SOUTH AUSTRALIA

TWENTY-SEVENTH REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

RELATING TO THE FACTOR OF THE REMARRIAGE OF A WIDOW IN ASSESSING DAMAGES IN FATAL ACCIDENTS UNDER THE WRONGS ACT

1972

The Law Reform Committee of South Australia was established by Proclamation which appeared in the *South Australian Government Gazette* of 19th September, 1968. The present members are:

THE HONOURABLE MR. JUSTICE ZELLING, C.B.E. (*Chairman*).

MR. B. R. COX, Q.C., *Solicitor-General.*

MR. R. G. MATHESON, Q.C.

MR. K. P. LYNCH.

MR. J. F. KEELER.

The Secretary of the Committee is Miss J. L. Hill, c/o Supreme Court, Victoria Square, Adelaide, South Australia.

TWENTY-SEVENTH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO THE FACTOR OF THE REMARRIAGE OF A WIDOW IN ASSESSING DAMAGES IN FATAL ACCIDENTS UNDER THE WRONGS ACT

To:

The Honourable L. J. King, Q.C., M.P.,
Attorney-General for South Australia.

Sir,

You have referred to us for consideration the problem which arises in relation to the assessment of damages in fatal accident cases under the Wrongs Act where one of the plaintiffs is, as is usually the case, the widow of the deceased.

The Court is at present required by a long series of authorities to take into account in reduction of the damages the possibility of the widow's remarriage. In the first claim under Lord Campbell's Act 9 & 10 Vic. c. 93 *Ainsworth* v. *The South Eastern Railway Company* 11 *Jurist* 758 Mr. Baron Parke directed the jury to assess the damages as if only a wound had been inflicted and accordingly the question of the widow's remarriage did not arise on such a direction. So too Chief Baron Pollock said in *Gillard* v. *Lancashire and Yorkshire Railway Company* 12 *L. T.* 356—

> "This Act (Lord Campbell's Act) enables them (i.e. the wife and family) to recover that which the deceased would himself have sued for had the accident not terminated fatally.

Again, of course, the remarriage of the widow would be completely irrelevant upon such a construction of the Act.

In *Dalton* v. *The South Eastern Railway Company* 27 *L.J. C.P.* 227 decided in Easter Term 1858 Mr. Petersdorff who appeared for the defendant and whose name appears in a number of the early cases under Lord Campbell's Act opened his argument as follows:—

> "The principle upon which the damages in actions under this Statute are to be calculated has never yet been clearly laid down."

However it was decided in *Blake* v. *The Midland Railway Company* 18 *Q.B.* 93: 21 *L.J. Q.B.* 233 that the Statute did not continue the old right which the party injured had but gave a substantive right of action for the persons named in the Statute and this was held to be the correct interpretation of the law in the Exchequer Chamber in 1863 in *Pym* v. *The Great Northern Railway Company* 32 *L.J. Q.B.* 377. Once that principle was established, clearly the question would arise as to one of the contingencies of life being the remarriage of the widow. No doubt in the early days as everything was left at large to the jury, and cases were few, largely arising out of railway accidents, no great particularity in the charge to the jury was required. They were simply asked to do what was fair and reasonable. A more sophisticated approach came for the first time in *Rowley* v. *The London and North Western Railway Company* (1873) *L.R.* 8 *Exch.* 221: 42 *L.J. Exch.* 153 where a solicitor was killed and actuarial evidence was introduced apparently for the first time. The trial Judge Chief Baron Kelly asked counsel for the plaintiff "Are you going to call an actuary" which may suggest that actuaries had already been called in previous cases. On the other hand

as the Lord Chief Baron had with him tables relating to life expectancy it may be that he had made a special study of this branch of the law. In any case the Court of Exchequer Chamber reversed him on the ground that allowance was not made for the various contingencies of this life, including the health of the deceased and the health of the widow. It would appear that the first case in which the wife's claims were specifically challenged, though on a different ground namely that she was living in adultery and therefore entitled to nothing, was in *Stimpson* v. *Wood in* (1888) 57 *L.J. Q.B. page* 484 where the Divisional Court upheld the contention and discharged the verdict for £5.0.0. in favour of the plaintiff. No doubt the coming of the motor car made the matter become of importance for the first time although as late as 1906 in the Eighth Edition of *Addison on Tort* there is no detailed discussion on this subject. However the law is now well settled that the remarriage of a widow is a factor to be taken into account in the assessment of damages on a claim for a fatal accident.

However, in recent years a reaction has set in against this which is best set out in the judgment of Mr. Justice Phillimore in *Buckley* v. *John Allen & Ford (Oxford) Ltd.* 1971 1 *All E.R.* 539 *at* 542 where the learned Judge said—

> "Secondly, it is said that I must take into account the prospects of the plaintiff's remarrying, and must make a suitable deduction on the basis that she would be supported by her new husband. Counsel for the defendants did not ask her any question on this subject, an example which was naturally followed by her counsel. Having, however, abstained from asking her anything about it—and I can well understand his not doing so—counsel for the defendants now says, and it is the conventional argument, that any woman with the sum she is likely to receive is likely to remarry. He suggested that she may not marry for perhaps seven years, but that she is likely to do so then because the children are older and largely off her hands. He says that she is an attractive woman. In this state of affairs I am wondering what is the evidence on which I must act. Am I to ask her to put on a bathing dress; because the witness box is calculated to disguise the figure? Equally, I know nothing of her temperament, I know nothing of her attitude to marriage. She may have some very good reason, perhaps religious reason, for saying that she never will remarry. She has had no chance to express her views. Has her marriage been an entirely happy experience? I do not know. On the other hand she may already be engaged to be married. On what do I assess the chances and fix the sum to be deducted from her compensation? After all, whatever men may like to think, women do not always want to remarry. There are quite a lot of rich widows who prefer to remain single, and I confess that I am not sorry to avoid this problem. Is a judge fitted to assess the chance or chances or wishes of a lady about whom he knows so little and whom he has only encountered for twenty minutes when she was in the witness box, especially when no-one has broached the topic with her? Judges should, I think, act on evidence rather than guesswork. It seems to me that this particular exercise is not only unattractive but also is not one for which judges are equipped. Am I to label the plaintiff to her face as attractive or unattractive? If I have the temerity to apply the label, am I likely to be right? Supposing I say she is unattractive, it may well be that she has a friend who disagrees and has looked below the surface and found

a charming character. The fact is that this exercise is a mistake. If there are statistics as to the likelihood of a widow remarrying based on her age and the amount of her compensation, just as there are statistics on the expectancy of life, they might provide a yardstick for deduction in the absence of evidence of some special factor in the individual case. In the absence of some such yardstick I question whether, having decided what she has lost by the death of the deceased, any judge is qualified to assess whether or when she is likely to remarry. Supposing she marries a man who is only concerned to spend her money? Is he to be treated as her new support in place of her former husband? I venture to suggest it is time judges were relieved of the need to enter into this particular guessing game. In this particular case I make no deduction for this lady's chances of remarrying."

Unfortunately this suggested reform of the law did not take root and the Courts have gone on ever since taking a widow's chances of remarriage into account. The report of the Winn Committee on Personal Injuries Litigation in July 1968 says at paragraphs 378 and 379 that the law should be changed so as to obviate the need for a trial Judge to assess damages taking into account the widow's prospect of remarriage.

In Ontario and possibly in the other Provinces of Canada it would seem that the law is different from that in Australia, in that the defendants must satisfy the Court and the burden is on them to do so, that the widow or children will gain some financial advantage or future benefits from the widow's remarriage before any deduction can be made in respect thereof: see *Lefebvre* v. *Dowdall and McLean* 46 *D.L.R. 2d.* 426.

However the impossibility of really being able to make any proper estimate of a widow's chances of remarriage or of benefit from the second marriage even assuming that this ought to be a ground for reduction of damage can well be seen from two cases, one in Alberta and one in our own Supreme Court. In the first which was in our own Supreme Court *Disher* v. *The Liverpool London & Globe Insurance Co. Ltd.* the plaintiff, the widow of a dentist, was aged 31, good looking and a well-known television star. When the matter came before Mr. Justice Reed not unnaturally counsel urged strongly upon him the necessity for making some deduction for her prospects of remarriage. His Honour in a judgment delivered on 27th April, 1960 and reported in the Law Society's Judgment Scheme Reports of that year at page 153 refused to make any such deduction. If he had had the tables in front of him which are now contained in 45 *A.L.J. at page* 160 he would have seen that widows aged 31 have an average duration of widowhood before remarriage of 7.6 years. In fact this widow has only recently remarried after some thirteen years' widowhood. Further there would have been a strong argument put to the Judge on the tables that 7.6 years is the average for such widows and that a widow with the looks and prospects of the widow in that case was very much more likely than the average widow to remarry quickly. In fact, had His Honour acceded to those submissions, clearly a very considerable injustice would have been done to the widow concerned.

The second is the rather remarkable case of *Mogck* v. *Waldum* (1965) 52 *D.L.R. 2d.* 322 where the plaintiff widow remarried but separated from her second husband after six weeks and he gave her no maintenance. It was argued that she ought to take maintenance

proceedings to compel him to maintain her but this found no favour with the Court although it might have done so at an earlier stage when voluntary action even by third parties went in reduction of the tort feasor's liability. Probably the most blatant example of that is in *Goodger v. Knapman* 1924 *S.A.S.R.* 347 where the deceased was an employee of the Municipal Tramways Trust and a voluntary levy on the deceased's fellow employees of the Trust produced £150, a very large sum in those days. Chief Justice Sir George Murray in a judgment which can only be described as astounding, allowed that amount to go to the wrongdoer or his insurance company as the case may be in reduction of the amount which the widow could otherwise have obtained as damages. That is, of course, no longer the law in South Australia: see *Francis v. Brackstone* 1955 *S.A.S.R.* 270. However this still does not get over the problem that if the separation had occurred after the damages had been assessed, and the remarriage had been taken into account in reduction of damages, the widow would have been grievously under compensated. One of the members of this Committee had reason to consider the same matter in *Public Trustee and Another* v. *Paniene* judgment delivered 15th July, 1971 and said at pages 5 and 6 of the judgment—

> "The other deduction suggested was for the plaintiff's remarriage. From the Tables found in 45 A.L.J. 161, on the remarriage of widows, 49% of widows aged 53 do remarry after an average time of widowhood of 6.4 years. I must confess that I find the strictness of Phillimore J., as he then was, set out in *Buckley* v. *John Allen & Ford (Oxford) Ltd.* 1967 1 *A.E.R.* 539 *at* 542, very easy to comprehend, although the result has, of course, been reversed in a later judgment. I think that the suggested deduction, apart from being abhorrent in treating women like cattle to be appraised, is also totally illogical. It is agreed that a woman's revived capacity to earn is not deductible. Why should her revived capacity to marry be deductible? It is well settled that under the Wrongs Act that (solatium apart) only economic factors enter into the the assessment. Why should her capacity to work as a housewife and be kept by her husband be treated any differently from her capacity to earn her living by doing any other work. However, I am bound by the authority of the High Court of Australia in *Carroll* v. *Purcell*, 107 C.L.R. 73 at page 79, to hold that I do have to consider this ground of deductibility notwithstanding what I have said, and on this subject I also refer to the judgment of Moffitt J.A. in *Schiffmann v. Jones*, 92 W.N. N.S.W. 780, at pages 787-788, and to the judgment of Isaacs J. in *Grant* v. *Pepper*, 92 W.N. N.S.W. 938 at 940-942.
>
> In this case, having seen this woman in the box, I am of the opinion that any deduction on this score should be minimal."

We think that the deduction should be abolished altogether, except where the widow has actually remarried and there is actual evidence, extending over a longer period than in Mogck's case, of what the alteration to her position has actually been.

The British Parliament has actually gone further and in the Law Reform (Miscellaneous Provisions) Act 1971, 1971 Statutes c.43 it is provided by Section 4(1)—

> "In assessing damages payable to a widow in respect of the death of her husband in any action under the Fatal Accidents

Acts 1846 to 1959 there shall not be taken into account the remarriage of the widow or her prospects of remarriage."

It will be seen that the Act prevents an *actual* remarriage from being taken into account but we are inclined to think that provided satisfactory evidence can be adduced both of the remarriage and of the quantum of benefits which the remarriage will bring to the widow then her damages but not those of the children should be reduced for this reason. The reduction of the amount to be divided, which therefore affects the amount which the children should get, because of some benefit to the widow is a common fallacy in fatal accident cases and one can see it in Disher's case itself where the whole estate went to the widow and was deducted and after that the amount was apportioned. If the children obtained no benefit either from the estate or from the remarriage then whatever the widow gets by way of estate or remarriage (except insofar as in either case the expectations may benefit the children) ought to be completely disregarded in relation to the children. It may well be this difficulty which caused the English Parliament to remove the whole sphere of remarriage of a widow from the calculation of damages in fatal accident cases.

However, our recommendation is that the prospects of remarriage be completely removed by Statute as a factor in assessing damages in fatal accident cases and that actual remarriage should be considered in relation to the widow only but not the children in cases where there is specific evidence (the onus in this matter lying on the defendant) to satisfy a Court that she has in fact benefited financially by the remarriage. This is a somewhat illogical compromise. As the judgment of *Public Trustee* v. *Paniene* shows the widow's revived capacity to work is not taken into account, and why her revived capacity to do housework for a second husband should be so taken into account is not logical but it may well be that what we suggest is a reasonable answer to the problem even though it cannot be defended on grounds of strict logic.

We have the honour to be

HOWARD ZELLING

K. P. LYNCH

JOHN KEELER

The Law Reform Committee of South Australia

REMARRIAGE OF WIDOW IN FATAL ACCIDENT CLAIMS

Minority Report

Our disagreement with the reasoning and recommendation of the other members of the Committee on this matter is so fundamental that we think it better to set out our own views in a separate report.

The duty of a court, in awarding damages to a widow under Part II of the Wrongs Act in respect to her husband's death is to give her "such damages as it thinks proportioned to the injury resulting from such death to (the widow)": section 20 (2). It has therefore to assess the pecuniary loss to the widow flowing from her husband's death. This is usually done by reckoning her immediate everyday loss at so much a week, converting this actuarially into a lump sum to represent the total loss for the joint lives, and then adjusting this figure to allow for the so-called contingencies of life. Making a contingency allowance is not confined to fatal injury cases. It is inseparable from the assessment of damages in permanent-injury accident claims, where the factors involved will be such things as the plaintiff's health, his work and promotion prospects, his inclination and ability to work beyond the normal retiring age—and frequently, be it noted, the prospect of the plaintiff marrying or of his or her present spouse dying. In the case of a widow's claim, the contingencies will be anything which was likely to have affected her husband's income, had he lived, during their joint lives, and anything resulting from her husband's death which does or may provide, in money terms, some mitigation of her immediate financial loss. There may be included in the latter category, depending upon the particular circumstances of the case, some allowance for whatever she may have received from her husband's estate, and some allowance—but only if the evidence warrants it—to represent her prospects of remarriage. By this kind of adjustment the court arrives at an award of damages, which, in accordance with established principles, "are given to compensate the recipient on a balance of gains and losses for the injury sustained by the death" (*Davies* v. *Powell Duffryn Associated Collieries Limited* (1942) *A.C.* 601 *at* 623).

It will be seen, then, that, with respect to all of these contingency items, the judge must look into the future and, relying as best he can on the evidence and the ordinary experience of mankind, try to arrive at an award which will do justice to both parties. Unless there is a special law requiring him to do so, he should not ignore anything which has had, or may have, an important effect upon the plaintiff's financial position. It is a fact of life that many widows marry again, and of these some will be worse off financially than they were during their first marriage, others will be better off, and the economic position of the rest will be more or less unchanged. No-one, so far as we are aware, denies these things or their logical relevance to the assessment of a widow's prospective loss. Such objections as there have been are directed rather to the difficulty of making an accurate appraisal of a widow's remarriage prospects, and the risk of doing an injustice to the widow should the court's view turn out to be wrong. It has also been said to be distasteful having to reckon the likelihood of a person remarrying. Phillimore J. evidently thought so: *Buckley* v. *John Allen and Ford (Oxford) Limited* (1967) 2 *Q.B.* 637.

Whether or not it is a disagreeable thing to have to assess the likelihood of a person marrying in the future will depend, of course, upon the attitude of the individual judge. That it is a relevant consideration in many damages cases, and not only widow's claims, is undeniable.

As far as its difficulty is concerned, it seems to us to be of the same character as a great many other conjectural questions which a judge must answer before he can arrive at a just solution to a claim, and we can see no ground in principle or in policy for singling out the factor of remarriage for special exemption. The widow's claim under Lord Campbell's Act has now had a fairly long history. Out of the countless judges in England and Australia who have assessed damages in such matters or have sat in appellate courts to review the awards of others, only two, so far as we are aware, have questioned the propriety of taking this factor into account where the evidence warrants it—Phillimore J. in the case cited, and Zelling J. in *Public Trustee* v. *Paniene* (L.S.J.S. 15th July, 1971). With great respect, we prefer, as consistent with principle and with the need to do justice to both sides, the attitude exemplified by Willmer L.J. in *Goodburn* v. *Thomas Cotton Limited* (1968) 1 *Q.B.* 845 (the case which disapproved Phillimore J.'s dicta in Buckley's case)—

> "I am afraid that I find myself unable to agree with the approach of Phillimore J. to this matter. It may, it is perfectly true, be distasteful for a judge to have to assess, and to put a money value on a widow's prospect of remarriage; but it seems to me that, in assessing the damages to be paid under the Fatal Accidents Acts, 1846 to 1959, it is necessary to take into account all the circumstances of the case, and there can be no doubt that one of the most important circumstances is the likelihood or otherwise of the widow remarrying. Distasteful though it may be, the task must be faced of assessing that likelihood. I venture to think that, difficult as the problem is, it is really no different in principle from the problem facing any judge where, in a personal injuries action, he must necessarily gaze into the future and assess the probabilities as to the injured person's future earning prospects". (850-1).

The stand which we take as a matter of legal principle is supported, we think, by the following considerations:—

> (1) There can be no doubt that the beneficial economic consequences to a widow of marrying again may be very considerable and may completely obliterate the day to day financial loss which resulted from her first husband's death. Under the recent English amendment (Law Reform (Miscellaneous Provisions) Act, 1971, section 4), the fact that the plaintiff has just married, or is about to marry, a millionaire must be ignored when assessing the financial loss resulting from her first husband's death. We can see nothing to commend such a legislative retreat from reality. The modified proposal made in the majority report would prevent a court having regard to the prospects of a marriage in the future, but would permit it to take into account a remarriage which has already taken place when there is actual evidence, which the majority report envisages would extend over a period of more than six weeks, of what the alteration to the plaintiff's position has actually been. This seems to us, with respect, to be a very unhappy compromise. Apart from the premium which it puts on delaying the hearing and the doubtful practicability of the qualifying words (should the defendant be given an adjournment to enable the court to see how the marriage works out financially?), it will simply allow our hypothetical widow to tell the court that she has not yet married her millionaire, because her lawyer has advised her not to, but that she proposes to do so as soon as

judgment has been entered in her favour and the time for appeal has expired.

(2) It is important to bear in mind that no judge is *obliged* to make any deduction for the remarriage contingency, and in many cases he will not do so. It is not suggested in the majority report that judges are in the habit of making excessive allowances under this head, and any judge who did so would no doubt be put right on appeal. We ourselves know of only one case where it has been suggested that a judge made an excessive or improper deduction for the contingency (*Schiffmann v. Jones,* (1970) 70 S.R. (N.S.W.) 455, where the widow's damages were increased on appeal), whereas, in practice, we have known of a number of cases where the judge has made little or no deduction, and the widow has happily remarried within a short time of the judgment. The way judges approach all contingency problems is typified by the judgment of Windeyer J. in *Parker* v. *Commonwealth* (1965) 112 C.L.R. 295—

> "Some deduction it might be suggested should be made at this point, as the husband's earnings might, because of ill health or from some other cause, cease before he reached the age of sixty-five—the contingency of his death is allowed for in the actuarial calculation. But as against a possible cesser of salary before sixty-five there is the important certainty of superannuation upon retirement—and from this the wife might be expected to benefit. There are other possibilities too such as some remunerative employment after sixty-five. Predictions of what the future might have held, if death had not occurred when it did, make the assessment of damages "proportionate to the injury resulting from death" very much a matter of speculation. Reliance upon calculations based upon average life expectancies, without regard to the seeming probabilities of the individual case, can give a specious appearance of certainty to an unsure conclusion. No two cases are alike. One matter that it is always said must be taken into consideration in cases of this kind is the possibility of a widow remarrying. As this Court said in *Carroll v. Purcell* (1), "This, for what it is worth in any particular case, has so long been regarded as having some value in the assessment of damages in fatal accident cases that it is profitless to debate how far the established rule is justified". The plaintiff said when asked about this: "Nobody can foretell the future. If I still feel the way I do now, I will never remarry". I was told by the actuary who gave evidence that about one-third of the women who become widows at the age of forty remarry at some time. This piece of information seems to me interesting but not very helpful. So much depends upon matters peculiar to the person and her circumstances, on various factors both emotional and material. However, I have taken the possibility of the plaintiff's remarrying into consideration along with various other prospects that counsel mentioned, or which have occurred to me, as telling one way or the other in the estimation of the pecuniary loss in this case. I have noticed, so far as seemed to me proper, a number of contingencies and probabilities and I have given a passing nod to what seemed to be mere possibilities. One thing weighs against another. I think, doing the best I can with imponder-

able data, that the pecuniary loss resulting from the death for the plaintiff and her daughter should be assessed at £15,000. But this is only one side of the account. From the loss must be deducted any pecuniary gains". (310-311)

The days have passed when a judge could make an automatic arbitary deduction for contingencies, whether in a fatal accident claim or a personal injury claim, and the approach of Windeyer J.—cautious unless the evidence pointing to another, and economically favourable, marriage is clear—is calculated to give a just result to both parties. Any attempt to deal with the matter on a statistical basis is plainly wrong (*Schiffmann* v. *Jones*, (1970) 70 S.R. (N.S.W.) 455).

(3) A legislative requirement that the court shall not take into account a widow's remarriage, or her prospects of remarriage, is really an instruction to the court to assess damages on the assumption that she will not marry. If this should be done for widows, it is difficult to see why it should not be done for other plaintiffs as well—a parent claiming under the Wrongs Act for the loss of his unmarried son's financial support; an orphaned child claiming by reason of his father's death; and the unmarried female plaintiff whose damages for personal injury are now often influenced by the likelihood of her marriage at some future time. It is hard to see why all these people should not share the arbitrary benefit now propsed for widows.

(4) The majority report, and the judgment of Zelling J. in *Public Trustee v. Paniene* (supra), place some reliance upon what is said to be the analogous situation of a widow's so-called revived capacity to earn occasioned by her husband's death. The High Court, in fact, has drawn a clear distinction between the two propositions. The widow's ability to work was always there and she could, like many other women, have worked during her marriage had she chosen to do so. (See *Carroll* v. *Purcell* (1961) 107 C.L.R. 73, at 79-80, 82-84).

(5) The English amendment follows the recommendation of the Winn Committee. The Committee's report gives no reason for its recommendation, other than to say that it was stimulated by representations from various lay bodies.

For these reasons, we are unable to support the recommendation of the majority of the Committee. It is not, of course, that we imagine that no hardship has *ever* resulted from a judge's mistaken assessment of the likelihood of a plaintiff widow marrying again. It is simply that, in this respect, it is in the same situation as all the other contingency features— future health, life expectancy, employment and promotion prospects, and so on. Perhaps the system is fundamentally imperfect and ought to be changed. Indeed we think there may be a lot to be said in favour of substituting a system of periodic payments, adjustable inter alia on remarriage or on failure of the second marriage, but such a system would obviously need a thorough examination. But the present proposal is not for a change in the system, but, rather, to make a special arbitrary provision in the case of one of many relevant contingency factors. We cannot see any good reason for doing this.

B. R. Cox

December, 1971.

R. G. Matheson