. 6, page 190) and Administration and Probate Act 1958 (Vic. Statutes, vol. 1, page 62)). The Commission feels that it would be more consistent and would remove any doubts which could arise if the disqualification of those claims were general, and to this end recommends the adoption of the South Australian legislation Survival of Causes of Action Act 1940 (s. 3(a)).

The recommendations of the Commission are to repeal the existing subsections C, D of s. 15 of "The Common Law Practice Act 1867 to 1964" and to substitute the two new subsections which appear on page 11 of this working paper.

Before concluding, the Commission wishes to refer to a situation which can arise in personal injury claims for damages where the injured person has or will come under a liability to pay medical or other expenses. In Blundell v. Musgrave, 96 C.L.R. 73, it was held that as the Naval Board had made a charge upon one of its ratings to pay for treatment of injuries sustained in a motor vehicle accident, the charge formed part of the damage in respect of which the rating was entitled to recover in an action. Paull J. in Schneider v. Eisovitch [1960] 2 Q.B. 431 held that expenses incurred by the plaintiff's relatives in flying to France to assist in certain arrangements could be recoverable under certain conditions which included the condition that the plaintiff had undertaken to pay the sum awarded to her relatives (see also Mayne & McGregor on Damages (12th ed.) paragraphs 179 and 762). Taylor J. was critical of this decision of Paull J. in Wilson v. McLeay and Anor. 106 C.L.R. 523, but he said at page 527 that he did not mean the necessity for such expenditure should not be taken into account but if no expenditure had been incurred no allowance should be made. Gibbs J. in Hobbelen v. Nunn [1965] Qd.R. 110 said at page 128: "The plaintiff, in order to succeed in recovering from the defendant the hospital charges that have not in fact been paid, must establish that Hobbelen was legally liable to pay those charges".

Professor Ross Parsons has published an article on the subject in volume 30 of the Australian Law Journal at page 618 entitled "Damages in Actions for Personal Injury". At page 621 the author says:

> "The doctrinal problem is one of framing rules which will see to it that the injurer's liability in damages is not diminished by any advantage which the injured person may receive or be entitled to receive from some third party. The simplest answer to this doctrinal problem is to allow the injured person to recover as if there had been no advantage received by or due to him from a third party. The question of whether the injured person will be compensated twice is then a domestic matter between the injured person and the third party. But there is some barrier of established doctrine which prevents such an answer in our law. We are firmly committed to regarding medical expenses as special damages. Where the injured person has never been and will never be under a legal liability to pay he cannot recover for he cannot show "expense"."

While endeavouring not to lose sight of the decision in Blundell v. Musgrave (supra), the article formulates certain rules which may be summarised as follows:-

(1) If the injured person is legally liable to pay charges they constitute a proper item of damages. Provided that when liability arises only if injured person is successful, the charges are not a proper item of damages.

(2) If there is any such legal liability it is irrelevant whether the charges will be paid by a third person or will be refunded if paid by injured person or whether the debt to the third person has been waived.

(3) Where a third person on fulfilment of a legal duty has provided medical treatment for the injured person which he cannot recover, the third person may maintain a separate action against the tortfeasor.

(4) Impairment of earning capacity is a proper item for damages and is not to be measured by regard to any payment received by an injured person from an outside source. Whether the injured person retains any benefit is between him and the outside source.

(5) Similarly, in measuring compensation for pain and suffering or shortened expectation of life, the payment from an outside source is irrelevant. Whether the injured person retains such benefit is between him and the outside source.

Although not properly within the ambit of the topic under discussion, the Commission feels there is a real need for more certainty in this field of damages. If recipients of this working paper expound their views and some degree of unanimity becomes apparent in the replies received, a recommendation to the Honourable the Minister may be formulated.

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SUGGESTED AMENDMENTS

Repeal of and new s.15C. The Principal Act is amended by repealing s.15C and inserting in its stead the following section:-

15C. 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 -

(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) a sum paid or payable as a gratuity -

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

Amendment to s.15D. Section 15D of the Principal Act is amended by omitting subsection (2) and inserting in its stead the following subsection:-

(2) Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person -

(a) shall not include any damages for his pain or suffering, or for any bodily or mental harm suffered by him, or for the curtailment of his expectation of life;

(b) shall not include any exemplary damages;

(c) in the case of a breach of promise to marry shall be limited to such damage, if any, to the estate of that person as flows from the breach of promise to marry;

(d) where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included.

COMPARABLE STATUTES OF OTHER AUSTRALIAN STATES

A. Equivalent to ss. 12 et. seq. - Dependants claim under Fatal Accident provisions

N.S.W.	Compensation to Relatives Act 1897-1953, vol. 2, p. 655
VICTORIA	Wrongs Act 1958, No. 6420, vol. 8, p. 1105
TASMANIA	Fatal Accidents Act 1934, vol. 2, p. 536
S.A.	Wrongs Act 1936, vol. 8, p. 750
W.A.	Fatal Accidents Act 1959.

B. Equivalent to ss. 15D et. seq. - Survival Acts

N.S.W.	Law Reform (Miscellaneous Provisions Act) 1944, vol. 6, p. 188 (see s. 2(2)(d), p. 190)
VICTORIA	Administration and Probate Act 1958, No. 6191, vol. 1, p. 49 (see s. 29(2)(c), p. 62)
TASMANIA	Administration and Probate Act 1935, vol. 1, p. 23 (see s. 27(3)(d), p. 35)
S.A.	Survival of Causes of Action Act 1940 (see s. 3(a), p. 313)
W.A.	Law Reform (Miscellaneous Provisions) Act 1941 (see s. 4(2)(d), p. 121).