SOUTH AUSTRALIA

FIFTY-SIXTH REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

RELATING TO THE FATAL ACCIDENTS PROVISIONS OF THE WRONGS ACT 1936

1981

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:

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The Secretary of the Committee is Miss J. L. Hill, c/o Supreme Court, Victoria Square, Adelaide, 5000.

FIFTY-SIXTH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO THE FATAL ACCIDENTS PROVISIONS OF THE WRONGS ACT 1936

To:

The Honourable K. T. Griffin, M.L.C.,
Attorney-General for South Australia.

Sir,

You have referred to us for consideration and report two areas arising with respect to the operation of the Wrongs Act in the field of damages for fatal accidents, namely the width of the class of persons who may claim and the heads of damages which may be subsumed in any claim that a claimant makes.

We take it in general that in advising you we are to consider that the philosophy underlying Part II of the Wrongs Act is that a person entitled to claim should be entitled to maintain broadly the standards of living enjoyed by that person during the lifetime of the deceased as a result of whose death the claim is made. The first formulation of this philosophy in South Australia is in the judgment of Mayo J. in *Simpson v. Benbow L.S.J.S. 16th February, 1955* at page 10 as to the maintenance of a home for widow and children, but it has been most explicitly formulated by Stephenson L.J. in his judgment in *K. and Others v. J.M.D. Co. Ltd. [1976] Q.B. 85 at 97,* where he said speaking of a claim by children:—

> "The children are, broadly speaking, entitled to enjoy the same material standard of life as they would have enjoyed if their father had continued to support them, and the defendants are bound to pay them enough to maintain them in the enjoyment of that standard to which the financial support of their father has accustomed them."

Are there then some persons who are not presently entitled to claim under the Wrongs Act who should be so entitled? There are four such classes that we can discover and they are as follows:—

1. A posthumous child.

The practice in this State has always been to regard a posthumous child as a child who when he is born is a claimant under the Wrongs Act, because of the decision of Phillimore J. in *The George and Richard [1871] L.R. 3 Admiralty & Ecclesiastical 466 at 480-482.* As far as we know this judgment has never been challenged and it has certainly been acted upon by the profession in this State for many years as correctly stating the law.

If you wish to put the matter beyond doubt, an amendment to the Act would certainly do that, but we should be very surprised if after the lapse of over a century, the Act were interpreted in any other way than that in which it was interpreted by Phillimore J. Nevertheless we recommend that the matter be put beyond doubt by statute.

2. The second class are divorced wives who were in receipt of maintenance from their husband at the time of his death, whether the obligation to maintain arose from an order of the Court or by agreement. It seems a little anomalous that putative spouses are entitled to claim whereas a divorced spouse, who under the new legislation may be a person of spotless integrity who has been divorced under the twelve month "no fault" legislation now obtaining, should be precluded from making a claim under Part II of the Wrongs Act, where she was entitled to be maintained by the deceased immediately prior to his death. We

are unable to see any reason of policy why this anomaly should continue and we recommend that it be altered.

3. The third case is one which none of us have in fact encountered in practice, but which could happen, and that is the case of an adopted child, who knows or gets to know of the identity of his natural parent and whose natural parent either supported him or gave him reason to think that help would be forthcoming if needed. We realize that this cuts across the policy of the Adoption Act to cut all the ties with the natural parent and bind the child to the family of the adopting parents, but it does seem a little hard that if an adopted child knows the identity of his real parent and either was getting help or had a reasonable expectation of getting help from that parent the child is barred from claiming. Whatever the policy of the law may be, there are more and more cases in these days where children are actively curious about the existence and the identity of the true parent and more and more are getting to know who that true parent is and whilst we have no firm recommendation to make to you on this matter as it is new ground, we think it is a matter which ought to be considered by you. What we have said applies *mutatis mutandis* to pure adoptions and cases of *de facto* adoption.

4. We also consider that there should be a right of claim in the following cases:—*(a)* where the deceased was in *loco parentis* to a child or children *(b)* where the deceased had assumed responsibility for the bringing up of a child—these two cases may conceivably be covered by the present law but the matter should not be allowed to remain in doubt—and *(c)* children of a *de facto* relationship who have become accepted as children of the household—a category similar to that recognized in section 6 of the Commonwealth Matrimonial Causes Act 1959.

Turning now to the heads of of damage which ought properly to be claimed in an action under Part II of the Wrongs Act and which are not at present claimable, there is only one such area where we feel that the law needs amendment

At present claims by children for the loss of a parent and in particular of the mother are in general narrowly construed so as to exclude all claims which do not sound strictly in financial loss to the child from the death of the parent and in particular from the death of the mother.

We have been assisted in this matter by consideration of a recent report by the Law Reform Commission of Western Australia Number 66 and whilst we have not come to quite the same conclusions as those contained in that report, it is proper that we should make reference to it in reporting to you on this matter.

The area which we are discussing therefore involves the question of gratuitous services by the parent to the child or services which do not sound, immediately at least, in monetary value. The law has been developing in this area over recent years and before we make recommendations to you it is necessary that we should recapitulate the changes in the law which have in fact taken place.

These have taken place in three areas:—first, in relation to gratuitous gifts made by reason of the death of the deceased; second by reason of gratuitous services rendered to all kinds of injured plaintiffs but in the area which we are discussing in particular in respect of assistance rendered by persons in consequence of tortiously caused death; and thirdly in relation to the loss of the special love, care and nurture of parents which do not broadly speaking today sound in damages at all, but which we think ought to be the subject of a claim.

Dealing with these in turn:—the law in South Australia got off to a bad start in this matter with the judgment of Murray C.J. in *Goodger v. Knapman 1924 S.A.S.R. 347.* The deceased was an employee of the Municipal Tramways who alighted from a tramcar and was struck by a following motor car and as a result of the collision was killed. The deceased's fellow employees in the Trust made a voluntary levy amongst themselves in the sum of one hundred and fifty pounds to assist the widow. One hundred and fifty pounds was a very large sum in those days—more than a year's wages for an average workman. Murray C.J. held that that amount was deductible from the damages which the widow ought to receive. In other words, and in plain English, the Municipal Tramways Trust employees had given one hundred and fifty pounds as a subvention by way of gift to the tortfeasor. The decision was outrageous and it is only remarkable that it stayed in the law as long as it did. It was not followed, though without mentioning the previous decision, by Ross J. in *Francis v. Brackstone 1955 S.A.S.R. 270* where it was held that gratuitous payments of sick leave by an employer were not deductible from the plaintiff's damages. It was ignored on the facts by F.E. Piper A. J. (as he then was) in *Papowski v. The Commonwealth of Australia 1958 S.A.S.R. 293 at 295* where His Honour pointed out that there were various factors which might go to whether or not such a collection might be taken up among the workmates and therefore it was not foreseeable.

The proper answer had been given previously by the Lord Chief Justice of Northern Ireland in *Redpath v. Belfast and County Down Railway 1947 N.I. 167 at 175* where His Lordship said:—

> "In these circumstances commonsense and natural justice appear to me to rise in revolt against the proposition that the money so subscribed should be diverted from the objects whom the subscribers intended to benefit in order to be applied in reduction of the damages properly payable by the wrong-doer as compensation to the victims for their loss. Why, one may well ask, should the defendant's burden be lightened by the generosity of the public?"

There is no doubt that such a collection amongst fellow employees for the benefit of the widow or children of the deceased would not be held to be deductible from the damages payable by a tortfeasor today: see e.g. *Luntz Assessment of Damages (1974) pages 283-284.* In any event Parliament intervened in South Australia to put the matter beyond doubt here by inserting Section 20 (2aa) (ii) into the Wrongs Act by the amending Act 58 of 1958 Section 3.

The second line of cases deals with services gratuitously rendered to the plaintiff or here to a widow or children by reason of the death of their parent or husband. For many years the value of these services was not recoverable and went in subvention of the tortfeasor. The first breach in this reasoning was contained in the judgment of Paull J. in *Schneider v. Eisovitch [1960] 1 All E.R. 169 at 174* where the Judge held that it had to be shown first that the services were reasonably necessary as a result of the tort; secondly that the out of pocket expenses of the friends who rendered the services were reasonable; and thirdly that the plaintiff undertook to pay the sum awarded to the friend of friends. The question was further discussed by Diplock J. (as he then was) in *Gage and Another v. King [1961] 1 Q.B. 188* where he held that there had to be a legal liability to pay and in the absence of legal liability there was no right to claim. Taylor J. sitting in the High Court of Australia in *Wilson v. McLeay (1961) 106 C.L.R. 523* disapproved Schneider v. Eisovitch and held that there should be some allowance in the general damages for visitation of an injured girl by her parents as she was in hospital

many hundreds of miles from home and her injuries were serious. He referred to the unreported case of *Morgan v. Morgan and Hosking (1960) 104 C.L.R. 667 (note)* (an appeal to the High Court from the South Australian Supreme Court) where Ross J. in the Court below had allowed the expenses of constant visits by the parents to a hospital at Thebarton because the plaintiff was for all practical purposes a vegetable and that allowance was upheld in the High Court of Australia on appeal. A similar answer was given by Wild C.J. of the Supreme Court of New Zealand in *Cook v. Wright [1967] N.Z.L.R. 1034.*

However elsewhere in the common law world the law progressed more quickly. The fair and reasonable value of gratuitous nursing services rendered by a wife to a minor daughter was allowed by the Supreme Judicial Court of Maine in *Johnson v. Rhuda (1960) 90 A.L.R. Ann. 2d. 1314.* Similarly a plaintiff husband was entitled to recover for the cost of travel to visit a hospitalized wife and for telephone calls where the hospital was at a distance from the city where the husband and wife lived: see the judgment of Grant J. in the Ontario High Court in *Roos v. Myers Motors Co. Ltd. (1968) 68 D.L.R. 2d. 488.* A similar result was reached by a Full Bench of the High Court of Andhra Pradesh in *Anthaiah v. Dibbayya 1970 A.I.R. A.P. 380.*

This position was confirmed by the decision of the Court of Appeal in *Cunningham v. Harrison [1973] 3 All E.R. 463.* Lord Denning, M.R., said at page 469:

> "It seems to me that when a husband is grievously injured—and is entitled to damages—then it is only right and just that, if his wife renders services to him, instead of a nurse, he should recover compensation for the value of the services that his wife has rendered. It should not be necessary to draw up a legal agreement for them."

That decision injected a great deal of commonsense into the position. Previously to that, in South Australia at least, counsel came along to Court in every case armed with an agreement more or less formal in which the plaintiff agreed to pay the cost of the services gratuitously rendered to him. Such agreements were invariably drawn up long after the event and obviously only when the plaintiff had had the benefit of the advice of counsel. Such an artificial state of affairs was no credit to the law. *Cunningham v. Harrison* was further extended by a differently constituted Court of Appeal in *Davies v. The Mayor, Aldermen and Burgesses of the Borough of Tenby [1974] 2 Ll.L.R. 469 at 473* where the Court held that even where a wife had not been doing paid work before but only domestic duties all extra attendance on the injured husband called for compensation: see also an article on this point in *1974 Cambridge Law Journal 40—Gratuitous Services and Damages—a Full Circle* by Professor Jolowicz. The rules were further extended by another Court of Appeal in *Donnelly v. Joyce 1974 Q.B. 454* where it was held that even though the person supplying the services had no direct cause of action against the defendant the amount was nevertheless recoverable. In that state of the law the Full Court of this State followed *Cunningham v. Harrison* and *Donnelly v. Joyce* in *Beck v. Farrelly (1975) 13 S.A.S.R. 17.* Nevertheless the matter was not regarded as free from doubt and it divided the Full Supreme Court of Victoria in *Pratt and Goldsmith v. Pratt [1975] V.R. 378.* Yeldham J. of the Supreme Court of New South Wales held that the fact that services were provided gratuitously in that case by the grandmother to grandchildren was irrelevant in the case of a claim for the death of the father: see *Thompson v. Mandla [1976] 2 N.S.W.L.R. 307* and His Honour extended what he said in that case to the case of illegitimate children in the case of *Johnson v. Ryan [1977] 1 N.S.W.L.R. 294.* The

whole matter was finally set at rest, at least as far as Australia is concerned, by the judgment of the High Court of Australia on appeal from the South Australian Supreme Court in *Griffiths v. Kerkemeyer (1977) 15 A.L.R. 387 at 391* Gibbs J., 403 Stephen J., and 413 Mason J.

We have gone through these cases in detail to show how recent the development of the law is and in which direction the law is tending.

We turn then to the third of these problems and one where we think there should be an amendment to the Wrongs Act, namely the case of a child who is deprived of the benefit of parental tuition and supervision and loving care which does not sound immediately in monetary damages. This normally means the loss of the mother, but of course it can also derive from the loss of a father, or indeed of a grandfather or grandmother if it is a grandparent with whom the children are living and the grandparent is tortiously killed or of a person in loco parentis. It has been the law for many years in Canada that substantial damages are recoverable for the loss of a parent, the disruption of a home, the failure to receive sound and adequate guidance understanding and maternal or paternal interest during the child's minority, and the resulting impairment of development. It was first established by the Supreme Court of Canada in *St. Lawrence and Ottawa Railway Company v. Lett (1885) 11 S.C.R. 422.* The passage from which the above summary was taken is from the judgment of Haines J. in the Ontario High Court in *Vana v. Laxarewicz (1964) 45 D.L.R. 2d. 574 at 578.* A similar authority to the same effect is found in the judgment of Patterson J. of the Nova Scotia Supreme Court in *Walter and Another v. Muise (1964) 48 D.L.R. 2d. 734. Vana v. Laxarewicz* was approved by the Supreme Court of Canada on appeal under the name of *Vana v. Tosta* in *(1967) 66 D.L.R. 2d. 97.* It is true that the formal order of the Supreme Court was to allow an appeal from a judgment of the Court below, but that was only by increasing the amount of damages and had no bearing on the acceptance by the Supreme Court of Canada of the accuracy of the law as set out in *Lett's case.*

The first case of which we are aware in which the problem of family disruption due to an accident was discussed in Australia is in the judgment of Evatt C.J. of the New South Wales Supreme Court in *Polley v. O'Donnell (1960) 77 W.N. N.S.W. 374 at 376* where His Honour was dealing with the slightly different topic of the effect of injuries on the destruction of personal and family happiness and thought that this should be reflected in an award of damages.

The first time that the applicability of the Canadian cases were argued in this country, so far as we are aware, is in the argument of two members of this Committee to the Full Court of this State in *Hamlyn v. Hann and Heagney (1967) S.A.S.R. 387* where the argument was that the Canadian cases should be followed. They reserved the point for full argument in the High Court of Australia, realizing that the Full Court were bound by previous authority, in case the matter went on appeal to the High Court. In fact the appeal to the Full Court was successful on monetary grounds and no further appeal was taken to the High Court of Australia.

The next alteration in the law came from the judgment of Tasker Watkins V.C.J. in *Regan v. Williamson [1976] 2 All E.R. 241* where the Judge held that the word "services" in relation to the value of services of a deceased wife to children should not be construed too narrowly by limiting it to the services of a housekeeper and that account should be taken of the fact that a wife does not work set hours but is in constant attendance on her family and is able to give instructions to children on all matters essential to their upbringing. The law was extended a little

further by a judgment of Mr. Brian Neill Q.C. sitting as a Deputy Judge of the Queen's Bench Division in *Mehmet v. Perry and Another [1977] 2 All E.R. 529* where the Judge held that children were entitled to recover as part of their damages for loss of their mother's services a sum for the loss of her personal attention to them as a mother as distinct from her services to them as a housekeeper: see page 537f.

The matter came again before the Full Court of this State in *Fisher v. Smithson (1977) 17 S.A.S.R. 223* where all three Judges of the Supreme Court felt that damages should be given for loss of services whether or not the loss is reflected in financial terms, but were constrained by authority to hold otherwise. One of the members of this Committee said at pages 240-241:—

> "An assessment of damages for the loss of a mother cannot be confined to the loss of such money as she earned or derived from investment, which formed part of the household fund, the whole or part of which could be used for the children's benefit. For example, most mothers have the role of seeing that their children properly apply themselves to study. It is their mother who makes sure that they do their homework notwithstanding other countervailing attractions, such as television. She goes through their work with them and sees that it is being carefully and sufficiently done by the child. A step-mother, however well intentioned and anxious to help her step-children, normally takes several years to attain that position of authority over them, if she ever does. Meanwhile habits of study may be lost or reduced in value. The child may not do well in education for a year or more, may lose heart and may lose confidence in his or her own ability to cope. All of these things reflect themselves in our society in hard cold cash. If a child gets superior educational attainments, it normally follows that his or her ability to obtain and hold down a good, well-paying position is increased, as is also the range of jobs over which they have a choice. Similarly the speed and also the range of promotion may depend wholly or largely on the possession of, or lack of, the requisite degree or diploma or trade qualification. These and other similar matters constrain me to think that the question of how much should be allowed to a child for the loss of his or her mother has not even yet been fully thought out and that awards of damages in this area should reflect all the loss which comes to a child from the death of a mother which may ultimately sound in monetary loss to the child."

Bray C.J. at pages 237-238 held that the claim should not be restricted to financial loss and Hogarth J. agreed with him at page 239. Zelling J., the third member of the Court, would have gone further and would have adopted the Canadian decisions as an accurate statement of the law if the authority of higher courts had permitted that course to be adopted.

We feel that it should not be a case of waiting until this matter goes to the High Court of Australia, which is the only court able to say whether the Canadian decisions ought to be followed here, for that may not happen for some time depending on the vagaries of case law. The fact is that the loss of a parent and particularly of a mother, is a catastrophic event in the life of a growing child. To restrict the amount of damages to financial loss or the loss incurred in providing the household services which the mother would otherwise have provided, is to fly in the face of common experience. Every person looks with gratitude and honour to the love affection and understanding of parents which enable a child to grow up in a happy and secure environment and to make the most of the talents with which he or she is endowed. To say that the shattering of that environment should be looked at only in terms of monetary loss,

and not in terms of the security which money may sometimes help to produce, at least in providing the wherewithal for the child to go as far as it possibly can in education, study, in sport, or in public activities of any kind, is to fail to recognise justly the loss which has really been sustained. The Western Australian recommendation is to provide for compensation for "loss of assistance and guidance" as a head of damage. They would however deal with this differently from what we recommend and would use this instead of solatium, which they reject, in cases of a deceased spouse, a deceased *de facto* spouse, parent of the deceased an unmarried child of the deceased or an unmarried person to whom the deceased stood in *loco parentis.*

We feel that it is sufficient for the purposes of this report if we recommend to you that a child be entitled to claim damages for the loss of all the advantages, financial and otherwise, which that child would have enjoyed if its parent, step-parent, grandparent with whom the child lived, or person in *loco parentis*, had stayed alive and not been killed by a tortfeasor and that the head of damage should enure to a child either as a child or grandchild of the marriage, as a child of a *de facto* marriage or a child in relation to whom the deceased stood in *loco parentis.*

Unlike Western Australia we would leave the solatium law as it is. It is well understood and it works well, but of course there is no solatium allowance for a child who loses his or her parent although solatium is paid in the converse case of the parent who loses a child. The reason for this presumably goes back to the Scottish law from which Napier C.J. made the original recommendations for solatium which were adopted by the Parliament of this State. However that anomaly will not matter if the head of damage which we recommend is placed on the statute book as an amendment to the Wrongs Act.

We should further point out that this report necessitates consequential amendment to Section 25 (1) *(b)* of the Wrongs Act.

We have the honour to be

HOWARD ZELLING
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