

**THE LAW REFORM COMMISSION OF HONG KONG**

**REPORT ON**

**DAMAGES FOR PERSONAL INJURY AND DEATH**

**(TOPIC 10)**

## **TERMS OF REFERENCE**

WHEREAS :

On 15 January 1980, His Excellency the Governor of Hong Kong Sir Murray MacLehose, GBE, KCMG, KCVO in Council directed the establishment of the Law Reform Commission of Hong Kong and appointed it to report on such of the laws of Hong Kong as might be referred to it for consideration by the Attorney General or the Chief Justice;

On 6 August 1982 the Honourable Attorney General and the Honourable Chief Justice referred to this Commission for consideration a topic in the following terms:

" *Damages in Civil Proceedings:*

*To consider the relevant law governing the award of damages in personal injury and death cases and:-*

- (1) *To make recommendations as to whether all or any of the principles contained in the Administration of Justice Bill 1982 should be adopted in Hong Kong.*
- (2) *To indicate whether, and if so what, further areas emerged during their deliberations as requires further consideration."*

At its Fifteenth Meeting on 26 November 1983 the Commission appointed a sub-committee to research, consider and advise on this topic.

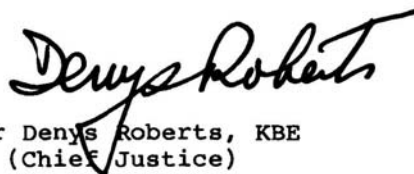
At its Twenty-sixth Meeting on 13 April 1984 the Commission received and considered the report of the sub-committee.

We have made in our report recommendations which will meet the problems described therein.

NOW THEREFORE DO WE THE UNDERSIGNED MEMBERS OF THE LAW REFORM COMMISSION OF HONG KONG PRESENT OUR REPORT ON DAMAGES FOR PERSONAL INJURY AND DEATH



Hon Michael Thomas, QC  
(Attorney General)



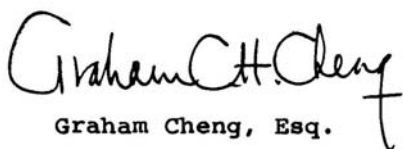
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Hon Mr Justice Fuad  
(Justice of Appeal)



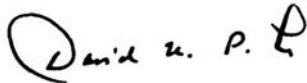
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Dated this 5th day of October 1984.

# THE LAW REFORM COMMISSION OF HONG KONG

## REPORT ON

## DAMAGES FOR PERSONAL INJURY & DEATH

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# Chapter 1

## Introduction

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1.1 The foundation of Hong Kong's system of accident compensation is the law of negligence. An accident victim can recover damages from the person who caused the accident (or that person's insurers) if the victim can prove that the accident was caused by that person's negligence. In addition to this general right of recovery there are certain statutory rights to compensation. The Employees' Compensation Ordinance and the Fatal Accidents Ordinance, for example, are the bases of two important rights to compensation.

1.2 From time to time it is necessary for these different types of compensation to be reviewed. Consideration may be given to an extension of the statutory rights, or to the way in which the different types of compensation inter-relate. In recent years the courts of Hong Kong have been particularly troubled by the possible duplication of awards in the case of fatal accidents. Similar problems have occurred in England and a Bill was introduced into Parliament as an attempt to resolve them. This was the Administration of Justice Bill 1982.

1.3 On November 10, 1982, the Law Reform Commission appointed a sub-committee with the following terms of reference -

To consider the relevant law governing the award of damages in personal injury and death cases and:

- (1) To make recommendations as to whether all or any of the principles contained in the Administration of Justice Bill 1982 should be adopted in Hong Kong.
- (2) To indicate whether, and if so what, further areas emerged during their deliberations as requires further consideration.

Initially the Topic was referred to as Damages in Civil Proceedings. However, on the recommendation of the sub-committee the name was changed to its current style of "Damages for Personal Injury & Death" as that title is seen as more appropriate.

1.4 The membership of the sub-committee is set out in Annexure 1.

1.5 Further information on the background to the 1982 Bill is given in Chapter 3.



1.6 We wish to place on record our gratitude to all those individuals and organisations who have assisted the sub-committee in its deliberations. In particular we wish to thank Mr. Nicholas Pirie and Mrs. Barbara Kaplan, both of the Hong Kong Bar, who attended many meetings of the sub-committee and gave us the benefit of their experience in this area of the law. We also thank all those persons who commented on the sub-committee Working Paper.

## Chapter 2

### Summary of work

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2.1 The sub-committee prepared a Working Paper, setting out the provisional views of the sub-committee.

2.2 The Working Paper was distributed free of charge to different individuals and organisations. A list of persons who received a copy is contained in Annexure 2. Recipients were invited to comment on the provisional views of the sub-committee. The response rate was very high and the comments most useful.

2.3 These comments were considered at several more meetings of the groups and of the full sub-committee. A copy of the Report was sent to a Law Draftsman who kindly prepared two draft bills to implement our proposals. These bills are contained in Annexure 3.

2.4 The Commission received the Report of the sub-committee at its 26th meeting on 13 April 1984. Consideration was given to the recommendations and at the 29th meeting on 5 October 1984 this report was signed.

## Chapter 3

### Background to this study

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3.1 The Bill referred to in paragraph (1) of our terms of reference has been passed by the United Kingdom Parliament and is now the Administration of Justice Act 1982. The text of the relevant provisions is set out in Annexure 4. The provisions of that Act relating to damages for personal injuries and fatal accidents represent the partial implementation of reports by the English Law Commission (Law Com 56) and the Pearson Commission (Cmnd No. 7054). We now propose to explain the background to those reports and the need for reform in this area of the law.

3.2 Where a person suffers personal injuries or is killed in an accident, compensation may be payable from a number of different sources. If the victims or his personal representative can establish that the accident was caused by another person's negligence he can recover compensation in the form of damages for negligence. The sum payable will depend on the extent of the injuries and of the financial loss suffered as a result, but it may be quite substantial. Where, however, it cannot be proved that the accident was caused by another person's negligence, or if that other person is uninsured and not worth suing, the victim will have to seek compensation elsewhere. He may, for example, be entitled to compensation under the Employees' Compensation Ordinance or from the Motor Insurers' Bureau. In some cases the victim will have no right to substantial compensation in respect of the injury but will instead have to rely on Social Welfare benefits or private charity.

3.3 In recent years, these various methods of providing compensation for personal injuries or fatal accidents have been the subject of much debate in those jurisdictions which apply the English common law. Some have argued for a thorough reform of the law to ensure that reasonable compensation is payable in all cases regardless of the cause of the injuries.

#### The English reports

3.4 In 1973 the English Law Commission published a Report on Personal Injury Litigation - Assessment of Damages (Law Com. 56). This Report did not consider whether any fundamental changes were necessary in the system of accident compensation but instead examined the principles governing the award of damages and considered whether certain archaic remedies should be abolished. Nineteen recommendations for change were set out in the Report.

3.5 No immediate action was taken to implement the Law Commission Report since in March 1973 a Royal Commission was established under the chairmanship of Lord Pearson to examine the whole system of accident compensation. The terms of reference of the Pearson Commission were 'to consider to what extent, in what circumstances and by what means compensation should be payable in respect of death or personal injury (including ante-natal injury) suffered by any person ...'

3.6 The Report of the Royal Commission was published in 1978 and contained 188 recommendations. Fundamental changes were suggested in certain areas. In the case of injuries caused by motor-vehicles, for example, a system of compensation was recommended which would not be based on the proof of negligence. Other proposals were less radical.

## **The Administration of Justice Act 1982**

3.7 The Administration of Justice Act 1982 implements some of the recommendations of the Law Commission and a few of those of the Pearson Commission. It does not purport to make any major changes to the law. As Lord Hailsham explained when introducing the Bill into the House of Lords, it contains 'relatively small reforms, all, in my judgment overdue, none, I hope, highly contentious, and certainly not from the party political point of view. It is intended to be a measure of good legal housekeeping.'

## **Summary of English reforms**

3.8 The changes made in the law may be summarised as follows -

- (i) the list of dependants who may claim in respect of a fatal accident has been extended;
- (ii) an award to a dependant is no longer to be reduced because of a benefit received by him as a result of the death of the victim;
- (iii) damages awarded in respect of a victim's personal injuries are to be reduced by any saving made by him as a result of his being maintained at public expense in a hospital or other institution;
- (iv) a system of provisional damages has been instituted;
- (v) certain actions for loss of services and society have been abolished;
- (vi) the right to damages for loss of expectation of life has been abolished;
- (vii) a claim for damages for bereavement has been created;
- (viii) the right to claim damages for loss of income in respect of any period after the victim's death ('the lost years') no longer survives that person's death.

3.9 It is now proposed to discuss the desirability of introducing these reforms in Hong Kong.

## Chapter 4

### The fatal accidents legislation

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4.1 At common law the wrongfully inflicted death of a person gave rise to no compensation, either in favour of the victim or of members of his family. A statutory remedy has, however, been given to certain dependants of the deceased who suffer the loss of economic or material advantages as a result of the death. If a bread-winner is wrongfully killed, therefore, a recognised dependant (e.g. the wife of the deceased) may claim for the loss of the financial support that the deceased would have given her had he not been killed. The basis of this claim, in Hong Kong, is the Fatal Accidents Ordinance ("FAO") (Cap 22; LHK 1980 ed) which is broadly the same as the English Fatal Accidents Act.

#### 1. The class of recognised dependants under the FAO

##### (a) *The present law*

4.2 In order to succeed in a claim under the FAO a person must prove both that he or she was financially dependant on the deceased and that he or she falls within the class of persons recognised as dependants. The persons who are recognised as dependants under the FAO are -

- (i) a wife or husband;
- (ii) parents and grandparents;
- (iii) children (including adopted and step-children) and grandchildren;
- (iv) brothers, sisters, uncles and aunts, and any issue of such persons.

'Wife' is defined as the lawful wife or, if there is more than one lawful wife, the lawful principal wife or (if there is no lawful principal wife) the lawful wives. Relationships based on marriage are treated as if they were direct relationships, and relationships of the half-blood are treated as full relationships. An illegitimate child is treated as the legitimate child of his mother and reputed father.

##### (b) *Reforms in England*

4.3 Section 3(1) of the Administration of Justice Act 1982 has extended the class of dependants who may claim under the Fatal Accidents Act. The extensions are largely a result of reform proposals made by the Law Commission and the Pearson Commission. They are as follows:-

(i) *former wife or husband*

4.4 The Law Commission pointed out (para 259) that a divorced wife who has been awarded maintenance may suffer serious hardship if her former husband is killed and she is not able to make a claim under the Fatal Accidents legislation. They therefore recommended that former wives and husbands should be within the definition of dependants. The Pearson Commission agreed with this recommendation and it has now become law in England. The provision applies not only to divorced persons, but to those whose marriage has been annulled or declared void.

(ii) *any ascendant or descendant*

4.5 This extension takes in great-grandparents and great-grandchildren (and persons even further degrees removed). A similar provision exists in Scotland under the Damages (Scotland) Act 1976. In recommending this extension, the Pearson Commission noted (para 403) that the likelihood of such claims is in practice remote but they saw no reason why they should in principle be excluded.

(iii) *a child of the family*

4.6 Under the 1982 Act a dependant includes -

*'any person (not being a child of the deceased) who, in the case of any marriage to which the deceased was at any time a party, was treated by the deceased as a child of the family in relation to that marriage.'*

This concept is borrowed from the Matrimonial Proceedings and Property legislation (applicable both in England and Hong Kong) and is wide enough to include children who have been de facto adopted and maintained by the deceased. This extension was recommended by both the Law Commission and the Pearson Commission, on the basis that the claim to damages for lost dependency of such a child was at least as strong as that of a stepchild.

(iv) *a person treated by the deceased as his parent*

4.7 This extension was not recommended by either Pearson or the Law Commission, but it seems to represent the converse of the provision relating to a child of the family. A child who has been de facto adopted may grow up and earn an income out of which he supports his de facto parents. In such a situation it seems right that, if he is involved in a fatal accident, those 'parents' should have a claim for lost dependency.

(v) *a person living as husband or wife*

4.8 The 1982 Act allows a claim for loss of dependency by - 'any person who -

- (i) was living with the deceased in the same household immediately before the date of the death; and
- (ii) had been living with the deceased in the same household for at least two years before that date; and
- (iii) was living during the whole of that period as the husband or wife of the deceased;'

It is also provided that in assessing damages in favour of this type of dependant there shall be taken into account the fact that the claimant had no enforceable right to financial support by the deceased as a result of their living together. This provision is undoubtedly the most controversial of the extensions to the class of dependants. Both the Law Commission and Pearson fought shy of making any recommendation in relation to cohabitants but the provision was accepted by Parliament.

**(c) Our recommendations**

4.9 We believe that it is common in Hong Kong for individuals to give financial support to persons who are not within the narrow class of dependants listed in the FAO. We therefore support the idea of extending the class of recognised dependants.

4.10 In addition to considering those relationships which have received recognition in the 1982 Act, we have considered whether there is a need in Hong Kong to recognise other relationships. We believe it is common for people in Hong Kong to support fairly distant relations, and friends of the family who are not related. This being so, we have considered whether the law should abandon the requirement of a family relationship between a dependant and the deceased and instead merely require proof of a factual dependency on the deceased. A precedent for such an approach exists in the Australian State of Victoria, where the Wrongs (Dependants) Act 1982 defines 'dependants' as -

*'Such persons as were wholly mainly or in part dependent on the person deceased at the time of his death or who would but for the incapacity due to the injury which led to the death have been so dependent.'*

4.11 This definition is wide enough to cover any person who was in some way dependent on the deceased before his death, whether they were part of his extended family or not. We are concerned, however, that this approach may be too wide. As a matter of principle we are not sure that claims should be allowed by any person for loss of dependency. For example, the deceased may have had a number of mistresses who received money from him. Should they be allowed to claim under the FAO? The factual dependency test would also enable a person to claim where there was a



commercial relationship between him and the deceased e.g. where they were partners. We do not think the FAO should be extended this far. In addition to the question of principle, there are practical objections to the factual dependency approach. With no limit to the number or type of claims that might be brought we foresee the possibility of the courts being swamped with claims and having great difficulty in distinguishing between genuine and bogus ones.

4.12 We note that the Law Reform Commission of Western Australia in its Report on Fatal Accidents (1978) rejected the broad approach being considered. The reasons given were as follows (para 3.11).

*'[This approach] would not only be very uncertain in its application, but would also radically change the present basis of the Fatal Accidents Act. Generally, the law has only afforded compensation to persons immediately injured by the wrongful act of another, and not to third persons who lose their livelihood, support or expected benefits from their association with him. The Fatal Accidents Act is at odds with this general principle, but can be justified on the grounds of the social desirability of protecting the family unit. Abolition of the family requirement in the legislation would bring in claims, including those based merely on commercial relationships, of an unpredictable range and number.'*

4.13 We find these arguments persuasive and we are of the view that a claim for loss of dependency should not be allowed merely on proof of a factual dependency.

4.14 We revert to the more orthodox approach of defining the relationships which should be recognised under the FAO. The 1982 Act extended the list of dependants to include -

- (i) a former wife or husband;
- (ii) any ascendant or descendant;
- (iii) a child of the family;
- (iv) a person treated by the deceased as his parent;
- (v) a person who had lived as husband or wife of the deceased for two years before the deceased's death.

The arguments in favour of the first two categories are set out above (paragraphs 4.4-5). The majority of those who responded to our Working Paper were of the view that these categories of dependants should also be recognised in Hong Kong. We agree with this view and accordingly recommend legislation to this effect.

4.15 The third category is defined as -

*"any person (not being a child of the deceased) who, in the case of any marriage to which the deceased was at any time a party,*

*was treated by the deceased as a child of the family in relation to that marriage."*

We regard this extension of the right to claim under the fatal accidents legislation of particular relevance to Hong Kong because such relationships are by no means uncommon. In particular, a person may regard someone as a child of his or her family as a result of a Chinese customary adoption which, if effected since January 1, 1972, is not legally valid. Under the present law such a child of the family is not entitled to make a claim under the FAO in respect of the death of an adoptive parent, unless the latter happens to be within one of the listed blood relationships (e.g. an uncle or aunt). Both the sub-committee and the majority of those who responded to the Working Paper considered that a child of the family should be able to claim. There is, however, one amendment to the English provision which we would recommend. Under Chinese customary law it is possible for an adult to be adopted and, where this occurs, we are of the view that the adopted person should be able to claim under the FAO in respect of the death of a "parent". It is arguable that the reference to "a child of the family" in the English provision would not apply to a person who was be "adopted" as an adult. We therefore recommend that the provision be amended so that the reference is instead to "a son or daughter of the family", which would cover the adopted adult.

4.16 The fourth category is "any person who was treated by the deceased as his parent." We regard this category as presenting some difficulty since, unlike the concept of a child of the family, it is new to the law and its meaning is far from clear. Given the imprecision of the phrase the courts might be faced with a difficult task in deciding what criteria must be satisfied before a person can be said to have treated another as his parent. our provisional view was that this category should be defined more closely and this view was shared by most people who responded to our Working Paper. In our view, the best way forward is to define this category in terms which are the converse of the definition of a child of the family. In other words, a claim under the FAO would lie in favour of

*"any person (not being a natural parent of the deceased) who, in the course of any marriage to which that person was a party, treated the deceased as a son or daughter of the family in relation to that marriage."*

In this way, the courts would not be troubled by a new concept. Moreover, in our view such a definition would cover those cases, including customary adoptions, where a claim should be available.

4.17 There is one further "adoptive" relationship the sub-committee considered which may not fall within the "child of the family" definition. In Hong Kong it is traditional and common for relationships to be created based on non-Christian Chinese customary "godding". This relationship arises when a person or married couple takes a godchild, often because there is no natural parent-child relationship. In many cases there is an existing blood relationship between godparent and child but this is not always so. As a

result, these relationships may not fall within any of the existing or proposed definitions of dependant. Members of the sub-committee took the view that these relationships should be recognised, since they are recognised by custom and the death of one party may deprive the other of financial support which was relied upon. However, the sub-committee found it difficult to define the relationship in any detailed way. The difficulty arises because there does not appear to be any consistent method of creating the "godding." The parties will usually address one another as "godmother" and "godson" etc, and there is sometimes a full ceremony in front of the gods, or a dinner hosted by the godparents, or gifts passing in both directions. These ceremonies are not, however, invariably observed. After lengthy consideration the sub-committee put forward two suggestions for dealing with this problem. The first is to extend the definition of "dependant" so as to include the brothers and sisters of the deceased's grandparents and their issue. This extension would help to catch those godding relationships which are based on a previous blood relationship. The second suggestion is to recognise Chinese godparents and godchildren directly by including them within the definition of "dependants". In view of the various ways in which these relationships are formed the definition could not go into detail but would be along the lines of "any godchild or godparent of the deceased according to Chinese custom." The sub-committee recognised the rather vague nature of such a provision but nevertheless referred it to the Law Reform Commission for consideration. The commission supported both suggestions.

4.18 The fifth category introduced by the 1982 Act, namely a person who had lived as husband or wife with the deceased, is undoubtedly the most controversial category. Cohabitees have also been given the right to claim loss of dependency in several Australian states. We recognise that attitudes to cohabitation may be different in Hong Kong from those in England or Australia. Nonetheless there are people in Hong Kong who live together as man and wife, and the hardship inflicted on the survivor by the death of his or her partner is just as real as in the case of a married couple. If the survivor were to be given an entitlement to loss of dependency this would merely recognise a de facto relationship. It would not be intended as an encouragement to such relationships, nor do we feel that it would have the effect of encouraging them. In principle, therefore, we are in favour of bringing cohabitees within the class of recognised dependants.

4.19 The precise definition of the persons who should be entitled is a more difficult question. In England, the right to claim loss of dependency is given to -

*'Any person who -*

- (i) was living with the deceased in the same household immediately before the date of the death; and*
- (ii) had been living with the deceased in the same household for at least two years before that date; and*

- (iii) *was living during the whole of that period as the husband or wife of the deceased.'*

4.20 The law in Scotland is less strict and allows a claim for loss of dependency by -

*'any person, not being the spouse of the deceased, who was immediately before the deceased's death, living with the deceased as husband or wife' (s 14(4), 1982 Act).*

4.21 Similar provisions to that in Scotland exist in the Australian Capital Territory (Compensation (Fatal Injuries) Ordinance 1968 ss 8(2) and 4(2)(h)) and the Northern Territory (Compensation (Fatal Injuries) Ordinance 1974 ss 8(2), 4(2) and 4(3)(c)).

4.22 In South Australia a claim is only allowed if the claimant was at the time of the deceased's death cohabiting with the deceased as de facto husband or wife and -

- (a) had so cohabited with the deceased continuously for the period of five years immediately preceding the death; or
- (b) had during the period of six years immediately preceding the death so cohabited with the deceased for periods aggregating not less than five years; or
- (c) had sexual relations with the deceased which resulted in the birth of a child.

4.23 In deciding which approach to adopt in defining a de facto spouse we consider that we should aim at including only those relationships which can be demonstrated to be stable and to have a reasonable prospect of permanency. Without such stability and permanence a continuing dependency cannot be established. The sub-committee took the view that there should be a minimum period of cohabitation and sought views on the appropriate period. Fixing the minimum period is to some extent arbitrary, and differing views were expressed by those who responded to the Working Paper. Most people chose either two or three years as the minimum period and both the sub-committee and the commission would support either of these periods. Two years is the period required under the 1982 Act.

4.24 We have considered the alternative basis for establishing a claim adopted in South Australia, namely cohabitation at the time of the deceased's death and the birth of a child to the couple. In our view this test does not meet the requirement of stability and permanence which we see as essential, and we do not recommend its introduction in Hong Kong. It should be noted that the child already has a claim to loss of dependency under the FAO.

## **2. Benefits which are to be deducted**

### **(a) The present law**

4.25 Section 9 of FAO provides that in assessing the damages payable in respect of a person's death there shall not be taken into account any insurance money, benefit, pension or gratuity which has been or will or may be paid as a result of the death. So, for example, if a person's widow receives some insurance money as a result of her husband's death this money is ignored in calculating the financial loss she has suffered. The word 'benefit' is, however, narrowly defined as meaning 'any payment by a friendly society or trade union for the relief or maintenance of a member's dependants'. As a result, any benefits received by a dependant from the estate of the deceased are deducted from the award made under FAO.

### **(b) Reforms in England**

4.26 The Law Commission considered (paras 255-6) that it was unfair that deductions should be made in respect of benefits derived from the estate of the deceased. They pointed out that in many cases the dependant might in any event have received the money or property at a later date. Moreover, the present law penalises the widow of a man who had saved by buying shares as opposed to one who saved by taking out life insurance.

4.27 The Pearson Commission agreed with this view, and added that under the present law a widow of a careful and thrifty man receives less under the Fatal Accidents Acts than the widow of a spendthrift whose net income was the same but who managed to save none of it. The 1982 Act gave effect to the reform proposals of the Law Commission and Pearson. It is now provided that -

*'In assessing damages in respect of a person's death in an action under the 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.'*

### **(c) Our recommendation**

4.28 The arguments made in favour of this reform are equally applicable to claims in Hong Kong and we therefore recommend a similar amendment to FAO.

## **3. Other reforms**

4.29 Although the FAO is substantially the same as the English Fatal Accidents Act 1976, the latter is drafted in a clearer and more modern style.

We therefore take this opportunity to suggest that the FAO be redrafted to bring it into line with its English counterpart.

## Chapter 5

# OFFSETS

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### Introduction

5.1 An injured person who suffers some pecuniary loss as a result of his injury may have all or part of the loss made good from some other source. For example, he may recover insurance monies or social welfare benefits. The question then arises as to whether such benefits should be taken into account in assessing the damages payable. This is a difficult and controversial question. Both the English Law Commission and the Pearson Commission considered the problem, but their recommendations were in conflict. The matter is continuing to be debated in the United Kingdom and a White Paper on the Reform of the Industrial Injuries Scheme was issued in 1981.

### Reform in England

5.2 The 1982 Act has only made one small amendment to this area of the law. Section 5 of the Act provides that:-

*'In an action ... for damages for personal injuries .... any saving to the injured person which is attributable to his maintenance wholly or partly at public expense in a hospital, nursing home or other institution shall be set off against any income lost by him as a result of his injuries.'*

This is a reversal of the English Court of Appeal decision in Daish v. Wauton [1972] 2 QB 262 to the effect that such savings were not to be deducted.

### The present law in Hong Kong

5.3 Certain ordinances expressly provide that, in assessing damages, a court is to take into account benefits received under that ordinance. For example, employees' compensation and pneumoconiosis compensation are both to be deducted from awards for damages (see Employees' Compensation Ordinance (Cap 282; LHK 1980 ed) s 26(1); Pneumoconiosis (Compensation) Ordinance (Cap 360; LHK 1980 ed) s 13(17)).

5.4 Where there is no statutory provision, the courts follow the approach of the English courts. Broadly speaking it may be said that :-

- (i) charitable payments, insurance monies and pensions are non-deductible;
- (ii) sick pay and (probably) unemployment benefits are deductible in full.

It has been held that payments received from the Social Welfare Department are not deductible (see Tang Kwong-chiu v Lee Fuk-yue [1980] HKLR 588; Wong Kou-shee v Chu Che-ping [1981] HKLR 249).

## **Our recommendation**

5.5. The 1982 Act has not made any comprehensive reform of the law in this area. The only question which, therefore, arises under paragraph (1) of our terms of reference is whether the principle set out in section 5 of the Act should be adopted in Hong Kong. In order to answer this it is necessary to take a closer look at the decision in Daish v. Wauton which was reversed by section 5.

5.6 In Daish v Wauton a boy aged five suffered brain damage in a motor accident for which the defendant was partly responsible. As a result, he was likely to spend the rest of his life in a national health service institution. The trial judge awarded only a small sum representing damages for loss of future earnings, on the basis that most of those earnings would have been spent on housing and maintenance, whereas now he would be supported by the state. The Court of Appeal held that this was wrong, and that the benefit of being maintained free of charge should not be taken into account in assessing damages for lost future earnings.

5.7 The Pearson Commission recommended the reversal of this decision for two reasons (see para 510). The reasons were that:-

- (i) the Commission had recommended that private medical expenses should be recoverable only where the plaintiff could show that for medical reasons it was reasonable for him to incur them; and
- (ii) the Commission wished to co-ordinate tort and state compensation.

5.8 With respect, we do not see force in the first reason given. The question whether an expense which has been incurred should be recoverable is entirely different from the question whether any savings made should be deducted from the damages. As to the second reason, there is a strong case for rationalising the two systems of tort and state compensation, but such a rationalisation has not yet taken place, either in England or Hong Kong.



5.9 In Hong Kong, the position at present is that payments made by the Social Welfare Department are not to be taken into account in assessing damages. In our view, the benefit of free hospitalisation is similar to the payment of social welfare benefits. Both benefits are a form of public benevolence and both are conferred independently of any legal liability in another person to compensate the victim. That being so, it would seem to us to be anomalous to require a court to make a deduction for savings made because the victim is kept in hospital at public expense.

5.10 Our view is that a provision corresponding to section 5 of the 1982 Act should not be introduced in Hong Kong.

## Chapter 6

### The award of provisional damages

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#### Introduction

6.1 Damages for personal injuries or death are awarded as a lump sum. The courts have the power, in the interlocutory stage of an action, to award interim payments in a case where liability is clear. But once the action comes on for hearing, the judge has to make an award of damages once and for all, no matter how uncertain the medical prognosis. This principle has been criticised as leading to grave difficulties and injustice.

6.2 Lord Scarman referred to this aspect of the law in Lim Poh Choo v Camden & Islington Area Health Authority [1980] AC 174:-

*'The course of the litigation illustrates, with devastating clarity, the insuperable problems implicit in a system of compensation for personal injuries which (unless the parties agree otherwise) can yield only a lump sum assessed by the court at the time of judgment. Sooner or later - and too often later than sooner - if the parties do not settle, a court (once liability is admitted or proved) has to make an award of damages. The award, which covers past, present, and future injury and loss, must, under our law, be of a lump sum assessed at the conclusion of the legal process. The award is final; it is not susceptible to review as the future unfolds, substituting fact for estimate. Knowledge of the future being denied to mankind, so much of the award as is to be attributed to future loss and suffering - in many cases the major part of the award - will almost surely be wrong. There is really only one certainty: the future will prove the award to be either too high or too low.'*

6.3 The Law Commission considered this problem and recommended that in certain circumstances the courts should have a power to award provisional damages. It drew a distinction between "chance" cases and "forecast" cases. "Chance" cases are those where the injury apparent at the trial may in the future be exacerbated by some catastrophe such as epilepsy, cancer or total blindness. "Forecast" cases are those where the injury is such that the medical prognosis is much more reliable. The distinction was seen as important, since in "chance" cases the lump sum award is bound to be either too high (if the catastrophe does not occur) or too low (if it does). This is because, at present, the award is based upon a calculation of what would have been the damages if the catastrophe had already happened, reduced by the percentage chance that it will not happen. In "forecast" cases,

a mistaken diagnosis is unlikely to lead to such an extreme difference between what should have been awarded and what was awarded.

6.4 The Law Commission recommended that in "chance" cases the court should be given power to award provisional damages on the basis that the catastrophe will not occur, and to award further damages at a future date if the catastrophe does occur. It added, however, that a provisional award should only be made against a defendant who is insured (or treated by the law as if insured).

## **Reform in England**

6.5 Section 6 of the 1982 Act states that provision may be made by rules of court for enabling a court to award provisional damages where:-

*'there is proved or admitted to be a chance that at some definite or indefinite time in the future the injured person will, as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration in his physical or mental condition.'*

Further damages may be awarded at a future date if the injured person develops the disease or suffers the deterioration.

6.6 It should be noted that there is no reference in section 6 to the limitation suggested by the Law Commission that provisional awards should only be made where the defendant is insured.

## **Our recommendations**

6.7 The criticisms of the assessment of damages in "chance" cases is as valid in Hong Kong as elsewhere. Furthermore, we understand that a system of provisional damages has been operated successfully for a number of years by the English Criminal Injuries Compensation Board. The view expressed by the sub-committee in its Working Paper was therefore that a power to award provisional damages should be introduced in Hong Kong. This view was supported by the majority of those who responded to the Working Paper. Some commentators did, however, suggest that insurance companies would be faced with serious practical problems in dealing with such awards. It was pointed out that these companies would have to maintain reserves for an indefinite period after the payment of the provisional award, and that this would lead to an increase in premiums. We have given serious thought to these views but we do not consider that they outweigh the merits of provisional awards. The number of cases where such an award is appropriate is likely to be comparatively small and insurance companies can establish contingency funds to deal with them. We are nevertheless anxious to minimise the difficulties faced by defendants. With this in mind, we recommend that Rules of Court should provide that a defendant may, if he so

wishes, pay money into court in respect of his possible future liability after an award of provisional damages has been made against him. Interest on such payments should accrue to the person making the payment in, and he should be entitled to withdraw the money at any time.

6.8 We have also considered whether provisional awards should only be made in cases where the defendant is insured. The Law Commission recommended such a limitation on the grounds that "the effect of such an award is that the defendant's liability will be uncertain perhaps for many years" (para 240). "Chance" cases do, by definition, involve uncertainty. However, it seems to us wrong in principle that the injured person should suffer from that uncertainty by possibly being gravely undercompensated. An uninsured defendant might be put in a difficult position if provisional damages were awarded against him, but under the present system of accident compensation an uninsured defendant will always be in a worse position than an insured person. Where provisional damages are followed by further damages, the defendant is only paying what he ought to pay by way of compensation.

6.9 The view expressed by the sub-committee in its Working Paper was that a court should be empowered to award provisional damages even where the defendant is uninsured. This proposal met with general support from those we consulted. It was, however, pointed out to us that a plaintiff could in certain circumstances be worse off if awarded provisional damages than if awarded a lump sum under the present system. In all cases the initial award will be less than the amount now awarded since it will not take into account the possibility that there will be a serious deterioration in the plaintiff's condition. The plaintiff may subsequently be unable to recover further damages if the deterioration does occur because the defendant, in the case of a limited company, has been wound up or ceased to carry on business or, in the case of an individual, has become bankrupt, has left the jurisdiction or has disappeared. We see the force in this argument and make two recommendations for the protection of the plaintiff. First, we recommend that in all cases (not merely where the defendant is uninsured) the plaintiff be given the right to an award of final damages calculated under the existing method if he so elects. Where the plaintiff is an infant or a person under a disability, however, such an election should only be possible with the leave of the court of trial. Secondly, for the avoidance of doubt, it should be provided that where a person has obtained an award of provisional damages his claim for further damages should crystallise on the winding up or bankruptcy of the defendant and be provable as a debt due to the plaintiff. Subject to these safeguards we recommend that a court should be empowered to award provisional damages regardless of whether the defendant is insured.

# Chapter 7

## Loss of expectation of life

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### Introduction

7.1 Where an injury causes the death of a person, or a reduction in his life expectancy, there are three heads under which damages might be payable. The first is the pecuniary loss which is suffered during the years which have been lost. This is discussed later in the section on 'lost years'. The second is the mental suffering caused where a living victim knows of his shortened life expectancy. Under the present law, this will be taken into account in assessing damages for pain and suffering and loss of amenity, and we do not see any reason to change this. The third head is the award of damages for 'loss of expectation of life' which is available regardless of pecuniary loss or knowledge of the loss of expectation. This head is the one which is considered in this section.

### The present law

7.2 Damages for loss of expectation of life were established in England by the decisions in Flint v Lovell [1935] 1 KB 354 and Rose v Ford [1937] AC 826. Subsequently the House of Lords decided in Benham v Gambling [1941] 1 All ER 7 that this head of damages was to be awarded not for 'the prospect of length of days, but the prospect of a predominantly happy life'. The courts are not, therefore, concerned with the number of years lost to the victim but with his prospects of happiness. In practice they award a conventional sum. In England, the award was originally £200 but this has subsequently risen to £1,500. This figure may, however, be reduced if there is evidence that the victim had little prospect of a predominantly happy life.

7.3 These principles have been followed in Hong Kong and the current award approved by the Court of Appeal is \$15,000 (see VSL Engineers Ltd v Yeung Wing [1981] HKLR 73, 89).

7.4 The impact of such awards depends on whether the victim is living or not. Where the victim is living, the award is normally of little practical importance, since the damages for the injuries sustained are likely to be much greater. Where the victim has died, the right to the award passes to his estate. The damages obtained will, however, be deducted from any award for loss of dependency under the FAO. The sum awarded under the FAO will usually be much greater than the conventional sum for loss of expectation of life and so the latter will be extinguished. For example, if a married man is killed in an

accident, his widow will usually inherit the claim for loss of expectation of life. Her claim for loss of dependency will normally far exceed the \$15,000 awarded for loss of expectation, however, and so that award disappears.

7.5 In fatal cases, the main role for the award for loss of expectation is in cases where there is no claim for lost dependency. The prime example of this is where a child has been killed. In such a case his parents will normally inherit the award, but will have no claim for lost dependency.

## **Reform in England**

7.6 The Pearson Commission pointed out that "damages for loss of expectation of life have an air of unreality. It is not possible to assess how happy the victim might have been if he had lived out his days. Still less is it possible to evaluate such a loss" (para 371). In the case of a living plaintiff the English Law Commission was of the view (para 99) that compensation should be related to the suffering caused to a victim who is aware that his days are prematurely numbered. Provided damages could be awarded for such suffering they were in favour of the abolition of the claim for loss of expectation of life.

7.7 In the case of a deceased victim there are other considerations. Under the present law, the award does have some relevance where a child is killed, since it is unlikely that any other damages will be available to his or her estate. The payment of the conventional sum may therefore be some consolation to the child's parents. In effect it is compensation for the grief caused by the bereavement, rather than for the child's loss of expectation of life.

7.8 Both the Law Commission and the Pearson Commission recognised the role of this head of damages as providing some solace for bereavement. They recommended, however, that if damages for bereavement were desirable they should be awarded as such, and not in the present indirect manner. Both Commissions therefore recommended the abolition of damages for loss of expectation of life.

7.9 The 1982 Act gave effect to these recommendations. Section 1(1) of the Act provides that -

- '(a) no damages shall be recoverable in respect of any loss of expectation of life caused to the injured person by the injuries; but*
- (b) if the injured person's expectation of life has been reduced by the injuries, the court, in assessing damages in respect of pain and suffering caused by the injuries, shall take account of any suffering caused or likely to be caused to him by awareness that his expectation of life has been reduced.'*

## **Our recommendation**

7.10 The arguments set out above are equally applicable in Hong Kong. Moreover other jurisdictions in the common law world are also abolishing the action for loss of expectation of life. For example, nearly all the provinces in Canada have abolished the action. The great majority of those who responded to the Working Paper felt that the action should be abolished in Hong Kong and it is therefore our view that a provision similar to section 1(1) of the 1982 Act should be introduced in Hong Kong.

## Chapter 8

### Bereavement

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#### The present law

8.1 Where a person is wrongfully killed, English law has not in the past recognised any claim in respect of the bereavement suffered by close relatives. This has not been the case in Scotland, where the common law has always included a solatium award. Recent legislation in Scotland has replaced the old solatium award with an award for loss of society, to compensate for the loss of the deceased's society and guidance. This action is available to the immediate family of the deceased, the spouse claiming for loss of society of his marriage partner or child, and the children for loss of guidance.

8.2 Some other jurisdictions have legislative provisions which enable a claim to be made for grief, or loss of society and guidance. In Canada, the courts have recognised a claim by a child for the loss of the care and guidance of a deceased parent. This claim arises under the fatal accidents legislation and the sum to be awarded depends on such matters as the contribution of the deceased to family life and the role of the deceased in the care and education of the children (see St. Lawrence and Ottawa Ry Co v Lett (1885) 11 SCR 442; Vana v Tosta [1967] SCR 71). A statutory right to a solatium has also been created in Eire (Civil Liability Act 1961, s 49), South Australia (Wrongs Act 1936-75, s 23 (a)(1)) and the Northern Territory (Compensation (Fatal Injuries) Ordinance 1974, s 10(3)(f)).

8.3 While English law has never awarded damages for bereavement per se, it can be argued that the award to the estate of the deceased of a sum for loss of expectation of life achieves an indirect compensation. However, where the beneficiaries are also the dependants of the deceased, the sum awarded for loss of expectation of life is conventionally merged with the damages awarded for dependency under the relevant statute (in Hong Kong, the Law Reform and Amendment (Consolidation) Ordinance). Thus the award is only of benefit in cases where the beneficiary is not an economic dependant of the deceased, for instance when the deceased is a child, or a wife not in paid employment.

#### Reform in England

8.4 The Law Commission recommended that an award be made to acknowledge the non-pecuniary loss suffered by the claimant in respect of the death of the deceased. The Commission felt that an award of damages, even



if small, can have some consoling effect where parents lose an infant child, or one marriage partner loses the other. The Report recommended (paragraphs 160-180) that the amount of compensation be fixed at a conventional sum (£1,000), and that the right to such compensation be limited to a spouse, or the parents of an unmarried infant child killed in an accident.

8.5 The Pearson Report differed in approach, proposing that the bereavement award be directed at the loss of society rather than at sorrow or suffering. The Report also recommended (paragraphs 418-431) that the Scottish provisions be adopted which give an additional right of action to an unmarried minor child for the loss suffered on the death of a parent. The Pearson Commission considered a fixed sum to be more appropriate than a varying award, but recommended that the sum be fixed at a figure related to the level of average annual industrial earnings, as this figure would take account of inflation.

8.6 Both the Law Commission and the Pearson Commission recommended that claims for bereavement should not survive for the benefit of the claimant's estate.

8.7 The Administration of Justice Act created a claim for bereavement. The claim is only for the benefit of a spouse or the parents of an unmarried minor child. A fixed sum of £3,500 is set as the amount of compensation.

## **Our recommendations**

8.8 We have given much consideration to the arguments opposing any attempt to compensate grief with a monetary award. Opponents of such an award suggest that a small award would be an insult to a grieving spouse or parent, and be treated contemptuously by those suffering the greatest grief. A large award, however, would simply be a gratuitous payment to those who did not in fact suffer grief. The award may be sought by claimants as a way of penalizing the tortfeasor, rather than as any real consolation for the grief suffered. If a fixed sum is set, unfairness would arise as the same award would be payable to a mother whose much-loved infant child was killed as to a mother for the loss of a rebellious, rejected teenage child. Yet if the sum awarded was at the discretion of the court, the court would be required to investigate every family relationship, attempting to place a value on the complex personal relationship between spouses, or parents and their children.

8.9 Despite these arguments, we feel that an award for bereavement is appropriate in Hong Kong. We believe that a monetary award would be accepted by the majority of the population of Hong Kong as a partial mitigation of their grief, and that the consolation afforded to the majority of the population would outweigh the problem of the occasional award to non-grieving, vindictive or greedy family members.

8.10 We have also considered the arguments opposing an award for loss of society. We accept that in some circumstances the family relationship may be such that spouses provide no comfort or society to each other, or that parents offer no guidance to their children. Nevertheless we believe that in Hong Kong society, even more perhaps than in Western society, the support and guidance given by family members to each other is of great value, and that when a family member is killed there is a real loss suffered by the other family members apart from material and economic loss.

8.11 The provisional view of the sub-committee was that a claim for bereavement should be created in Hong Kong which is intended to provide compensation both for grief and for loss of society and guidance. This view was shared by almost all of those who responded to the Working Paper. We therefore recommend the creation of a claim for bereavement.

8.12 We now turn to a consideration of the persons who should be entitled to bring a claim for bereavement. Our terms of reference require us to consider the changes in the law introduced by the 1982 Act and we accordingly use that Act as our starting point. However, we consider that attitudes towards the family in Hong Kong differ from those in England and we accept that there is a case for enlarging the list of persons who should be entitled to an award for bereavement.

8.13 We note that in some jurisdictions the right to claim for bereavement or loss of society and guidance is given to a wide range of people. In the Northern Territory, for example, the claim may be made by any of the persons listed as dependants under the fatal accidents legislation, including brothers and sisters, a former spouse and a de facto spouse. The Manitoba Law Reform Commission recommended in 1979 that the claim should be available to any person who, in the view of the court, has suffered a loss of guidance, care and companionship.

8.14 Where one marriage partner is killed we are of the view that the sole right to the award should normally be that of the surviving spouse, even where there are also surviving children. We do not deny that the children will suffer grief and loss of society and guidance, but feel that if the award is made in favour of the surviving spouse the money will in practice be used for the benefit of the family as a whole. If young children were to be entitled to share in the award the money would have to be paid into court and the children would therefore not immediately benefit. Our recommendation in this respect is in line with the 1982 Act.

8.15 If the award for bereavement were always to go to the spouse of the deceased (assuming there is one) this would, however, mean that a spouse could recover under this head even though he or she had been separated from the deceased for many years. Since the deceased may be survived by children or other close relatives it seems to us to be wrong that the spouse should be preferred to them. We therefore consider that the claim by the spouse should be barred if he or she had been living apart from the deceased for a certain period immediately before the deceased died. In

selecting an appropriate period we have been guided by the Matrimonial Causes Ordinance which recognises that a marriage may be irretrievably broken down if the parties have lived apart for a continuous period of two years. We suggest that the same period be adopted in relation to bereavement. In addition the meaning of "living apart" should follow the meaning of that term in the Matrimonial Causes Ordinance. Thus the parties will not be considered as living apart unless one of them regards the marriage as finished (see Santos v Santos (1972) 2 All ER 650). A period of separation brought about, for example, by the hospitalisation of the deceased would not in itself amount to a living apart.

8.16 We next consider the situation where the deceased leaves no surviving spouse who is entitled to claim. In England a claim for bereavement in such circumstances has only been recognised where the deceased was an unmarried minor, in which case the parents are entitled to the award. We do not see why the claim should be so limited. It seems to us entirely artificial to provide a claim for bereavement in respect of, say, a deceased seventeen year old but not of, say, a twenty-two year old. Nor do we believe that the fact of marriage should preclude a claim for bereavement by anyone other than the spouse of the deceased. Where there is no surviving spouse but the deceased is survived by a child or children we recommend that the children should be entitled to an award for bereavement. Where both parents die at the same time, or shortly after one another, we believe the children should be entitled to bereavement awards in respect of both parents. However, the entitlement to the award in respect of the death of the first parent would normally go to the spouse and then be extinguished on that spouse's death (see para 8.25 below). It therefore seems advisable to provide that a spouse's entitlement to an award should be conditional on that spouse surviving for a certain period. In this way the claim would not be lost if the spouse dies, but would pass to the children (or other claimants listed below). A suitable period for this survivorship requirement would, we suggest, be thirty days.

8.17 Where the deceased leaves no surviving spouse or children we recommend that the award for bereavement should go to the parents of the deceased. The argument in favour of a thirty day survivorship (stated in the previous paragraph) applies equally to the claim of the parents, and to the other claims which are suggested in the following paragraphs. We therefore recommend that all entitlements to damages for bereavement should be conditional on the claimant surviving the deceased by thirty days.

8.18 Another situation which needs to be considered is that where the deceased had been the subject of a de facto adoption and was therefore treated as the child of another family. The Law Commission was opposed to the creation of a claim for bereavement in favour of the 'parents' of a deceased 'child of the family'. The Commission felt there would then be a dispute between the real parents of the child and the de facto parents over the award for bereavement (paragraph 177). We agree with this argument but it has no force where the real parents of the child are no longer living. Where a deceased minor leaves no surviving spouse, children or parents but that

minor had been treated as a child of the family by adoptive parents we feel those parents should be entitled to an award for bereavement.

8.19 In situation not falling within paragraphs 8.12-16 the persons who are likely to suffer grief are the deceased's brothers and sisters. In such a situation we therefore recommend that the siblings be given a right to claim for bereavement.

8.20 We have considered the possibility of allowing a right of action to putative spouses or cohabitants, but in view of the complexities of weighing the claim of a legal but estranged spouse against the claim of a cohabitee, we have decided that the right to the award should be limited to legally recognized relationships.

8.21 We now have to consider the nature of the award. There are several possible approaches -

- (a) no maximum figure, the approach adopted in Scotland and in the Northern Territory of Australia and several Canadian provinces;
- (b) a maximum figure, the approach in South Australia (A\$3,000 for the parents, \$4,200 for a spouse);
- (c) a fixed sum, the approach adopted in Alberta (C\$3,000 for each specified person) and England (£3,500 in total).

8.22 We favour having a fixed sum. Any attempt to quantify the grief or loss suffered when a family member is killed would be arbitrary and offensive to the parties and would place an unbearable burden on the court.

8.23 Fixing the amount of the award is an arbitrary decision, but we note that those jurisdictions which do have either a fixed sum or a maximum figure have set it in the region of a total figure of HK\$40,000. We therefore recommend that the fixed sum awarded for bereavement should initially be \$HK40,000. We suggest, however, that some form of machinery be devised which will enable this figure to be adjusted from time to time without the need for new legislation.

8.24 A number of our recommendations involve allowing more than one claim for a bereavement award, but it is our view, following the approach of the 1982 Act, that the same fixed sum award be made in every case. Where claims are made by more than one child, or parent or sibling we recommend that the sum be divided equally between the claimants.

8.25 Since the award for bereavement is to compensate an individual for his or her grief and loss of society and guidance it follows that if the individual dies the claim should not survive for the benefit of his estate. This is the position under the 1982 Act and we therefore recommend that any claim for bereavement should not survive the death of the claimant.

8.26 One final question we feel should be considered is the effect of a bereavement award on other welfare payments. If it were the case that a claimant awarded this sum were thus to become ineligible for housing or for some other welfare benefit, the award would be a disadvantage rather than a consolation to the claimant. We would recommend that some arrangement be made (probably administrative) whereby the award not be taken into account in calculating a person's means for the purpose of eligibility for welfare benefits.

## Chapter 9

### Loss of Services

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#### The present law

9.1 As a general rule, compensation for loss or injury resulting from a tort is limited to the immediate victim. However, in some circumstances a third party is entitled to claim for certain consequential damage he suffers as a result of the victim's incapacity. A third party may claim for the loss of the injured person's services in the following circumstances -

- (a) a married man may claim for the loss of his wife's services;
- (b) a father may claim for the loss of his child's services;
- (c) an employer may claim for the loss of his domestic servant's services.

9.2 The action by which a husband may recover damages for the loss of his wife's services is known as an action for loss of consortium. This remedy is based on once held beliefs as to a husband's proprietary interest in his wife. Although the beliefs on which the claim is founded are no longer commonly held, the remedy remains unchanged, and attempts to extend the action to wives for the incapacity of their husbands, so as to achieve some measure of fairness and consistency, have been firmly rejected by the courts.

9.3 The claim that a father has for the loss of his child's services is known as *servitium* and is based on the former view that a father had proprietary rights in his child. A father may claim for loss of the services of a child old enough to be of use to the parent. Even where a child is of little practical service to his parent, the fiction of usefulness has been upheld until comparatively recently to enable a parent to recover the medical expenses paid out in the course of the child's recovery. Since such expenses are now as a matter of practice awarded as part of the child's action against the tortfeasor, the action is seldom brought.

9.4 The action of *servitium* also enables an employer to sue for the loss of his employee's services. This remedy has been severely restricted by the suggestion that the action is only available in respect of domestic servants (IRC v Hambrook [1956] 2 QB 641). Actions for loss of an employee's services are now rarely brought.

## Reform proposals in England

9.5 The Law Commission considered that the third party actions for loss of services were 'archaic and anomalous and their abolition would leave no important loss uncompensated' (paragraph 121).

9.6 With regard to the loss of gratuitous services the Law Commission pointed out that the law was not consistent since, apart from a husband or father, no other dependant had the right to compensation for such a loss (paragraph 157). The Commission recommended that the law be changed so that -

- (i) compensation be available for the loss of gratuitous services which were, prior to the injury, rendered by the accident victim to any member of his or her family group (defined as the class of dependants under the fatal accidents legislation); and
- (ii) the victim himself should recover the value of the lost services, not the person who has lost the services.

Two reasons were stated for giving the remedy to the victim. These were that it was out of keeping with modern views as to a housewife's status that the remedy should be in the hands of the husband, and that it was proposed to confine to the injured person himself the right to recover all losses resulting from his injury (see paragraph 121).

9.7 The Pearson Commission endorsed the Law Commission's proposals in all respects. It agreed that the damages should be recoverable by the victim in his own right, stating that -

*'It seems to us that a person who loses the capacity to render services to others suffers a real loss. The housewife who can no longer care for her family has not lost money, but she has lost money's worth.'* (paragraph 353).

9.8 Two years after the publication of the Pearson Report, the English Court of Appeal decided in Daly v General Steam Navigation Co Ltd [1980] 3 All ER 696 that an injured housewife could, in her own action, recover damages for partial loss of her ability to do her work. In regard to the future loss of housekeeping ability, the court awarded the estimated cost of employing domestic help during the plaintiff's life expectancy, even though she might not use the award to employ domestic help. In regard to the pre-trial period the court looked at the actual loss sustained by the plaintiff and did not have regard to the cost of employing domestic help since the plaintiff had not in fact employed such help.

## **The Administration of Justice Act 1982**

9.9 The Administration of Justice Act 1982 implemented the recommendations of the Law Commission and Pearson Commission to the extent that the actions for loss of services were abolished (see section 2).

9.10 The proposed new right of a victim to recover the value of gratuitous services which he or she can no longer render to members of the family group was not created.

## **Reform in Hong Kong**

9.11 The view of the sub-committee and of almost all those who responded to the Working Paper is that an employer's action for loss of services of his employee should be abolished in Hong Kong. The action is anomalous in that it only applies to domestic servants and in any event it is always possible for an employer to protect himself from any financial loss caused by the loss of the employee's services. Where, for example, the employer continues to pay wages to an injured employee he can in effect recover the cost from the person responsible for the injury by providing in the contract of employment that the employee is obliged to refund such payments from the damages obtained.

9.12 So far as gratuitous services are concerned we agree with the two English Reports that it is anomalous that the only third parties who can recover for the loss of such services are husbands and parents. In our view the choice is between extending the third party remedy in favour of any member of the family group who suffers such a loss of services, or confining the remedy to the injured person himself.

### ***(a) The third party approach***

9.13 In support of the third party approach it may be argued that it is the third party who loses the services and is likely to be the one who pays for replacement services. If this approach is to be adopted it would be possible simply to provide that the right which a husband has to sue for loss of his wife's services is available to certain other persons. This was done in the South Australian Wrongs Act 1972 which states that a wife may recover damages for the loss of consortium of her husband in the same manner as a husband can recover for the loss of his wife's consortium. Alternatively, the present remedy for loss of services could be abolished and replaced by a new statutory remedy in favour of specified third parties. This was done in the Family Law Reform Act 1978 of Ontario. In view of the historical basis of the present remedy and the difficulty there might be in adapting it to new circumstances we would favour the latter approach.

9.14 If there were to be a new statutory remedy for loss of services of an injured person it should, in our view, be available to the members of the



family of that person. In Ontario the remedy is given to those persons defined as dependants for the purposes of the fatal accidents legislation. The Irish law Reform Commission considered this approach was too wide and preferred limiting the remedy to relationships of proximity of association rather than those arising from consanguinity or affinity. It recommended that there should be a single family action available for the benefit of the family unit residing together. We have considered both of these approaches and provisionally favour the former. Although the list of dependants in the FAO is fairly wide it must be remembered that a person will only be able to make a claim if he can prove that the injured person has been prevented by the injury from rendering services for him that would otherwise have been rendered. Whether the claimant was living with the injured person does not seem to us to be a relevant consideration.

9.15 There is one other aspect of a third party action which we think should be considered. According to the English decision in Mallett v Dunn [1949] 2 KB 180, a husband's claim for loss of his wife's services is based on a separate cause of action from the wife's claim in respect of her injuries. As a result it was held that the husband's claim was not affected by any contributory negligence of the wife. This decision was applied in Australia in Curran v Young (1965) 38 ALJR 452. It does not, however, appear to have been followed in Hong Kong.

9.16 In this connection, Professor Flaming has observed that-

*"in terms of fairness and social policy, .... it does not make a great deal of sense that a wrongdoer should be required to foot the whole of the medical bill if, but only if, his contributorily negligent victim turns out to be a married woman whose husband can providentially espouse the cause of their joint domestic budget."*

*(see The Law of Torts (5th ed. 1977) pp 645-6)*

Moreover where wife is fatally injured and the husband sues as a dependant under the FAO, the award in his favour will be reduced by the wife's contributory negligences.

9.17 We conclude that if a statutory remedy is to be given to third parties it should be made clear that awards are to be reduced if the injured party was guilty of contributory negligence.

**(b) The remedy in favour of the victim**

9.18 Both the Law Commission and the Pearson Commission recommended that it should be the injured person himself who recovers for loss of the ability to render gratuitous services. Their reasons have already been set out (see paragraphs 103-4). The Scottish Law Commission also came to the same conclusion in 1978 (see Scot. Law Com. No. 51) and reasoned as follows -

*"It may be objected that it is not the injured person himself but his family who suffer the loss. We think, however, that this is an artificial way of looking at the matter. The injured person will normally have some earning capacity outside the family which he will have lost as a result of the accident. Within the family group, for practical reasons, a system of division of labour and pooling of income obtains in which, though in law the services are rendered gratuitously, they are in practice a species of counterpart for the benefits which that member receives as a member of the family group. If by reason of an accident a member of the family group loses the ability to offer the appropriate counterpart for the benefits he receives, he should be compensated for this loss." (para 38)*

9.19 It may also be objected that, if the injured person recovers the damages, he or she may not use them to provide replacement services for the members of the family. We are unconvinced by this argument and would again quote the reasoning of the Scottish Law Commission -

*"We have also considered in this context whether it would be appropriate to confer on members of the injured person's family a direct right of recovery from the [defendant]. We do not think it would be appropriate, not merely because the [defendant] might be exposed to a multiplicity of actions, but because, during his life, apart from the accident, the injured person would have remained free to choose who is to benefit by his services. For the latter reason we do not consider that, in this context, the injured person should be placed under any obligation to account to the individual relatives who may have suffered from his inability to render the services. The matter must be left to the moral sense of the injured person ..... "*  
(para 40)

9.20 According to the English Court of Appeal decision in Daly v General Steam Navigation Co. Ltd. an injured plaintiff is already entitled in England to compensation under this head. This may explain why the recommendations for a statutory remedy in favour of the victim were not implemented in the 1982 Act. The courts in Hong Kong are not, however, bound to follow the Daly case and so if a remedy in favour of the victim is thought to be desirable a statutory provision along the lines recommended in England would put the matter beyond doubt.

**(c) Our recommendation**

9.21 Members of the sub-committee were originally divided in their opinions as to which of the two approaches to follow. The Working Paper invited views on this issue and the majority of those responding favoured the remedy in favour of the victim. As a result the sub-committee recommended

that a statutory remedy should be created in favour of an injured person to enable him or her to recover damages for loss of the ability to render gratuitous services. The Commission accepts the recommendation

## Chapter 10

### Loss of Society

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#### The present law

10.1 Under the present law, the only person who can claim for the loss of comfort and society of an injured person is a husband in respect of his wife. The claim is one aspect of the action of consortium. Based as it is on an anachronistic action, the claim has been met in recent cases with a conventional award. In Hong Kong this sum was stated to be HK\$2,000 (Wang Ting v Huen Hing-kwan [1979] HKLR 396). There is no corresponding claim by a wife for loss of the comfort and society of her husband, nor by a parent for loss of the comfort and society of a child.

#### Reform in England

10.2 Both the Law Commission and the Pearson Commission considered that the action for loss of a wife's society was anachronistic and should be abolished. The 1982 Act implemented these recommendations (section 2(a)).

#### Our recommendations

10.3 We agree with the English Commissions that it is anachronistic and anomalous that only a husband should be entitled to claim for loss of society. It appears to us, however, that there is a case for extending the remedy to other persons. We have already recommended that in fatal cases there should be a right to claim damages for bereavement, and that this claim should relate not only to grief but also to loss of society. In our view, the loss of society suffered in a serious but non-fatal accident may be as great as in a fatal case. A person who is rendered a 'vegetable' by an accident may be as incapable of providing comfort and society as a dead person.

10.4 We have considered the possibility of defining the circumstances in which a claim for loss of society should be allowed. One approach would be to define the nature of the victim's incapacity - unconsciousness would be one example. Further consideration demonstrates that this approach is unsatisfactory. The range of incapacities is so great that any list would inevitably lead to omissions and anomalies. Another way of tackling the problem would be to define the minimum period during which the loss of society should be suffered. Since the victim may eventually recover from his incapacity a minimum period of, say, six months could be provided

for. Again we are of the view that this approach would be unsatisfactory because of the anomalies that would arise.

10.5 Under the present law a husband's claim for loss of society is not circumscribed in any of the ways discussed above. In view of the difficulties of defining the loss of society in any satisfactory manner we think it preferable not to attempt any definition and to entrust the courts with the task of making awards in appropriate cases.

10.6 Since the loss of society suffered will vary from case to case in duration and other respects it does not seem appropriate to make the award a fixed sum. On the other hand we think it would be inappropriate for the court to award more under this head than it could do for bereavement in a fatal case. We therefore recommend that the maximum possible award for loss of society should be set at the same figure as the fixed sum for bereavement.

10.7 We turn now to a consideration of the persons who should be entitled to claim for loss of society. Since the basis of this claim is the loss of physical comfort and companionship we think the claim should be restricted to those who are closest to the injured person and who usually reside with him or her. Where the injured person is married the victim's spouse should normally be given the right to claim. As with the claim for bereavement, however, we recommend that a spouse's claim for loss of society should be barred where the spouses have lived apart for a continuous period of two years immediately preceding the event giving rise to the cause of action. Where there is no spouse, or the spouse is barred from claiming, we recommend that any children of the injured person (including illegitimate children and a child of the family) who reside with the injured person should be able to claim. If there are no such children we recommend that the claim be given to the parents of the injured person, provided again that they reside with him or her. As with the claim for bereavement, we recommend that all claims for loss of society be made conditional on the claimant living for at least thirty days after the accrual of the cause of action in favour of the injured person. This will ensure that the claim gets passed on to the next claimant in the event that the first claimant dies shortly after the injury to the relation.

10.8 The order of claimants is thus the same as the first three claims for bereavement, save that for the loss of society award there is an additional requirement that the children or parents be resident with the injured person.

10.9 It remains for us to consider the relationship between the claims for loss of society and bereavement. On the face of it the two claims cover different ground - personal injuries and fatal cases respectively. It is possible, however, that a person will be seriously injured and die from that injury years later, after an award for loss of society has been made. In such a case we think the award for loss of society should bar any subsequent claim for bereavement. The first award will have taken into account the seriousness of the injury and its effect upon the claimant and we think an award for bereavement would amount to a duplication of the compensation. Circumstances can no doubt be imagined in which the person entitled to an

award for bereavement would be different from the person who has recovered for loss of society. A spouse might, for example, recover for loss of society and then live apart from the injured person for more than two years before that person's death. If there is no spouse, the children residing with the injured person are entitled to the award for loss of society, whereas all children and the parents of the deceased are entitled to the award for bereavement. Where there is a long interval between the injury and death, however, we feel that the main suffering of relatives will come after the injury rather than after the death and that it is right that those closest to the victim at the time of the injury should be the ones to recover.

# Chapter 11

## The loss years

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### 1. The Present Law

11.1 Where a person dies as a result of injuries, or has his life expectancy reduced, that person will obviously be unable to earn any income during the years of his life which he has lost ('the lost years'). The question is whether any claim should lie in respect of the loss of that income.

#### (a) *Claims under the Fatal Accidents Ordinance*

11.2 The dependants of a person who has died as a result of his injuries are entitled to claim for their loss of financial support under the Fatal Accidents ordinance ('FAO'). This remedy has been available in Hong Kong since 1889.

11.3 There are two ways in which such a claim may be presented. The first and more cumbersome way is to calculate the dependency of each claimant separately and then check the totals against the deceased's net annual income at the date of his death. The second method is explained in Kemp and Kemp, The Quantum of Damages (4th ed, 1975) vol 1, pp 235-6 as follows -

*'Start with the deceased's net income at the date of his death: estimate how much of this he spent on himself: then, if his pattern of life justifies the assumption, take the remainder of his net income as being spent for the benefit of his dependants.'*

In estimating how much the deceased spent on himself, no account is taken of expenditure on things the cost of which continues unabated after his death, such as mortgage payments, lighting and heating.

#### (b) *The victim's own claim*

11.4 Where the victim survives the accident he may bring proceedings himself. However, if he accepts a sum in settlement of his claim or obtains judgment for damages, his dependants cannot make a claim under the FAO after his death (see Read v Great Western Railway Co (1868) LR 3 QB 555).

11.5 The English Court of Appeal decided in Oliver v Ashman [1962] 2 QB 210 that an injured plaintiff was only entitled to recover damages for loss of future earnings during the period he was likely to remain alive, and not for the lost years. This rule, combined with the principle laid down in Read v Great Western Railway Co, was capable of producing hardship to the dependants of the victim. If, for example, the life expectancy of a young married man were reduced by an accident from 40 years to 5 years, he could recover damages for loss of income only during those 5 years. After his death his dependants could recover nothing further. Cases arose both in England (see McCann v. Sheppard [1973] 2 All ER 881) and in Hong Kong (see Mui Ling-kwan v Wong Yin-wah [1973] HKLR 465) where dependants were not adequately compensated because of the rule in Oliver v Ashman.

11.6 The High Court of Australia refused to follow Oliver v Ashman. In Skelton v Collins (1966) 39 ALJR 480 it was held that, in Australia, loss of earnings in the lost years could be recovered, less what the plaintiff would have spent on his own maintenance. This approach was favoured by the English Law Commission and the Pearson Commission, and both bodies recommended legislation to bring English law into line with that in Australia. Such legislation became unnecessary when, in 1978, the House of Lords overruled Oliver v Ashman. In Pickett v British Rail Engineering Ltd [1980] AC 136 the House of Lords held that an injured plaintiff is entitled to recover damages for loss of earnings during the lost years subject to a deduction in respect of the plaintiff's own living expenses during that period.

11.7 Pickett's case has been followed in Hong Kong (see eg VSL Engineers (HK) Ltd v Yeung Wing [1981] HKLR 407). The present position in Hong Kong, therefore, is that an accident victim can recover damages for 'lost years'.

### **(c) The claim under LARCO**

11.8 Section 20 of the Law Amendment and Reform (Consolidation) Ordinance ('LARCO') provides, as a general rule, that on the death of any person all causes of action vested in him shall survive for the benefit of his estate. This means that the persons named in the deceased's will or, where there is no will, those entitled to claim under his intestacy will obtain any damages recovered in respect of such causes of action.

11.9 Under this provision, the estate of a fatal accident victim inherits the claims which the deceased could have brought had he survived. Before Pickett's case, the deceased would have had no claim to damages for lost years, because of the rule in Oliver v Ashman. No such claim could therefore pass to his estate. The dependants of the deceased could, however, claim for their loss of dependency under the FAO.

11.10 Neither the Law Commission nor the Pearson Commission recommended any change in this area of the law. The law was nevertheless



changed as a result of developments in the courts. Following the decision in Pickett, the House of Lords held in Gammell v Wilson [1981] 1 All ER 578 that the recently recognised claim for lost years did pass to the estate of the victim. The damages are to be calculated in the same way as for living plaintiffs, namely they are to equal the net income of the deceased during the lost years, minus the personal expenses of the deceased during that period. Since the sums that would have been spent on the dependants of the deceased are not to be deducted, such an award will normally equal or exceed the total awards made under the FAO.

**(d) Calculating damages for the lost years**

11.11 The correct method of calculating damages for the lost years has been the subject of some controversy. It now seems reasonably clear that the trial judge should adopt the approach set out by Roberts CJ in Wong Sai-chuen v Tam Mei-chun (1982) Civ App No 133 of 1981, as follows :-

- (a) he assesses the net income (that is, the income after tax) which the victim would have been expected to receive during his lost years;
- (b) he deducts from this figure only 'the cost of maintaining himself (otherwise described as 'personal expenses');
- (c) these personal expenses will include the cost of housing, food, clothing, travelling, insurance, a holiday, entertainment, social activities and perhaps a car;
- (d) the 'personal expenses' should reflect the victim's own pattern of expenditure and the general standards of reasonable expectation of persons of his background, status and income;
- (e) the contributions which the victim would have made to his family do not form part of the cost of maintaining himself. Nor do his savings, if any.

11.12 There is no doubt that an element of speculation enters into the calculation of damages for the lost years. As Griffiths LJ commented in one case (Croke v Wiseman [1981] 3 All ER 852), "In attempting to assess the value of a claim for the lost years, the court is faced with a peculiar difficulty. Not only does it have to assess what sum the plaintiff might have been earning, but it also has to make an assessment of the sum that would not have been spent on the plaintiff's own living expenses and would have therefore been available to spend on his dependants".

11.13 Different views have been expressed in decided cases as to how speculative the calculation is. A list of relevant cases on the lost years is contained in Annexure 5. In Gammell v Wilson Lord Fraser stated (at p 588) that 'The process of assessing damages in such cases is so extremely uncertain that it can hardly be dignified with the name of calculation: it is little more than speculation'. According to Lord Scarman in Gammell v Wilson, the element of speculation varies according to the age of the victim.

*"In the case of a young child, the lost years of earning capacity will ordinarily be so distant the assessment is mere speculation. No estimate being possible, no award, not even a 'conventional' award should ordinarily be made. Even so, there will be exceptions ... A teenage boy or girl, however ... may well be able to show either actual employment or real prospects, in either of which situation there will be an assessable claim. In the case of a young man, already in employment ... one would expect to find evidence on which a fair estimate of loss can be made. A man, well-established in life ... will have no difficulty."*

In two subsequent cases (Connolly v Camden & Islington Area Health Authority [1981] 3 All ER 250; Croke v Wiseman [1981] 3 All ER 852) courts accordingly awarded nothing in respect of claims for the lost years of children aged 5 years and 21 months respectively.

11.14 So far as the calculation of the deceased's living expenses is concerned, Lord Salmon stated in Pickett's case that:

*"The assessment of ... living expenses may, no doubt, sometimes present difficulties, but certainly no difficulties which would be insuperable for the courts to resolve - as they always have done in assessing dependency under the Fatal Accidents Acts."*

The English Court of Appeal has recently decided, however, that the calculation of living expenses for the purposes of the LARCO award are slightly different from those calculated under the FAO. For the purposes of the FAO the living expenses are those sums which the deceased would have spent exclusively on himself, whereas under LARCO they include a pro rata share of sums spent for the joint benefit of the deceased and others (eg rent) (see Harris v Empress Motors Ltd (1984) 1 WLR 212).

11.15 Another approach has been suggested in Hong Kong by Roberts CJ in Wong Sai-chuen v Tam Mei-chuen -

*"I suggest that it is open to a trial judge, having assessed the FAO dependency :-*

- (a) to apply this figure as the first part of the free balance, unless there is evidence that the amount of dependency might have varied during the lost years;*
- (b) to add to that the deceased's notional savings during his lost years.*

*As a starting point, it would be reasonable, in my view, to adopt the formula ... of taking 10% of the deceased's net earnings as the amount of the notional savings ... The natural thrift of the*

*inhabitants of Hong Kong suggests that this is not an unreasonable assumption."*

11.16 This approach recognises that a person's income may be used for three purposes - for supporting his dependants, for personal expenses, and for savings. Whereas a claim under the FAO only relates to the amount spent on the dependants, a claim under LARCO should be for the whole of the net income minus the personal expenses, and therefore should include any savings. Hong Kong courts have in a number of cases therefore awarded more under LARCO than under the FAO (see eg Wong Sai-chuen v Tam Mei-chun; Yeung Yuk-sim v Mak Kam-lit; Chung Wing v Wong Lan-ying; Lam Sze v Ling Shum-ha; Chan Kit-ching v Lee Yuk-sui).

## **Relationship between awards under the FAO and LARCO**

11.17 As a general rule, any pecuniary benefit which accrues to a dependant of the deceased in consequence of his death must be taken into account when damages are awarded to the dependant under the FAO (Davies v Powell Duffryn Associated Collieries Ltd [1942] AC 601). This principle applies to an award of damages for the lost years which is inherited by a dependant under LARCO. Where the only dependant of the deceased also inherits his estate, therefore, the FAO award will normally merge with the award under LARCO and disappear.

11.18 Where there are other dependants the position is more complicated. According to several English cases (see Benson v Bigg's Wall & Co Ltd [1982] 3 All ER 300; Harris v Empress Motors Ltd [1982] 3 All ER 306; Lawrence v John Laing Ltd (1982) Law Soc Gaz 1248) a judge should first calculate the awards to be made to each dependant under the FAO (ie a separate sum for each), and then deduct from each award any sum awarded under LARCO. Where, for example, the dependants of the deceased are his widow and one child, the widow may inherit the whole of the LARCO award and this may extinguish the award made in her favour under the FAO. Since the son receives no part of the LARCO award, he receives his full entitlement under the FAO. The effect of this is that the defendant pays the full LARCO award, plus a further sum under the FAO.

## **2. The need for reform**

11.19 The recent developments which have been outlined above have not left the law in a satisfactory state. The hardship created by the rule in Oliver v Ashman was overcome when the claim for lost years was established, but this in turn has created many difficulties and anomalies. As Roberts CJ commented in Wong Sai-chuen v Tam Mei-chun 'judicial tears have converted a firm path into a swamp, infested with intellectual alligators'.

11.20 The decision in Gammell v Wilson to the effect that the claim for lost years passes to the estate of the deceased was reached by a reluctant

court. Lord Diplock commented that 'the law of damages has reached a state for which [he] can see no social, moral or logical justification'. The members of the House of Lords in that case who called for legislative reform of the law did not go unheeded. The 1982 Act includes provisions dealing with the lost years problem.

### 3. Fatal cases

11.21 The need for reform is felt most strongly in relation to fatal cases. The present law may be criticised in three main respects.

#### (i) "Double recovery"

11.22 The effect of the decision in Gammell v Wilson is that in fatal cases there are now two claims for financial loss caused by the death: the dependants of the victim can claim loss of dependency under the FAO, and the estate of the deceased can claim damages for 'lost years' under LARCO. Where none of the dependants are beneficiaries of the estate, the defendant will be liable to pay both types of awards in full. For example, if the deceased left all his property to a charity, the defendant will have to pay the LARCO award to that charity as well as compensating the dependants of the deceased under the FAO. Since no deduction is made from the LARCO award in respect of the sums which the deceased would have spent on his dependants, there is a double recovery in respect of such sums.

#### (ii) "Windfall"

11.23 Where the dependants of the deceased also benefit under the deceased's estate they do not obtain both the FAO and their share of the LARCO award. Each will be awarded whichever sum is the greater. The defendant does not therefore have to pay both awards in full. Nevertheless the end result has been criticised by some as creating an unjustified 'windfall'.

11.24 The term 'windfall' has been used in two different contexts. The first is where the beneficiaries of the estate would have been likely, in the ordinary course of things, to have predeceased the victim (eg they are his parents). The receipt of an award greater than their loss of dependency may therefore be regarded as a 'windfall'. Had the deceased lived a normal life they would have predeceased him and would never have shared in his estate (see McMullin V-P in VSL Engineer (HK) Ltd v Yeung Wing [1981] HKLR 407, 411).

11.25 The second use of the term 'windfall' is where the same persons benefit from the awards under the FAO and LARCO but the distribution of those awards is such that the defendant ends up paying more than either award taken separately. This has happened in a number of cases. In Benson v Biggs Wall & Co Ltd [1982] 3 All ER 300, for example, the judge awarded

£47,750 both for loss of dependency and as damages for the lost years. The fatal accidents award was shared by the deceased's widow (£42,500) and son (£5,000). The damages for the lost years (together with £1,250 for loss of expectation of life) was also inherited by the widow and son, but in different proportions. The widow received £36,750 and the son £2,250. Each received the larger of their awards, namely £42,500 and £12,250 respectively, and the total amount payable (£54,750) therefore exceeded the aggregate awards for loss of dependency and the lost years. McCowan J commented in a subsequent case (Harris v Empress Motors Ltd [1982] 3 All ER 306, 309) that such a result offends common sense.

### ***(iii) The degree of speculation***

11.26 Many people regard the degree of speculation involved in lost years claims as unacceptable. A degree of speculation enters into claims for loss of dependency under the FAO, because the court has to calculate the income which the deceased would have earned in the future had he lived. But the class of dependants and the level of their dependency will have been established by the time of the death. In the case of claims under LARCO, however, the amount of speculation may be much greater. In particular, in the case of a young, unmarried person the court must consider whether that person would have married in the future, whether he would have had children, and how this might have affected his spending habits. Although it might be possible to calculate some of these possibilities on a statistical basis the courts in practice do not do this and there is no consistency in the way the courts deal with these problems.

## **Reform options**

11.27 We are in no doubt that the law relating to damages for the lost years in fatal cases is in need of reform. In our view, the fact that a defendant may have to pay double compensation, under the FAO and LARCO, cannot possibly be justified. We have therefore considered three ways of improving the law, namely:-

- (a) to abolish the claim under the FAO;
- (b) to abolish the claim under LARCO;
- (c) to retain both claims, but limit the claim under LARCO to the loss of net savings.

We now propose to consider each option.

### ***Option (a)***

11.28 Lord Scarman stated in Gammell v Wilson that the 'logical, but socially unattractive, way of reforming the law would be to repeal the Fatal Accidents Act ... This would leave recovery to the estate; and the dependants

would look, as in a family where the breadwinner is not tortiously killed, to him (or her) for their support during life and on death. They would have the final safeguard of the Inheritance (Provision for Family and Dependants) Act 1975.'

11.29 We are against this approach for several reasons. In our view it is the dependants of the deceased who are in the greatest need of compensation in respect of the financial loss caused by the death. It is therefore wrong to allow the estate to claim the financial loss, since the money may not go to those dependants. It is true that certain dependants may claim reasonable provision out of the estate under the Deceased's Family Maintenance Ordinance, but this is a round-about procedure and in any event it only protects a limited class of persons. Furthermore the claim under the FAO is well established and the courts are used to dealing with such claims. We conclude, as did Lord Scarman, that 'the protection of the fatal accidents legislation has been with us for so long that [we] doubt whether its repeal would be welcomed.'

### ***Option (b)***

11.30 The second approach is to abolish the claim under LARCO for damages for the lost years in fatal cases. The only claim for financial loss resulting from the lost years would then be that of the dependants under the FAO. This approach would avoid all the problems relating to double recovery, the "windfall," and the calculation of damages. It was also the approach recommended by the Law Commission in 1973 (para 105) and the Pearson Commission in 1978 (vol 1, paras 433-7). The 1982 Act has given effect to these recommendations by providing in section 4 that the damages recoverable for the benefit of the estate of any person shall not include :-

*"any damages for loss of income in respect of any period after that person's death."*

A similar provision introduced in Hong Kong would both eliminate all the problems associated with the lost years claim and bring Hong Kong law into line with that in England.

11.31 There are, however, arguments against the complete abolition of the LARCO claim. The main criticism of the present law is that it allows double recovery in respect of the money which would have been spent on the dependants of the deceased. If the LARCO claim were to be abolished, however, it would mean that the deceased's estate would be deprived not only of the sums which would have been spent on the dependants, but also of the amount which the deceased would have saved. This leads us to consider our third option.

### **Option (c)**

11.32 This option involves the retention of claims under both the FAO and LARCO, but is aimed at eliminating any double recovery. As has been pointed out above, double recovery may occur because the sums that would have been spent on the deceased's dependants are not deducted from the LARCO award. This anomaly could be overcome by requiring the courts to make such a deduction. The effect would be that the LARCO award would be calculated by reference to the net savings which the deceased would have made had he lived a normal lifespan (the "net savings method"). Such an approach was in fact adopted in the Hong Kong case of VSL Engineers (HK) Ltd v. Yeung Wing [1981] HKLR 407, and although the Court of Appeal subsequently disapproved this method of calculation, Roberts CJ thought it had some attraction. He observed that -

*"The net savings method has attractions. It involves a relatively simple calculation. It treats the amount which the deceased handed to his wife for her maintenance in the same way as that which he handed to her for his maintenance. It ensures that there would accrue to the deceased's estate only what, had he lived, would have been found in it at his death, because he would have saved it. And it avoids the inflation of LARCO awards by the amount of the dependency, which will appear in the FAO award as well."*

*(See Wong Sai-chuen dec'd v Tam Mei-chun (1982) Civ App No. 133 of 1981)*

Since the net savings method takes into account the sums which the deceased would have spent on his dependants there is no overlap between the LARCO claim and awards under the FAO. No merger of these awards should therefore take place.

11.33 This approach is also consistent with the rule that in assessing damages for pecuniary loss, the principle of full compensation should be applied. As Lord Blackburn stated in Livingstone v Rawyards Coal Co (1880) 5 App cas 29, 39 -

*'... where any injury is to be compensated by damages, in settling the sum of money to be given ... you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong ...'*

Where the deceased would have saved part of his income during the lost years there is no doubt that his estate has been deprived of that money. Damages should therefore compensate the estate for this loss.

## Our recommendations

11.34 The provisional view of the sub-committee was that option (c) should be adopted. Of those who responded to the Working Paper, the majority favoured this approach. A number of people did comment unfavourably on this approach, however, and their arguments merit discussion.

11.35 Some commentators pointed out that it was incorrect to regard the net savings as the only surplus left from the net income after deductions are made for personal expenses and sums spent on the dependants. We acknowledge the logic of this. There may be other amounts which were dealt with in other ways by the deceased. Nevertheless we are of the view that the estate should only be able to claim for the loss of those sums which would have been saved by the deceased. If other uses made by the deceased of his money were to be taken into account we feel this would create an unacceptable level of speculation as to whether that money should be regarded as a loss to the estate.

11.36 Another commentator considered that lost years awards had considerably increased the level of awards and that the social cost of this increase was not justified. We sympathise with this view but do not consider that this should lead us to recommend the total abolition of damages for the lost years. Our recommendation that only the loss of savings should be recovered would, if implemented, reduce the level of awards considerably.

11.37 The same commentator also regarded the degree of speculation involved in lost years claims as unacceptable. This does seem to us to be a valid criticism. A degree of speculation enters into claims for loss of dependency under the FAO, but in the case of claims under LARCO, the amount of speculation may be much greater. In some cases the courts have held that where some matters are very speculative they would simply consider the facts as at the date of death and not make any guesses as to what the future might hold (see eg Lee Kai-cheung v Yim Tat-kuen (1983) HCA No. 1374 of 1983). In our view this approach should be adopted in all cases relating to lost years in fatal cases. We recommend that a LARCO claim for damages for the lost years should only lie in respect of the loss of saving during the lost years, and that such a loss should be calculated on the basis of the established pattern of savings (if there is one) of the deceased prior to the accident. This approach will eliminate speculation as to the future savings habits and will make settlements easier to arrange. It will enable the estate of a deceased person with an established pattern of savings (eg a middle-aged family man) to recover the loss of future savings, but will eliminate claims in the case of a young person with no savings pattern. In our view this approach is preferable to the total abolition of damages for the lost years and yet has a degree of certainty and simplicity.

11.38 The discussion of the lost years has so far concentrated on the loss of income during those years. In most cases this will be the only financial loss in that period. It is possible, however, that there may be other losses. In



the recent case of Adsett v West [1983] 3 WLR 437 it was held that a claim for the lost years could include a claim for the loss of an inheritance during those years. That decision led to the rather bizarre result that the father of the deceased who was the beneficiary of the estate, could claim for his son's loss of inheritance from the father. In our view such losses should not be recoverable as being too speculative. We therefore recommend that the damages awarded in respect of the lost years should not include any claim for the loss of any property which would or might have vested in the deceased had he not died as a result of the tortious act.

11.39 Another loss which might arise in the lost years is the loss of ability to render services. It has already been recommended that a statutory right be created which would enable an injured person to recover the value of the services which can no longer be performed (see paras 9.18-21). Where a person dies from his injuries it would normally follow that the estate would inherit the cause of action under LARCO. If such an inheritance is permitted, however, the risk of double recovery would again arise, since the dependants of the deceased are also able to claim under FAO for the loss of the services of the deceased (see Berry v Humm & Co [1915] 1 KB 627; Lee Ping-tim v Wong Kin-foon [1978] HKLR 347). To avoid such a possibility we therefore recommend that a claim for loss of ability to render services should not pass to the estate of the deceased under LARCO.

11.40 In order to give effect to the recommendation in the three preceding paragraphs it will be necessary to depart from the wording of the 1982) Act. Section 4(2) of that Act provides that the estate of a deceased person shall not inherit "any damages for loss of income in respect of any period after that person's death". It will be necessary to provide that (i) the part of the income which would have been saved shall still be inherited; (ii) any damages for the loss of an inheritance or for the loss of ability to render services after that person's death shall not be inherited.

#### **4. Non-fatal cases**

11.41 The claim for damages for the lost years in non-fatal cases involves quite different considerations from those discussed above in relation to fatal cases. In non-fatal cases there is no possibility of double recovery or of a 'windfall' because no additional claim for loss of dependency can be made after the victim recovers damages himself (see para 11.4 above). It will be recalled that the claim for lost years was recognised in Pickett's case for precisely this reason. Without such damages, the dependants would not have recovered their loss of financial support during the lost years. The claim therefore provides a remedy where one was previously lacking.

11.42 There is clearly a need to protect the dependants during the lost years of the victim, but there may be other ways of doing this apart from retaining the existing claim for damages for the lost years.

## Reform options

11.43 The Law Commission considered this problem in 1973, before the lost years claim was established, and considered three solutions -

- (a) establishing a claim for loss of earnings during the lost years, based upon the amount of those earnings less what the plaintiff would have spent on himself;
- (b) permitting the dependants to bring an action under the fatal accidents legislation notwithstanding that the deceased had, during his lifetime, himself received damages;
- (c) enabling the plaintiff to join his dependants in his own action and providing that the sum awarded to compensate the dependants for the lost years should be paid into court.

Solution (a) is, in fact, the present law as established in Pickett's case. Solution (b) involves reversing the rule in Read v Great Eastern Railway Co (1868) LR 3 QB 555 to the effect that the dependants cannot make any claim after the victim has himself recovered damages.

11.44 The Law Commission considered these options at length and took into account the views expressed in response to its earlier working paper. The full text of the discussion is set out in Annexure 6 to this report. Solution (b) was rejected primarily on grounds of practicability (see paras 76-83). It was felt that major difficulties would arise in relation to the settlement of a claim by the victim since:-

- (i) it would be necessary to record the basis of the settlement;
- (ii) there would be a conflict of interests between the victim and his dependants, who would be unrepresented in the settlement; and
- (iii) settlements would therefore need to be approved by the court.

Solution (c) was also rejected (see paras 84-5). Again it was felt that this solution would greatly complicate the settlement of claims. Solution (a) was therefore recommended both by the Law Commission and the Pearson Commission. The 1982 Act has, in effect, adopted this solution by making no change to the law relating to lost years in non-fatal cases.

11.45 This commission agrees that solutions (b) and (c) are not practicable solutions to the problem. It has, however, considered a further solution, which we shall call solution (d). This solution is based on the argument that the law relating to non-fatal cases should, as far as possible, be consistent with that in fatal cases. The principles on which damages are to be awarded should not vary according to whether or not the victim survives long enough to obtain judgment.

11.46 In fatal cases, we have recommended that there should be two claims in respect of pecuniary loss: the dependants should be entitled to claim loss of dependency under the FAO; and the estate should be entitled to claim the loss of net savings under LARCO. In non-fatal cases we have concluded that it would not be practicable to give the dependants a right to claim for loss of dependency. There is, however, no reason why the victim himself should not recover the amount which will be lost to the dependants during the lost years. It is true that the victim might decide to use the money for purposes other than supporting his dependants, but we do not believe that this will often happen. In any event, the freedom the victim is given is no different from the freedom he would have had in using his income had he lived a normal lifespan. Similarly, there is no reason why the victim should not be entitled to recover the net savings which he would have made during the lost years.

11.47 Solution (d) therefore, is that in non-fatal cases the victim should be entitled to recover the amounts which, during the lost years, he would either have spent on his dependants or would have saved.

11.48 The choice is, therefore, between solution (a), that is to retain the present law relating to lost years, and solution (d). There is, in fact, little difference between the two solutions since, as has been seen, the courts sometimes treat the lost years claim as a claim for loss of dependency and loss of savings. Since solution (d) would not involve any substantial change in the law we have considered whether there is any advantage to be gained by adopting this solution. It may be argued that a legislative provision stating that, in non-fatal cases, the award for the lost years should compensate the victim for the loss to the dependants and the loss of net savings would ensure consistency between fatal and non-fatal cases. It would also help to eliminate much of the uncertainty which still surrounds the calculation of damages for the lost years. Against this it may be argued that the principles relating to lost years cases are now much clearer than before, and that the 1982 Act does not affect the lost years claim in non-fatal cases.

## **Our recommendation**

11.49 On balance, we have decided to recommend solution (a), that is to leave the law as it is. In reaching this conclusion we have been swayed by the fact that during the period of our study the principles upon which lost years awards are to be made have become much clearer, and by the fact that the 1982 Act has made no change to this area of the law. Any legislative provision in Hong Kong would be likely to create new problems of interpretation that would once again lead to unnecessary confusion.

## Chapter 12

### Consequential matters

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#### **Seduction, enticement and harbouring**

12.1 We have already recommended that the actions for loss of services of a wife, child or servant should be abolished (see paragraphs 9.1-21). Section 2 of the 1982 Act which effects such an abolition in England also abolishes two other archaic remedies. These are the right of an employer to recover damages from a person who -

- (i) deprived the employer of the services of his female servant by raping or seducing her; or
- (ii) enticed or harboured a servant of the employer.

12.2 Since our terms of reference are to consider the award of damages in personal injury and death cases we are not called upon to make any recommendation concerning these remedies. We would nevertheless suggest that consideration be given to the abolition of these remedies in Hong Kong. In addition, we note that the action of a husband in respect of the enticement of his wife was abolished in England in 1970 (Law Reform (Miscellaneous Provisions) Act) but is presumably still applicable in Hong Kong. Consideration might also be given to the abolition of this remedy.

#### **Criminal Injuries Compensation Scheme etc.**

12.3 In the case of a fatal accident, the dependants of the deceased victim may be entitled to claim compensation from one of three funds administered by the Social Welfare Department. These are the Criminal Injuries Compensation Scheme, the Law-enforcement Compensation Scheme and the Emergency Relief Fund. If our recommendations concerning the extended definition of dependants under the FAO and the new claim for bereavement are implemented we would hope that consideration would be given to making similar changes in the three Social Welfare Department Schemes. We note that in England an amendment has been made to the Criminal Injuries Compensation Scheme to bring it into line with the 1982 Act (Home Office Circular No. 27 of 1983).

## **A single ordinance**

12.4 We have earlier suggested that the FAO could be improved by adopting the more modern style of the English Act (see paragraph 4.29). We also suggest that consideration be given to the creation of a single ordinance dealing with damages for personal injuries. This would mean that the provisions dealing with claims by dependants and by the estate of the victim would be found in one place. In the course of such a reform the opportunity could be taken to remove inconsistencies that exist between the two types of claims.

## **Related ordinances**

12.5 There are three ordinances which concern the family of a deceased person: the Fatal Accidents Ordinance (discussed in Chapter IV above) provides for the dependants of a person who is wrongfully killed; the Intestates' Estates Ordinance (Cap. 73; LHK 1971 ed) deals with the distribution of the estate of a person dying intestate; and the Deceased's Family Maintenance Ordinance (Cap. 129; LHK 1971 ed) deals with the situation where a 'dependant' of the deceased is not provided with reasonable provision for his maintenance, either under the will of the deceased or under the rules of intestacy. Such a dependant can apply to the court for an order of such reasonable provision out of the estate as the court thinks fit.

12.6 There are therefore three ordinances which set out the classes of persons who ought to be provided for in the event of someone's death. It might be expected that the classes of persons in the three ordinances would more or less coincide, but this is not the case. For example, the list of recognised dependants under the FAO (set out in paragraph 4.2) may be contrasted with that under Cap. 129, which is much more limited -

- (i) a wife or husband by a valid marriage;
- (ii) an unmarried daughter by a valid marriage;
- (iii) an infant son by a valid marriage;
- (iv) a son by a valid marriage who is, by reason of some mental or physical disability, incapable of maintaining himself;
- (v) a parent of the deceased substantially maintained by him immediately before his death.

12.7 If an accident victim recovers substantial damages and then dies, leaving all his property to a charity, only those persons listed above may make a claim against the estate. Where a victim dies in an accident, however, a much wider class of dependants may claim for loss of their dependency under FAO. If our recommendations concerning the extension of the recognized dependants under the FAO is implemented the disparity between these ordinances will be even greater.

12.8 We recognized that it is beyond our terms of reference to consider any reforms of the law relating to the distribution of estates, but we would suggest that there is a need for a review of this legislation.

## Chapter 13

### Summary of recommendations

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13.1 There is a need to extend the class of recognized dependants who may claim under the Fatal Accidents Ordinance (paras 4.1-9).

13.2 The extension should be achieved by widening the list of recognized relationships, rather than by allowing a claim to be made by anyone who can prove a factual dependency (paras 4.10-13).

13.3 The list of recognized relationships should include -

- (i) a former wife or husband (paras 4.4 & 4.14);
- (ii) any ascendent or descendant (paras 4.5 & 4.14);
- (iii) a son or daughter of the family (paras 4.6 & 4.15);
- (iv) a person who treated the deceased as a son or daughter of the family (paras 4.7 & 4.16);
- (v) a person who had lived as husband or wife of the deceased for a certain period (paras 4.8 & 4.18-23);
- (vi) brothers and sisters of the grandparents of the deceased and their issue (para 4.17);
- (vii) any godchild or godparent of the deceased according to Chinese custom (para 4.17).

13.4. The minimum period of cohabitation for those in class (v) above should be two or three years (paras 4.19-24)

13.5 All benefits which accrue to a dependant as a result of the death should be disregarded in calculating the amount of the award (paras 4.25-28).

13.6 The Fatal Accidents Ordinance should be re-drafted in a clearer and more modern style, similar to that in the English Fatal Accidents Act 1976 (para 4.29).

13.7 The damages awarded for personal injuries should not be reduced because the injured person is maintained at public expense in a hospital or other institution and as a result makes some saving (paras 5.1-10).

13.8 A system of provisional damages similar to that established by section 7 of the 1982 Act should be introduced in Hong Kong (paras 6.1-7).

13.9 The system should apply in all cases, regardless of whether the defendant is insured (paras 6.4-6 & 6.8-9).

13.10 Rules of Court should provide that a defendant may, if he so wishes, pay money into court in respect of his possible future liability after he has been ordered to pay provisional damages. Interest on such payments should accrue to the person making the payment in, and he should be entitled to withdraw the money at any time (paras 6-9).

13.11 A plaintiff should have the right to a final award of damages assessed as at present instead of a provisional award if he so elects. Where the plaintiff is a minor or is under a disability leave of the court of trial should be required before such a right can be exercised (paras 6-9).

13.12 Where a person has obtained an award of provisional damages his claim for further damages should crystallise on the winding up or bankruptcy of the defendant and be provable as a debt due to the plaintiff (paras 6-9).

13.13 A court, in assessing damages for pain and suffering should be entitled to take into account any awareness of the injured person that his expectation of life has been reduced (paras 7.1-10).

13.14 Subject to the preceding paragraph, no damages should be recoverable for loss of expectation of life (paras 7.1-10).

13.15 If damages for loss of expectation of life are abolished, an award for bereavement should be introduced as a measure of compensation for grief and loss of society and guidance (paras 8.1-11).

13.16 The award should be of a fixed sum which should initially be set at HK\$40,000 (paras 8.21-23).

13.17 A claim for bereavement should be for the benefit of such of the following persons as survive the deceased for not less than thirty days-

- (i) the spouse of the deceased, provided that spouse had not lived apart from the deceased for a continuous period of two years immediately preceding the death of the deceased (paras 8.14-16);
- (ii) if there is no spouse who can claim, the children of the deceased (paras 8.16 & 8.24);
- (iii) if there is no spouse and no child who can claim, the parents of the deceased (para 8.17);
- (iv) if there are no parents or children, in the case of a minor who has been treated as a child of another family, the de facto parents (para 8.18);
- (v) in other cases, the brothers and sisters of the deceased (para 8.19).

13.18 The claim for bereavement should not survive the death of the claimant (para 8.25).



13.19 An award for bereavement should not be taken into account when eligibility for welfare benefits is being calculated (para 8.26).

13.20 The actions for loss of services of a wife, child or employee should be abolished (paras 9.1-12).

13.21 These actions should be replaced by a remedy in favour of the injured person for loss of the ability to render gratuitous services. This remedy should be provided for in the new legislation which should also provide that the claim shall not survive for the benefit of the claimant's estate on his or her death (paras 9.18-21 & 11.39-40).

13.22 A husband's right to claim for the loss of society of his injured wife should be replaced by a statutory remedy for the loss of comfort and society of an injured person (paras 10.1-5).

13.23 A maximum figure should be set for the award for loss of society which should be the same figure as for bereavement (para. 10.6).

13.24 The new remedy should be available for the benefit of such of the following persons as live for not less than thirty days after the accrual of the cause of action in respect of the injury -

- (i) the spouse of the injured person, provided that spouse had not lived apart from the injured person for a continuous period of two years immediately before the accrual of the cause of action;
- (ii) if there is no spouse who can claim, any children of the injured person residing with him or her;
- (iii) if there are no such children, the parent or parents of the injured person, provided that they reside with the injured person (paras 10.7-8).

13.25 An award for loss of society should bar any subsequent claim for bereavement (para 10.9).

13.26 The law relating to the 'lost years' in fatal cases should be reformed (paras 11.1-27). The claim under LARCO for the lost years should be reduced so that it represents only the net savings which the deceased would have made during the lost years. The award should be calculated on the basis of the established savings pattern (if any) of the deceased at the time of the accident (paras 11.32-40).

13.27 The law relating to the 'lost years' in non-fatal cases should be retained as at present (paras 11.41-49).

13.28 Consideration should be given to the desirability of abolishing actions for seduction, enticement and harbouring (paras 12.1-2).

13.29 Consideration should be given to amending the Criminal Injuries Compensation Scheme and related schemes in the light of reforms advocated above (para 12.3).

13.30 Consideration should be given to the creation of a single ordinance dealing with claims by dependants and the estate of an accident victim (para 12.4).

13.31 Consideration should be given to a review of the law of succession in the light of reforms advocated above (para 12.5).

## 第 13 章

### 建議摘要

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13.1 目前，獲得確認為倚靠死者供養的親屬，可根據意外死亡條例的規定提出索償。本委員會認為這類獲確認的親屬身份，其範疇應予擴闊（第 4.1 至 4.9 段）。

13.2 本委員會認為應使多項親屬關係獲得確認，藉以擴闊這類親屬名份的範疇；而非採用誰人能夠證實自己確實為倚靠死者供養的親屬，便有資格提出索償的辦法，來把這種親屬名份擴闊（第 4.10 至 4.13 段）。

13.3 具下述身份的人士應被視為具有獲得確認的親屬關係：

- (i) 前妻或前夫（第 4.4 及第 4.14 段）；
- (ii) 上代親屬或後裔（第 4.5 及第 4.14 段）；
- (iii) 在死者家庭內，被視為子女的人士（第 4.6 及第 4.15 段）；
- (iv) 把死者視作家庭內的兒子或女兒的人士（第 4.7 及第 4.16 段）；
- (v) 在一段時間內一直與死者共同生活，一如其丈夫或妻子的人士（第 4.8 及第 4.18 至 4.23 段）；
- (vi) 死者祖父母的兄弟及姊妹及他們的後嗣（第 4.17 段）；
- (vii) 根據中國習俗而結成的誼子女或誼父母（第 4.17 段）。

13.4 上述第(v)類所指的人士，最少應與死者同居已有二或三年（第 4.19 至 4.24 段）。

13.5 在計算賠償數額時，應該毋須考慮到死者的親屬因死者亡故而獲得的各項利益（第 4.25 至 4.28 段）。

13.6 意外死亡條例應重新草擬，所用文字應力求明確，並且配合現代體裁，冀能與一九七六年英國意外死亡法所用者相類似（第 4.29 段）。

13.7 即使傷者入住支銷公費的醫院或其他機構，因而可節省若干私人支出，其個人損傷賠償額不應因此相應減少。

13.8 當局應仿效一九八二年英國法律執行法第七條之規定，在香港設立類似的臨時賠償制度（第 6.1 至 6.7 段）。

13.9 該制度應適用於任何案例，不論被告人有否購買保險（第 6.4 至 6.6 段及第 6.8 至 6.9 段）。

13.10 法院規則應規定被告人在被判令支付臨時賠償後，如其本人有此意願，可將一筆款項存入法庭，以應付其日後可能須負的賠償責任。該筆款項所得的利息應歸存款人所有；而該人亦應有權在任何時間取回該筆款項（第 6.7 至 6.9 段）。

13.11 原告人有權隨其本人意願選擇接受一筆照現行辦法評估的損傷最終賠償，來代替臨時賠償。如果原告人乃未成年或沒有行為能力者，則須先行獲得審裁法庭批准，才可行使這項選擇權（第 6.7 至 6.9 段）。

13.12 於有關之被告人宣布清盤或破產時，已獲取臨時賠償的人士所提出的進一步索償，應得到明確的認定，並得證實為須償還予原告人的債項（第 6.7 至 6.9 段）。

13.13 法庭在評估傷者因所受的痛苦與創傷而應得到的賠償額時，應有權考慮到傷者是否知悉自己生命的預期情況受損，而把這一點計算在內（第 7.1 至 7.10 段）。

13.14 除上述一段所規定者外，原告人不得因生命預期情況受損而獲得任何賠償（第 7.1 至 7.10 段）。

13.15 如果當局取消彌補生命預期情況受損的賠償，則應設立一項喪痛賠償，以補償死者親屬所受到的哀傷及失去死者作伴和提挈的痛苦（第 8.1 至 8.11 段）。

13.16 該項賠償應為一筆定額款項，初步應訂為港幣四萬元（第 8.21 至 8.23 段）。

13.17 具下列身份的人士，在死者去世三十日後仍然在生者，則可因喪痛而提出該項索償 ——

- (i) 死者的配偶，必須在死者死前兩年期內一直與死者同住（第 8.14 至 8.16 段）；
- (ii) 如果沒有具索償資格的配偶，則死者的子女有權提出索償（第 8.16 至 8.24 段）；
- (iii) 如果沒有具索償資格的配偶或子女，則死者的父母有權提出索償（第 8.17 段）；
- (iv) 如果死者沒有在生的父母或子女，而其本身尚未成年，及生前被別個家庭當作子女對待，則死者的養父母有權提出索償（第 8.18 段）；
- (v) 在其他情況下，死者的兄弟及姊妹有權提出索償（第 8.19 段）。

13.18 因喪痛而提出的索償權利，在索償者死後不應繼續生效（第 8.25 段）。

13.19 當計算是否符合資格領取福利補助時，不應將所獲得的喪痛賠償計算在內（第 8.26 段）。

13.20 因失去妻子、子女或僱員的服務而提出的訴訟行動應予廢除（第 9.1 至 9.12 段）。

13.21 上述訴訟行動應由一項發給傷者的補償所代替，以補償傷者在提供不計報酬服務方面所喪失的能力。新法例應規定傷者可獲得這項補償，並且應規定這項索償權利，不應在索償者死後仍繼續生效，免致這項索償權利被列為索償者的遺產（第 9.18 至 9.21 段及第 11.39 至 11.40 段）。

13.22 丈夫因受傷的妻子不能作伴而提出索償的權利，應改由一項要求獲得法定補償的權利所取代，以補償失去傷者的慰藉及作伴的損失（第 10.1 至 10.5 段）。

13.23 法例應規定因失去傷者作伴而可獲得的最高補償額，這數額應相等於喪痛所獲的補償額（第 10.6 段）。

13.24 具有下列身份的人士在有關傷亡的訟因形成後三十日後仍然生存者，應有權獲取這項新補償：

- (i) 傷者的配偶，但該配偶必須在訟因形成前兩年期內一直與傷者同住；
- (ii) 如果沒有具索償資格的配偶，則任何與傷者同住的子女；
- (iii) 如果沒有具索償資格的子女，則傷者的父母可獲得補償，但他們必須是與傷者同住的（第 10.7 至 10.8 段）。

13.25 有關人士因失去傷者作伴而獲得補償後，便不得提出喪痛賠償的要求（第 10.9 段）。

13.26 與致命意外事件中「喪失的歲月」有關的法律應予改革（第 11.1 至 11.27 段）。根據法律修訂及改革（綜合）條例為死者所喪失的歲月而索取的賠償，應減至僅相當於死者在喪失的歲月中可以積蓄得到的淨數。如在意外發生時，死者已有既定的儲蓄模式，則賠償額應按照其儲蓄模式計算（第 11.32 至 11.40 段）。

13.27 與非致命意外事件中「喪失的歲月」有關的現行法律應保留不變（第 11.41 至 11.49 段）。

13.28 本委員會認為應考慮是否適宜廢除因誘姦、慫恿及窩藏而引起的訴訟行動（第 12.1 至 12.2 段）。

13.29 本委員會認為應考慮依據上文所主張的各項改革，對暴力傷亡賠償計劃及各有關計劃作出修訂（第 12.3 段）。

13.30 本委員會認為應考慮制定單一條例，專門處理意外受害人的親屬所提出及根據受害人的遺產權而提出的索償要求（第 12.4 段）。

13.31 此外，本委員會認為應考慮依據上文所主張的各項改革，對遺產承繼法律進行檢討（第 12.5 段）。

**Sub-Committee on Damages for Personal Injuries**

Mr Bob Allcock (Chairman)	Senior Lecturer, School of Law University of Hong Kong
Hon Mr Justice Barker (Vice Chairman)	Justice of Appeal
Mrs Pauline Cheung	Assistant Principal Legal Aid Officer
Mr Charles Ching, QC	Barrister
Dr The Hon Henrietta Ip	Member of the Legislative Council
Mr Simon S O Ip	Solicitor, Messrs Johnson, Stokes & Master
Mr Stephen C K Law, JP	Assistant Director of Social Security, Social Welfare Department
His Honour Judge McClelland	District Court Judge
Ms Robyn Martin	Lecturer, School of Law University of Hong Kong
Mrs Angeli Tsui	Co-ordinator of Family Services, Caritas
Mr Wong Hay-chih	General Insurance Manager Sentry Insurance
Mr Nicholas F F Pirie (Observer)	Barrister
Mrs Barbara Kaplan (Observer)	Barrister
Mr A N Watson-Brown (Secretary)	Attorney General's Chambers

## Annexure 2

List of organisations/individuals to whom the Working Paper was sent (those who responded are marked\*)

The Chief Justice  
Sir Alan Huggins  
\* The Hon Mr Justice Leonard  
\* The Hon Mr Justice Cons  
The Hon Mr Justice Yang  
\* The Hon Mr Justice Fuad  
\* Registrar, Supreme Court  
\* Mr C J Perrior  
\* The Law Draftsman  
The Hon T S Lo, CBE, JP,  
\* The Hon F K HU, JP  
Dr Philip C K Kwok, JP  
Dr Ambrose Y C King  
The Hon Mr Justice Power  
\* The Hon Mr Justice LIU  
The Hon Mrs Selina Chow, JP  
Mr Arjan Sakhrani, QC  
Professor Peter Willoughby, JP  
Mr Brian McElney, JP  
\* Mr David K P LI, JP  
The Hon Mr Justice Rhind  
\* The Hon Mr Justice Mayo  
\* The Hon Mr Justice Jackson-Lipkin  
\* The Hon Mr Justice Kempster  
\* The Hon Mr Justice Hunter  
\* The Hon Mr Justice Mantell  
\* Messrs Lovell, White and King  
Edmund Cheung & Co  
Coward Chance  
Denton, Hall and Burgin  
Gallant Y T Ho & Co  
Linklaters & Paines  
Charles Russell & Co  
Wilkinson & Grist  
McKenna & Co  
\* Baker & McKenzie  
Clyde & Co  
Deacons  
Fairbairn & Kwok  
\* Mr M J Merry  
\* Messrs Johnson, Stokes Master  
\* Norton, Rose, Botterell & Roche  
\* Sinclair Roche  
Woo, Kwan, Lee & Lo  
Masons & Marriott



Mr Kut Ying Hay  
 Mr Joseph W N Cheung  
 \* Mr Wong Che Ming  
 Mr Mathew HO Chi-ming  
 Ms Lillian M Y Chan  
 Mr R M M Evans  
 Mr Richard Morris  
 Mr Michael Lintern-Smith  
 \* Mr Paul Li  
 \* Mr Pat Bobby Ying HO  
 \* Mr Patrick Burke  
 Mr Joseph C K Yim  
 \* American International Underwriters, Limited  
 Kowloon Motor Bus Co. (1933) Ltd.  
 \* China Motor Bus Co. Ltd.,  
 \* South China Morning Post  
 Hong Kong Standard Newspapers Ltd  
 Ming Pao Daily News  
 Wah Kiu Yat Po  
 Sing Tao Newspapers Ltd  
 \* The Dean, School of Law, University of Hong Kong  
 \* Chinese Manufacturers' Association of HK  
 Hong Kong Christian Industrial Committee  
 \* Director of Legal Aid  
 Mr Henry Litton, QC  
 \* Mr Michael Ozorio  
 Mr Robert Ribeiro  
 Mr William Stone  
 \* Mr C Mumford  
 \* Mr Ruy Barretto  
 \* Miss Corinne D'A Remedios  
 \* Mr Denis K L Chang, QC  
 Mr Richard Mills-Owens, QC  
 Mr Ronny K W Tong  
 Mr R K Sujanani  
 Mr K Bokhary, QC  
 \* Hong Kong Council of Social Service  
 Social Welfare Department  
 Hong Kong Social Workers Association Ltd  
 Hong Kong Diocesan Chancery  
 \* Hong Kong Diocesan Tribunal  
 Mr Frank Stock  
 \* Miss J N Lewis  
 Mr W P G Munro  
 \* Army Claims, British Forces  
 \* Mr P A Tait  
 \* Medical Superintendent, Ruttonjee Sanatorium  
 Mr Donald Smith  
 \* Union Insurance Society of Canton, Ltd  
 Hong Kong Federation of Medical Societies

Hong Kong Medical Association  
Chinese Medical Association  
Medical & Health Services Department  
Social Welfare Department  
\* Labour Department  
Hong Kong Paediatric Society  
British Medical Association  
\* Actuarial Association of Hong Kong  
Accident Insurance Association of Hong Kong  
\* The Pacific Insurance Co Ltd  
\* Peter B Kutner, the University of Oklahoma  
Mr Desmond Keane, QC

A BILL

To

Amend the Law Amendment and Reform (Consolidation) Ordinance in relation to damages recoverable in tort by and on behalf of persons who sustain personal injuries, and to make other related and consequential changes to the law.

Enacted by the Governor of Hong Kong, with the advice and consent of the Legislative Council thereof.

Short title and Commencement. 1. (1) This Ordinance may be cited as the Law Amendment and Reform (Consolidation)(Amendment) Ordinance 1984.

( of 1984.) (2) This Ordinance shall come into operation on the day appointed for the commencement of the Fatal Accidents Ordinance 1984 but shall not apply to any cause of action that accrues before then.

Amendment of section 20. (Cap. 23.) 2. Section 20 of the principal Ordinance is amended -

( of 1984.) (a) by inserting after subsection the following -  
"(1A) The right of a person to claim under section 4 of the Fatal Accidents Ordinance 1984 (for bereavement) or under section 20C(1) of this Ordinance (for loss of society) shall not survive for the benefit of his estate on his death.";

(b) in subsection (2) by deleting paragraph (a) and substituting the following -

"(a) shall not include -

- (i) any exemplary damages;
- (ii) any damages in respect of the loss of any property that would or might have vested in the deceased if he had not died when he did;

(iii) any damages in respect of loss of ability to render services after his death;

(iv) any damages for loss of income in respect of any period after his death, except where before the date on which the cause of action accrued he had established a pattern of making savings from income, in which case the damages shall include an amount calculated on the basis of that pattern, subject to such deduction as the court thinks fit on account of the accelerated payment of any such lost income for which damages are awarded;"; and

(c) by inserting after subsection (6) the following -

"(7) In this section "savings" -

(a) includes expenditure which has increased, maintained or protected the deceased's wealth;

(b) excludes -

(i) sums saved for expenditure on leisure for the deceased or his dependants;

(ii) sums expended on premia for the deceased's own life assurance."

Addition of new sections 20A, 20B and 20C.

3. The principal Ordinance is amended by adding after section 20 the following new sections -

"Abolition of right to damages for loss of expectation of life.  
1982 c.53, s.1.

20A. (1) In an action for damages for personal injuries -

(a) no damages shall be recoverable in respect of any loss of expectation of life caused to the injured person by the injuries; but

(b) if the injured person's expectation of life has been reduced by the injuries, the court, in assessing damages in respect of pain and suffering caused by the injuries, shall take account of any suffering caused or likely to be caused to him by awareness that his expectation of life has been so reduced.

(2) The reference in subsection (1)(a) to damages in respect of loss of expectation of life does not include damages in respect of loss of income.

Abolition of common law actions for loss of tort - society or service. 1982 c.53, s.2.

20B. Except as provided in section 20C, no person shall be liable in

(a) to a husband on the ground only of having deprived him of the services or society of his wife;

(b) to a parent (or person standing in the place of a parent) on the ground only of having deprived him of the services of a child; or

(c) on the ground only

(i) of having deprived another of the services of his menial servant;

(ii) of having deprived another of the services of his female servant by raping or seducing her; or

(iii) of enticement of a servant or harbouring a servant.

Actions for loss of society or services.

20C. (1) Where injury is caused to any person by any wrongful act, neglect or default which entitles him to maintain an action and recover damages, and which causes the husband, wife, children or parents of the

injured person to be deprived of his society, the person who is liable to such an action shall, subject to subsection (3), also be liable in damages for the loss of the injured person's society suffered by such of the following persons as survive 30 days after the date on which the cause of action accrued -

- (a) the husband or wife of the injured person, unless they had been living apart for a continuous period of at least 2 years immediately preceding the date when the cause of action accrued; or
- (b) where there is no spouse entitled to recover damages under paragraph (a), any children of the injured person who were living with him at the date when the cause of action accrued; or
- (c) where there is no such spouse or child, any parent of the injured person who was living with him at the date when the cause of action accrued.

(2) The total sum awarded as damages under subsection (1) in respect of any injured person -

A BILL  
To

Repeal and replace existing provision for the compensation of dependants of persons killed as a result of tortious acts.

Enacted by the Governor of Hong Kong, with the advice and consent of the Legislative Council thereof.

Short title and commencement. 1. (1) This Ordinance may be cited as the Fatal Accidents Ordinance 1984.

(2) This Ordinance shall come into operation on a day to be appointed by the Governor by notice in the Gazette but shall not apply to any cause of action that accrues before then.

Interpretation. 2. In this Ordinance, unless the context otherwise requires -

(Cap. 290.) "adopted" means adopted in pursuance of an adoption order made under the Adoption Ordinance or of any adoption recognized as valid by the Law of Hong Kong;

"dependant" in relation to a deceased person means -

(a) the wife, husband, former wife or former husband of the deceased and any person whose marriage to the deceased has been annulled or declared void;

(b) any person who

(i) was living with the deceased in the same household immediately before the date of his death; and

(ii) had been living with the deceased in the same household for at least 3 years before that date,

as the husband or wife of the deceased;

(c) any parent or other ascendant of the deceased;

(d) any person (not being a parent of the deceased) who, in the course of any marriage

to which that person was a party, treated the deceased as a son or daughter of the family in relation to that marriage;

- (e) any child or other descendant of the deceased;
- (f) any person (not being a child of the deceased) who, in the case of any marriage to which the deceased was at any time a party, was treated by the deceased as a son or daughter of the family in relation to that marriage;
- (g) any person who is, or is the issue of, a brother, sister, uncle or aunt of the deceased;
- (h) any person who is, or is the issue of, a brother or sister of a grandparent of the deceased;
- (i) any godchild or godparent of the deceased according to Chinese custom;

"wife" means -

- (a) in the case of a Christian marriage or its civil equivalent, the lawful wife; and
- (b) in the case of any other lawful marriage
  - (i) the lawful wife of such marriage; or
  - (ii) if there is more than one lawful wife, the lawful principal wife recognized as such by the personal law of the husband of such marriage, or if there is no lawful principal wife, the lawful wives so recognized.

(2) In deducing any relationship for the purposes of this Ordinance -

- (a) an adopted person shall be treated as the child of the person or persons by whom he was adopted and not as the child of any other person; and, subject thereto;
- (b) any relationship by affinity shall be treated as relationship by consanguinity, any relationship of the half-blood as a relationship of the whole blood, and the stepchild of any person as his



child; and

- (c) an illegitimate person shall be treated as the legitimate child of his mother and reputed father.

Right of  
action for  
wrongful act  
causing death.  
[cf. 1982  
c. 53, s. 3.]

3. (1) If death is caused to any person ("the deceased") by any wrongful act, neglect or default which is such as would (if death had not ensued) have entitled him to maintain an action and recover damages in respect thereof, 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 deceased.

(2) Subject to section 4(2), every such action shall be for the benefit of the dependants of the deceased.

Bereavement.  
[cf. 1982  
c. 53, s. 3.]

4. (1) An action under this Ordinance may consist of or include a claim for damages for bereavement unless, by reason of the act, neglect or default referred to in section 3(1), any person has recovered, by action or otherwise, a sum in respect of loss of the deceased's society under section 20C(1) of the Law Amendment and Reform (Consolidation) Ordinance.

(2) A claim for damages for bereavement shall only be for the benefit of such of the following persons as survive the deceased for not less than 30 days

- (a) the wife or husband of the deceased, unless they had been living apart for a continuous period of at least 2 years immediately preceding the death of the deceased; or
- (b) where there is no spouse by or for whom a claim can be made under paragraph (a), the children of the deceased; or
- (c) where there is no person by or for whom a claim can be made under paragraph (a) or (b), the parents of the deceased or (if he was illegitimate) his mother; or
- (a) where there is no person by or for whom a claim can be made under paragraph (a), (b) or (c) but the deceased was at the date of his death a minor, any person who in the course of any marriage to which that person was a party treated the deceased as a son or daughter of the family in relation to that

marriage; or

- (e) where there is no person by or for whom a claim can be made under paragraph (a), (b), (c) or (d), any brother or sister of the deceased.

(3) Subject to subsection (4), the sum to be awarded as damages under this section shall be \$40,000.

(4) Where there is a claim for damages under this section for the benefit of 2 or more persons, the sum awarded shall be divided equally between them (subject to any deduction falling to be made in respect of costs not recovered from the defendant).

(5) The Legislative Council may by resolution amend subsection (4) by varying the sum specified therein.

Persons entitled to bring the action. [cf. 1982 c. 53, s. 3.]

5. (1) An action under this Ordinance shall be brought by and in the name of the executor or administrator of the deceased.

(2) If -

(a) there is no executor or administrator of the deceased; or

(b) no action is brought within 6 months after the death by and in the name of an executor or administrator of the deceased,

the action may be brought by and in the name of all or any of the persons for whose benefit an executor or administrator could have brought it.

(3) Not more than one action shall lie for and in respect of the same subject-matter of complaint.

(4) The plaintiff in the action shall be required to deliver to the defendant or his solicitor full particulars of the persons for whom and on whose behalf the action is brought and of the nature of the claim in respect of which damages are sought to be recovered.

Assessment of damages. [cf. 1982 c. 53, s. 3.]

6. (1) In the action such damages, other than damages for bereavement, may be awarded as are proportioned to the injury resulting from the death to the dependants respectively.

(2) After deducting the costs not recovered from the defendant any amount recovered otherwise than as damages for bereavement shall be divided among the dependants in such shares as may be directed.

(App. III,  
p. CG.)

(3) In an action under this Ordinance, or under the Carriage by Air (Overseas Territories) Order 1967, where there fall to be assessed damages payable to a widow in respect of the death of her husband there shall not be taken into account the re-marriage of the widow or her prospects of re-marriage.

(4) In an action under this Ordinance where there fall to be assessed damages payable to a person who is a dependant within the meaning of paragraph (b) of the definition of that term in section 2, in respect of the death of the person with whom the dependant was living as husband or wife, there shall be taken into account (together with any other matter that appears to the court to be relevant to the action) the fact that the dependant had no enforceable right to financial support by the deceased as a result of their living together.

(5) If the dependants have incurred funeral expenses in respect of the deceased, damages may be awarded in respect of those expenses.

(6) Money paid into court in satisfaction of a cause of action under this Ordinance may be in one sum without specifying any person's share.

Assessment of  
damages;  
disregard of  
benefits. [cf.  
1982 c. 53, s.  
(App. III, P. CG.)

7. In assessing damages in respect of a person's death in an action under this Ordinance or under the Carriage by Air (Overseas Territories) Order 1967, 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.

Repeal.  
(Cap. 22.)

8. The Fatal Accidents Ordinance is repealed.

## Explanatory Memorandum

This Bill implements certain recommendations of the Law Reform Commission, in conjunction with the Law Amendment and Reform (Consolidation)(Amendment) Bill which is published at the same time. The recommendations were included in a report published under the title "Damages for Personal Injuries and Death".

2. The Bill repeals and replaces the current Fatal Accidents Ordinance (Cap. 22) although much of the substance is unchanged. With the exception of the following matters, and save for necessary minor local modifications, the Bill closely follows the wording of the English Fatal Accidents Act 1976, as extensively substituted by the Administration of Justice Act 1982. This is as recommended by the Commission, which preferred the style of the English Act. The main differences now are that -

- (a) definitions are brought together, in accordance with legislative practice in Hong Kong, into clause 2 of the Bill and are drawn to reflect local circumstances and to implement some of the recommendations of the Commission; in particular, the definition of "dependant" departs extensively from that in the English Act;
- (b) the clause introducing the right to damages for bereavement (clause 4) departs from the English Act in order to comply with the Commission's recommendations as to who the beneficiaries of such a claim should be; and
- (c) provision for reduction of damages to a dependant by reason of the contributory negligence of the deceased is not found in the Bill (although it is in the English Act) because it is already included in section 21(4) of the Law Amendment and Reform (Consolidation) Ordinance (Cap. 23).

3. The Bill has no Public Service staffing or financial implications.

2

c. 53

**Administration of Justice Act 1982**

**PART 1**

**DAMAGES FOR PERSONAL INJURIES ETC.**

***Abolition of certain claims for damages etc.***

Abolition of right to damages for loss of expectation of life.

**1.—**(1) In an action under the law of England and Wales or the law of Northern Ireland for damages for personal injuries—

- (a) no damages shall be recoverable in respect of any loss of expectation of life caused to the injured person by the injuries; but
- (b) if the injured person's expectation of life has been reduced by the injuries, the court in assessing damages in respect of pain and suffering caused by the injuries; shall take account of any suffering caused or likely to be caused to him by awareness that his expectation of life has been so reduced.

(2) The reference in subsection (1)(a) above to damages in respect of loss of expectation of life does not include damages in respect of loss of income.

Abolition of actions for loss of services etc.

**2.** No person shall be liable in tort under the law of England and Wales or the law of Northern Ireland—

- (a) to a husband on the ground only of his having deprived him of the services or society of his wife ,
- (b) to a parent (or person standing in the place of a parent) on the ground only of his having deprived him of the services of a child ; or
- (c) on the ground only—
  - (i) of having deprived another of the services of his menial servant;
  - (ii) of having deprived another of the services of his female servant by raping or seducing her; or
  - (iii) of enticement of a servant or harbouring a servant.

***Fatal Accidents Act 1976***

Amendments of Fatal Accidents

**3.—**(1) The following sections shall be substituted for sections 1 to 4 of the Fatal Accidents Act 1976—

Act 1976.  
1976 c. 30

" Right of action for wrongful

**1.—**(1) If death is caused by any wrongful act, neglect or default which is such as would (if death

act causing death.

had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof, 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.

(2) Subject to section 1A(2) below every such action shall be for the benefit of the dependants of the person ("the deceased ") whose death has been so caused.

(3) In this Act " dependant " means—

- (a) the wife or husband or former wife or husband of the deceased,
- (b) any person who—
  - (i) was living with the deceased in the same household immediately before the date of the death ; and
  - (ii) had been living with the deceased in the same household for at least two years before that date ; and
  - (iii) was living during the whole of that period as the husband or wife of the deceased ;
- (c) any parent or other ascendant of the deceased;
- (d) any person who was treated by the deceased as his parent ,
- (e) any child or other descendant of the deceased;
- (f) any person (not being a child of the deceased) who in the case of any marriage to which the deceased was at any time a party was treated by the deceased as a child of the family in relation to that marriage ;
- (g) any person who is or is the issue of a brother, sister, uncle or aunt of the deceased.

(4) The reference to the former wife or husband of the deceased in subsection (3)(a) above includes a reference to a person whose marriage to the deceased has been annulled or declared void as well as a person whose marriage to the deceased has been dissolved.

(5) In deducing any relationship for the purposes of subsection (3) above—

- (a) any relationship by affinity shall be treated as a relationship by consanguinity, any relationship of the half blood as a relationship of the whole blood, and the stepchild of any person as his child; and
- (b) an illegitimate person shall be treated as the legitimate child of his mother and reputed father.

(6) Any reference in this Act to injury includes any disease and any impairment of a person's physical or mental condition.

Bereavement **1A.**—(1) An action under this Act may consist of or include a claim for damages for bereavement.

(2) A claim for damages for bereavement shall only be for the benefit—

- (a) of the wife or husband of the deceased; and
- (b) where the deceased was a minor who was never married—
  - (i) of his parents, if he was legitimate; and
  - (ii) of his mother, if he was illegitimate.

(3) Subject to subsection (5) below the sum to be awarded as damages under this section shall be £3,500.

(4) Where there is a claim for damages under this section for the benefit of both the parents of the deceased, the sum awarded shall be divided equally between them (subject to any deduction falling to be made in respect of costs not recovered from the defendant).

(5) The Lord Chancellor may by order made by statutory instrument, subject to annulment in pursuance of a resolution of either House of Parliament, amend this section by varying the sum for the time being specified in subsection (3) above.

Persons entitled to bring the action.

**2.**—(1) The action shall be brought by and in the name of the executor or administrator of the deceased.

(2) If—

- (a) there is no executor or administrator of the deceased, or

(b) no action is brought within six months after the death by and in the name of an executor or administrator of the deceased,

the action may be brought by and in the name of all or any of the persons for whose benefit an executor or administrator could have brought it.

(3) Not more than one action shall lie for and in respect of the same subject matter of complaint.

(4) The plaintiff in the action shall be required to deliver to the defendant or his solicitor full particulars of the persons for whom and on whose behalf the action is brought and of the nature of the claim in respect of which damages are sought to be recovered.

Assessment  
of damages.

**3.—**(1) In the action such damages, other than damages for bereavement may be awarded as are proportioned to the injury resulting from the death to the dependants respectively.

(2) After deducting the costs not recovered from the defendant any amount recovered otherwise than as damages for bereavement shall be divided among the dependants in such shares as may be directed.

(3) In an action under this Act where there fall to be assessed damages payable to a widow in respect of the death of her husband there shall not be taken account the re-marriage of the widow or her prospects of re-marriage.

(4) In an action under this Act where there fall to be assessed damages payable to a person who is a dependant by virtue of section 1(3)(b) above in respect of the death of the person with whom the dependant was living as husband or wife there shall be taken into account (together with any other matter that appears to the court to be relevant to the action) the fact that the dependant had no enforceable right to financial support by the deceased as a result of their living together.

(5) If the dependants have incurred funeral expenses in respect of the deceased, damages may be awarded in respect of those expenses.

(6) Money paid into court in satisfaction of a cause



of action under this Act may be in one sum without specifying any person's share.

Assessment of damages: disregard of benefits.

4. 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."

(2) In section 5 of the Fatal Accidents Act 1976 the words "brought for the benefit of the dependants of that person" shall be omitted.

PART I  
1972 c. 33.

(3) In section 3 of the Carriage by Railway Act 1972 (which provides that a person who has a right of action under that Act in respect of the death of a railway passenger shall not bring an action under the Fatal Accidents Act 1976)—

1976 c. 30.

(a) in subsection (1)(a), at the beginning there shall be inserted the words "subject to subsection 1(A) below." ;

(b) the following subsection shall be inserted after that subsection—

"(1A) Nothing in subsection (1) above affects the right of any person to claim damages for bereavement under section 1A of the Fatal Accidents Act 1976." and

(c) in subsection (4), after the word " Order ", in the second place where it occurs, there shall be inserted the words " the reference to section 1A of the Fatal Accidents Act 1976 in subsection (1A) above shall be construed as a reference to Article 3A of that Order ".

### ***Claims not surviving death***

Exclusion of Law Reform (Miscellaneous Provisions) Act 1934.  
1934 c. 41.

4.—(1) The following subsection shall be inserted after section 1 (1) of the Law Reform (Miscellaneous Provisions) Act 1934 (actions to survive death)—

"(1A) The right of a person to claim under section 1A of the Fatal Accidents Act 1976 (bereavement) shall not survive for the benefit of his estate on his death."

(2) The following paragraph shall be substituted for subsection (2)(a)—

"(a) shall not include—

- (i) any exemplary damages;
- (ii) any damages for loss of income in respect of any period after that person's death;"

### ***Maintenance at public expense***

Maintenance at public expense to be taken into account in assessment of damages.

**5.** In an action under the law of England and Wales or the law of Northern Ireland for damages for personal injuries (including any such action arising out of a contract) any saving to the injured person which is attributable to his maintenance wholly or partly at public expense in a hospital, nursing home or other institution shall be set off against any income lost by him as a result of his injuries.

### ***Provisional damages for personal injuries***

PART I  
Award of provisional damages for personal injuries.  
1981 c. 54.

**6.—(1)** The following section shall be inserted after section 32 of the Supreme Court Act 1981—

“Orders for provisional damages for personal injuries.

**32A.—(1)** This section applies to an action for damages for personal injuries in which there is proved or admitted to be a chance that at some definite or indefinite time in the future the injured person will as a result of the act or omission which gave rise to the cause of action develop some serious disease or suffer some serious deterioration in his physical or mental condition.

(2) Subject to subsection (4) below as regards any action for damages to which this section applies in which a judgment is given in the High Court, provision may be made by rules of court for enabling the court in such circumstances as may be prescribed, to award the injured person—

- (a) damages assessed on the assumption that the injured person will not develop the disease or suffer the deterioration in his condition; and
- (b) further damages at a future date if he develops the disease or suffers the deterioration.

(3) Any rules made by virtue of this section may include such incidental supplementary and consequential provisions as the rule-making authority may consider necessary or expedient.

(4) Nothing in this section shall be construed—

- (a) as affecting the exercise of any power relating to costs, including any power to make rules of court relating to costs ; or
- (b) as prejudicing any duty of the court under any enactment or rule of law to reduce or limit the total damages which would have been recoverable apart from any such duty.

(2) In section 35 of that Act (supplementary) "32A," shall be inserted before " 33 " in subsection (5).

(3) The section inserted as section 32A of the Supreme Court Act 1981 by subsection (1) above shall have effect in relation to county courts as it has effect in relation to the High Court, as if references in it to rules of court included references to county court rules.

**List of cases relating to the lost years**

**I English cases**

Pickett v British Rail Engineering Ltd [1980] AC 136

Kandalla v British European Airways Corp [1980] 2 WLR 730

Gammell v Wilson [1981] 1 All ER 578

Connolly v Camden & Islington Area Health Authority [1981] 3 All ER 250

Croke (a minor) v Wiseman [1981] 3 All ER 852

White v London Transport Executive [1982] 1 All ER 410

Benson v Biggs Wall & Co Ltd [1982] 3 All ER 300

Harris v Empress Motors Ltd [1982] 3 All ER 306

Lawrence v John Laing Ltd [1982] Law Soc Gaz 1248

Clay v Pooler [1982] 3 All ER 570

**II Hong Kong cases**

VSL Engineers (HK) Ltd v Yeung Wing [1981] HKLR 407

Wong Sai-chuen v Tam Mei-chun (1982) Civ App No 133 of 1981

Yeung Yuk-sim v Mak Kam-lit (1982) HCA No 5150 of 1980; Civ App No 88 of 1982

Wong Sau-wah v Leung Kam-cheuk (1982) Civ App No 46 of 1982

Chung Wing v Wong Lan-ying (1982) HCA No 4120 of 1980

Lam Sze v Ling Shum-ha (1982) HCA No 2803 of 1980

Lee Yan-ying v Hui Chun-yip (1982) HCA No 6233 of 1981

Chan Kit-ching v Lee Yuk-sui (1982) HCA No 4249 of 1982

Ng Kung v Kowloon Motor Bus Co (1933) Ltd (1982) HCA No 8470 of 1981; Civ App No 7 of 1983

Wong Yuk-Chau v Tang Suk-yee, Daisy (1983) Civ App No 13 of 1983

Extract from Law Commission Report

**(A) THE RULE IN *OLIVER v. ASHMAN***

**The provisional proposals for reform**

55. In Section (A) of published Working Paper No. 41 we discussed<sup>1</sup> the rule in *Oliver v. Ashman*<sup>2</sup> in which the Court of Appeal decided that where a plaintiff's expectation of life is reduced he can only recover damages in respect of his future loss of earnings during the period he is likely to remain alive and that nothing may be awarded in respect of the further period he would probably have lived had it not been for his injury. We went on to express our sympathy with the strong criticisms that have been made of this rule, the main one being that it results in manifest injustice to the dependants of a plaintiff who has a seriously reduced expectation of life.

56. The need to reform the rule in *Oliver v. Ashman* arises, and arises urgently, in order to produce a just award in the sort of case exemplified by two typical situations. The first is the case of a young husband in a coma, having a wife and two children dependent upon him. His expectation of life is short and he will probably survive the date of trial by only a short time. *Murray v. Shuter*<sup>3</sup> is a very clear illustration. The second concerns a slow death, the life expectation being five to ten years, the victim being conscious. *Smith v. Central Asbestos Co.*<sup>4</sup> provides the typical variations of this tragic situation. We think that such cases involve a clear injustice which should be remedied.

57. A recent decision of the Court of Appeal demonstrates the injustice which can be caused by the rule in *Oliver v. Ashman*. In *McCann v. Sheppard*<sup>5</sup>, the plaintiff, a man aged 26, was very seriously injured in a road accident in August 1968. In January 1970 the plaintiff issued a writ against the driver of the car in which he had been a passenger at the time of the accident. Some six months later, while the action was still pending, he married and a child of the marriage was born in September 1971. In June 1972 his action came on for trial and he was awarded damages (including interest) of £41,252: this total included a sum of £15,000 for loss of future earnings. In July the defendant gave notice of appeal. On 22 October 1972, the plaintiff died as a result of his injuries (he took an overdose of drugs prescribed to kill his pain). The case then came before the Court of Appeal which gave judgment in March 1973. Evidence of the plaintiff's death was admitted and the original award was varied by, *inter alia*, reducing the £15,000 for loss of future earnings to £400 (representing the loss of earnings between judgment and death). This meant that the plaintiff's widow and child were deprived of any compensation for their lost dependency. The Court re-assessed the damages as at the date of trial as if it had then been known that,

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<sup>1</sup> Published Working Paper No. 41, paras. 52-58.

<sup>2</sup> [1962] 2 Q.D. 210.

<sup>3</sup> [1972] 1 Lloyd's Rep. 6.

<sup>4</sup> [1971] 2 W.L.R. 206.

<sup>5</sup> [1973] 1 W.L.R. 540.

within a few months, the plaintiff would die and, because of the rule in *Oliver v. Ashman*, the Court was unable to award anything for the "lost period" in substitution for the £15,000 extinguished by the death. Stamp and James, L.JJ. both expressed the opinion that, in any event, nothing could have been awarded for the "lost period" even had the rule in *Oliver v. Ashman* not been binding on the Court because, at the date of trial, the plaintiff could not have established that there was any prospect of his "making any savings out of earnings". Had the law been what we think it ought to be<sup>6</sup> the result of this case would have been different; loss during the "lost period" would have been assessed on the basis of what the plaintiff would have earned less his probable expenditure on his own maintenance over that period. This test would have resulted in the substitution for his loss of future earnings (out of which he would have had to maintain both himself and his family) of an amount calculated by reference to that part of his earnings which he would have spent on maintaining his family. This would, in effect, have meant the substitution for the £15,000 of a sum equivalent to that which his widow would have recovered under the Fatal Accidents Acts had he died before his case came to trial. We think that this would generally be considered a just decision.

58. We expressed the provisional conclusion that the present rule in *Oliver v. Ashman* should be reversed and suggested three possible alternative solutions for changing the law: —

- (a) the reversal by legislation of the rule in *Oliver v. Ashman* and the adoption of the formula accepted in the Australian case of *Skelton v. Collins*<sup>7</sup>, i.e. compensation for loss of earnings in the so-called "lost years"<sup>8</sup> should be based upon the amount of such earnings less what the plaintiff would have spent on his own maintenance;
- (b) assuming the retention of the present rule that a plaintiff gets nothing for the "lost period", the dependants should be permitted to bring an action under the Fatal Accidents Acts notwithstanding that the deceased had, during his lifetime, himself received damages;
- (c) a plaintiff should be enabled to join his dependants in his own action and provision should be made that the sum awarded to compensate the dependants for what they would probably lose during the lost period should be paid into court.

59. We further said that we thought the choice must be between the first and third solutions though we were not committed to either. However, we expressed an adverse view on the second proposal.

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<sup>6</sup> See paragraph 87 below.

<sup>7</sup> (1966) 39 A.L.J.R. 480.

<sup>8</sup> In this Report we refer to this time as the "lost period".

### **Analysis of the three proposed solutions in the light of consultation**

60. With but one exception all the commentators on Published Working Paper No. 41 supported the reversal of the rule in *Oliver v. Ashman* by legislation. There was, however, a very wide difference of opinion as to what should be put in its place. Numerically the first alternative solution, outlined in paragraph 58(a) above, had the most support. A variation of this solution which would provide no deduction at all for living expenses had slight support. The second solution, outlined in paragraph 58(b) above, found little favour but that which it did find was very persuasive. The third solution, outlined in paragraph 58(c) above, found some support but we have concluded that it is too complex a solution to be satisfactory.

61. The problems presented by a reversal of the rule in *Oliver v. Ashman* are difficult ones and we feel that we should set out in some detail, as we do in paragraphs 62-85 which follow, the matters we have considered in making our final choice in favour of the first solution propounded in the Working Paper.

### **Solution (a) analysed**

62. A reform of the law on the basis of Solution (a) would, we recognise, not be in accordance with the principles generally applied in the assessment of compensation for future loss of earnings, which take no account of how the plaintiff will spend the money awarded – whether on himself, on his dependants or otherwise. Nevertheless, we consider that the principle of earnings less what he would have spent on his own maintenance ought to be accepted.

63. In the case of mature plaintiffs with no dependants, we envisage that compensation would depend on whether the plaintiff could establish as a probability that he would have saved some part of his earnings during the lost period or spent them otherwise than upon himself. In the case of very young plaintiffs we would expect the awards to be small because of the impossibility of such plaintiffs establishing as a probability that they would, in fact, have made any savings from future earnings. In both these cases it is true that the award, unless spent by the plaintiff himself, might result in a bonus for his estate and ultimate beneficiaries not dependant upon him at the time of the accident, nor perhaps at death. However, we do not see the foregoing result as unjust, particularly in the case of a mature plaintiff without dependants at the time of the accident; by reducing the plaintiff's expectation of life, the dependant has taken from him his ability to offer to anyone who might become dependant upon him in the future any security during the lost period.

64. In the case of plaintiffs with dependants at the time of the accident, the amounts would be substantial, but there would be no certainty that the plaintiffs, having obtained their awards, would, in fact, put aside that part of the total award as provision for their dependants; and, to this extent, the object of compensating the dependants might be nullified. However, the fact that this solution is the one nearest in principle to the way in which damages are at present awarded (*i.e.* that they should be paid to the victim himself) is a persuasive factor in its favour. In any event we feel it would be taking an over cynical view of the attitude of accident victims to assume that any large



number of them will not devote that part of their damages to making provision for their dependants. We attach importance to the fact that this solution is undoubtedly the simplest to operate.

**Solution (b)—the prima facie case against**

65. In the Working Paper we suggested that this solution (allowing the dependants to bring a Fatal Accidents Acts claim notwithstanding that the plaintiff had himself in his lifetime recovered damages) would present a number of practical difficulties. Those we mentioned were that the limitation period would certainly have to be extended; that, after perhaps a considerable lapse of time, the dependants might have difficulty in proving that the deceased had died as a result of the original accident; that in accordance with the rules governing deductions in Fatal Accidents Acts claims, it would be necessary to determine the extent to which the claiming dependants had benefited from the death; and that the defendant would have a potential claim hanging over him perhaps for years.

**Solution (b)—the arguments in favour**

66. As we have already mentioned<sup>9</sup> the arguments put on consultation in favour of this solution were very persuasive and accordingly, before stating our final recommendation in favour of the first solution we feel we should set them out in some detail.

67. If the revised law is to revolve, as it should, around the question of dependency, the relevant dependants might be:—

- (i) dependants at the time of trial, *or*
- (ii) assumed dependants at the date of assumed death, where the trial occurs before death, *or*
- (iii) actual dependants at the date of death.

It is put forward as self-evident that the actual dependants at the date of death is the logical class, consistent with existing principles and with justice. Only by the adoption of Solution (b) can the compensation be placed in the hands of those dependants to produce a result which is free from anomaly and injustice and is a consistent working out of existing principles.

68. The argument in favour of Solution (b) then goes on to pose three problems and to suggest the answer to them. First, it is asked to what extent must the dependants give credit for benefits received from the estate in so far as they are benefits derived from the victim's award. It is argued that they must do so. Second, it is pointed out that there is a possibility of abuse by a well advised victim himself under Solution (b). He would, of course, only receive the present *Oliver v. Ashman* award but, if he was frugal, much of his award might remain at his death, to diminish his wife's award. By a proper will, however, he could direct his estate to his adult children or some other

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<sup>9</sup> See para. 60 above.

beneficiary, so that his widow's award would be undiminished. But, it is argued, this is not a disturbing possibility. It must be recognised that wealthy and well advised men do just this before their deaths, so that their widows benefit in Fatal Accidents Acts claims. Moreover, judicious delay on the part of alert lawyers can achieve the same result under the present law. Third, it is argued that while Solution (b) necessitates consideration of the limitation periods, the answer may not be difficult to find.

**Difficulties as to limitation periods in Solution (b) answered**

69. The present law as to limitation under the Fatal Accidents Acts is that:—

- (a) if a victim's claim is tried in his lifetime, and he is awarded compensation, his dependants have no further claim on his death;
- (b) if a victim settles his claim in his lifetime, the same result follows;
- (c) if a victim allows the limitation period for his claim to pass in his lifetime, neither he nor his dependants on his death have any claim;
- (d) if a victim issues a writ within three years of his accident and then spins out proceedings in the knowledge that he is dying, on his death his dependants' claims are in effect added to his (which survive to his estate) and there is a full claim for his suffering and past loss of earnings and a full Fatal Accidents Acts claim for the dependant family loss.

70. It is argued that the adoption of Solution (b) will not inhibit the living plaintiff from bringing his case to trial expeditiously because, under it, no-one will henceforward suffer. It is, therefore, further argued that there is no reason why any dependants should have a claim more than three years after the accident unless the victims has commenced proceedings within the period prescribed for his own claim. This principle, it is accepted, should be subject to the obvious qualifications:—

- (i) that disability on the victim's part or (the provisions of the Limitation Act 1963, or other proper reasons may extend the period beyond three years;
- (ii) that a payment by way of settlement to the victim should not extinguish the claim of the dependants.

71. It is argued finally that there is no necessity for the dependants to be subject to any separate limitation period. If the victim must bring or settle his own proceedings in good time, it is not anticipated that, in practice, any great difficulty will confront widows in proving their claims. If they cannot do so in the rare instance, they must fail.

72. As to the danger in Solution (b) that this will leave a defendant with a potential claim hanging over him for years; it is pointed out that for practical purposes the defendant will be an insurance company. While it is certainly embarrassing to any defendant to have an unresolved issue of liability hanging over him, because he may lose vital witnesses, under Solution (b) liability has to be tried under the usual time limitations in the victim's action. The fact that an insurance company may have to retain money over a period of years because the issue of quantum is not immediately resolved would, it is thought, have but a marginal effect on insurance premiums and Solution (b), involving deferred payments which may never arise, appears more favourable to insurers than the larger immediate payments which would arise under Solution (a).

73. For all the foregoing reasons it is argued that of the three alternatives suggested, the best is Solution (b) which is symmetrical and logical and the only solution which is practical and just.

74. We would now turn to the reasons which have led the Commission to reject the foregoing arguments, persuasive though they are.

#### **Solution (b)—the arguments against**

75. On grounds of principle we accept that the arguments summarised in paragraphs 66-73 above go a long way to neutralising the *prima facie* case against Solution (b) as rehearsed in paragraph 65 above; but we attach greater importance than do our critics to the desirability of preventing a defendant from having an action hanging over him. Nor are we entirely convinced by the argument quoted in paragraph 67 above that it is axiomatic that the qualified dependants should be those at the date of death. The view is held by some that during his lifetime a plaintiff ought to have some discretion as to the provision he makes for his dependants.

76. Our objections to Solution (b) are on grounds of practicability. We are specially concerned about the practicability of this solution in those cases which are settled; in such cases major difficulties would arise under three heads:—

- (i) the problem of recording settlements;
- (ii) the conflict of interests involved in agreeing settlements;
- (iii) the necessity of court approval for settlements.

77. In the first place the practicability of arriving at settlements under Solution (b) would be seriously inhibited by the necessity of having a system of recording such settlements and the fact that the record of every settlement would have to state three matters:—

- (i) The loss of expectation of life upon which it was based. This would be necessary because, in the case of premature death, the defendant would, unless this basis of settlement were recorded, be

paying double compensation; to the plaintiff for the period he was not going to live, to the dependants for the period which had already been the subject of compensation to the plaintiff.<sup>10</sup>

- (ii) The amount of the damages attributable to future loss.
- (iii) The extent to which questions of liability had been taken into account in arriving at the settlement. This might be either in respect of contributory negligence or in respect of the chance of total failure or both. This proportion would govern the dependants' subsequent claim.

78. There is, perhaps, no reason why a system for such a detailed recording of settlements should not be devised, although there would be difficulties in doing this. More serious, however, are the difficulties which arise because of the fundamental conflicts of interest between the parties involved in the settlement.

79. A plaintiff will nearly always want as big a capital sum as he can get; an insurer, under a Solution (b) regime would want to have recorded as big a reduction for liability risk as possible; but it would be in the interest of dependants, present or future, that the liability risk should be as low as possible, even at the expense of a smaller capital sum being paid to the plaintiff. In the negotiations leading to compromise the dependants would not be represented, they might not even exist and, in any event, their future claim would be only indirectly in issue. The insurer defendant would take very seriously into account the claim which he would know he had some day to meet and, to the detriment of the dependants, would attempt to cast settlements so that as much weight as possible was placed upon the liability risk. This would make it very difficult for the plaintiff and his legal advisers.

80. The mechanics of negotiation contain a fair amount of bluff and counter-bluff and a plaintiff's legal adviser, faced with what seemed to him to be a generous offer, but one linked with a higher liability risk than he thought justifiable, would be in grave difficulties.

81. In the result, we believe that if Solution (b) were adopted every settlement of a claim which contained an element of compensation for the lost period would have to be approved by the court and here further difficulties would arise.

82. The object of approving such settlements would be to safeguard the interest of dependants or future dependants. But a simple requirement that all settlements containing a lost period element should be approved by the court could quite easily be circumvented by the parties agreeing, in negotiation, that the plaintiff had suffered no loss of expectation of life. It would, therefore, be necessary that every settlement of a claim for personal injuries should go

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<sup>10</sup> If one rejects a system which would compensate the plaintiff for the lost period without any deduction for his own maintenance, only one based on periodic payments can protect a plaintiff who exceeds his expected life span.

before the court to ensure that it did not contain a lost period element. In view of the great number of personal injury claims this would seem to be a substantial and most undesirable addition to the cost of litigation and the work of the courts.

83. It has been suggested that, because most claims with a lost period element are substantial, a solution might be to make all claims for personal injury above a certain figure subject to the approval of the court. Such a solution might, however, fail to catch the very cases where the dependants' interests are most important, namely, those in which the plaintiff has suffered a very big reduction in his life expectancy.

### **Solution (c) analysed**

84. The relatively few comments we received in favour of this solution have not convinced us that our own objections to it in Published Working Paper No. 41 were ill-founded. If a plaintiff with dependants was able to join them in his action, we envisaged that a sum of money would be awarded to compensate the dependants for what they would probably lose during the lost period. This money would be paid into court where it would earn interest during the remaining years of the plaintiff's life, such interest being taken into account in the computation of the capital sum. On the plaintiff's death the sum in court would go to his dependants in proportions decided by the judge at the trial of the action. If the plaintiff lived longer than his prognosed expectation of life, he would be allowed to apply to the court for a variation of the way in which the disposal of the money had been ordered; he would also be able to apply for a variation on account of changes in his family situation, such as the desertion of a wife, the marriage of a daughter whose expected dependency was thereby ended, or perhaps the addition of more dependants, for example by adoption.

85. Our main objection to this solution is that it would, in practice, greatly complicate the settlement of claims. A plaintiff with a reduced expectation of life and dependent children would have to obtain the approval of the court and the position of his wife would require protection also.

### **Recommendations**

86. On balance we have come to the conclusion that the difficulties in Solutions (b) and (c) are such that it is Solution (a) which we should recommend.

87. We, therefore, recommend that the rule in *Oliver v. Ashman* be reversed by legislation and that, in any case where it is established that the plaintiff's expectation of life has been reduced by his injuries, he should himself be compensated for the loss during the period he would otherwise have lived on the basis of his anticipated income from earnings (and from other sources for the reasons given in paragraph 90 below) during that period, less what he would have spent on his own maintenance (Clause 2(2)(b)).

88. We reject the suggestion, made to us on consultation, that there should be an age limit below which such damages should not be awarded. Awards

to young plaintiffs will inevitably be small because it will be impossible for such plaintiffs to establish that they would probably have made any savings or supported any dependants out of their earnings, and an arbitrary age limit seems undesirable.

89. We do not, however, think that the court should be restricted to considering only dependants actually in existence at the time of the accident. It ought to be open to a plaintiff without dependants at the time of his accident to establish as a probability that he would have used his earnings during the lost period otherwise than on himself.

90. We are also of the opinion that, in line with the reasoning of the Australian High Court in *Skelton v. Collins*, the plaintiff should be entitled to compensation for other kinds of economic loss referable to the lost period. A person entitled by will to receive an annuity for his life would, if his life were shortened by the defendant's fault, lose the capacity to receive the annuity during the lost period, no less than he would lose his earning capacity. There seems to be no justification in principle for discrimination between deprivation of earning capacity and deprivation of the capacity otherwise to receive economic benefits. The loss must be regarded as a loss of the plaintiff; and it is a loss caused by the tort even though it relates to moneys which the injured person will not receive because of his premature death. No question of the remoteness of damage arises other than the application of the ordinary foreseeability test.

91. A plaintiff's income may, however, come from dividends paid on capital assets and, as these assets will themselves, subject to death duties, be able to pass, on his death, to his dependants, we consider the court must have a discretion to ignore such lost income in the lost period in its assessment of damages (see the proviso to Clause 2(2)(b)).