Project No 66

Fatal Accidents

REPORT

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The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972*.

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CHAPTER 1 - INTRODUCTION

Terms Of Reference

1.1 The Commission was asked to consider and report on whether the *Fatal Accidents Act 1959* should be amended -

(a) to widen the class of persons (including any posthumous child) entitled to claim;

(b) to provide for an amount to be awarded in the nature of solatium.

Working Paper

1.2 The Commission issued a working paper in February 1978. The names of those who commented on the paper are listed in Appendix I and the paper itself is produced as Appendix II.
CHAPTER 2 - OUTLINE OF THE FATAL ACCIDENTS ACT

History and scope of the Act

2.1 Under the common law, no one could receive damages in tort for the death of another. This meant that the dependants of a person who was killed because of the fault of a third party could not recover compensation from the wrong-doer for the loss of their financial support. It was also not possible under the common law for the deceased's personal representative to obtain compensation on behalf of the estate for the income the deceased would have earned had he not been killed. A consequence of this latter rule was that the members of the deceased's family also could not obtain compensation indirectly, either as beneficiaries under the deceased's will or on his intestacy.

2.2 During the nineteenth century, it came to be accepted as unjust that the wrong-doer should be able to escape financial responsibility for the dependants' loss, and a statute (known as Lord Campbell's Act) was enacted in England in 1846 which gave protection to certain close relatives of the deceased. The impetus for this reform was the increase in fatal accidents due to the advent of railways in England.

2.3 Lord Campbell's Act was adopted in Western Australia in 1849. The Act was repealed and replaced, with some modifications, by the Fatal Accidents Act 1959.

2.4 A detailed account of the scope of the Fatal Accidents Act, and the method of calculating damages is contained in chapter 2 of the working paper. Liability under the Act arises where the death of a person is caused by a wrongful act, neglect or default, which is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect of the act, neglect or default. An action is undertaken by the deceased's personal representative on behalf of the designated relatives, and the damages are based on the amount of financial support each relative could have expected to receive had the deceased lived. Account is taken of such contingencies as ill-health or unemployment of the deceased had he lived, and in the case of his widow, the chances of remarriage. A claimant need not show that he would necessarily have received financial benefit from the deceased had he lived; it is sufficient to show that he had a reasonable expectation of such benefit. The

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1 See note 57 to the working paper for the list of relatives protected by Lord Campbell's Act.
2 By Ordinance 12 Vict. No. 21.
court will value that chance and award compensation accordingly. Sometimes the matter is beset with so many doubts and uncertainties that the claim is "pressed to extinction by the weight of multiplied contingencies". This is particularly so in the case of claims by parents in respect of the death of a small child.

2.5 Although there is no express limitation in the *Fatal Accidents Act* itself, the courts have consistently construed the legislation as providing compensation only for financial or material loss. Thus, compensation is not awarded for non-economic loss such as grief or the loss of companionship or love.

2.6 The Act works on the general principle of balancing the financial gain to dependants (such as a benefit under a will) against their financial losses, and authorises an award only for the difference. However, not all gains are included; for example s.5(2) of the Act expressly provides that insurance money, superannuation or like benefits, and pensions are not to be taken into account.

**Class of claimants**

2.7 The relatives of a deceased on whose behalf an action may be brought are as follows -

- (a) his or her spouse;
- (b) a child (including a step child);
- (c) a grandchild;
- (d) a parent (including a step parent);
- (e) a grandparent.

2.8 For the purposes of the Act, in determining any of the relationships referred to in (b) to (e) illegitimate relationships are treated as legitimate and adoptive relationships are treated as natural relationships. However, in the former case, the relationship shall not be taken to have been proved unless paternity had been admitted by or established against the father in the lifetime of the deceased person.

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3 *Barnett v Cohen* [1921] 2 KB 461 at 472.
4 See paragraphs 2.5 and 6.2 of the working paper.
5 See note 12 of the working paper.
6 s.3(1), (2) and (3).
7 s.6(3).
2.9 There is no express provision in the Act regarding a posthumous child of the deceased. However, in a nineteenth century English case *The George and Richard*, it was held that such a child was eligible in regard to the corresponding English legislation, and it seems certain that the position would be the same under the Western Australian Act.

**General**

2.10 The circumstances in which liability usually arises under the *Fatal Accidents Act* are those of deaths caused by negligence on the roads or by accidents at work caused, for example, by an unsafe system of work or by the negligence of a fellow employee. In the case of deaths caused by negligence on the roads, defendants are virtually always insured against their liability to pay damages under the Act because of compulsory third party insurance. In the case of work-related fatalities, the Commission understands that virtually all employers insure in respect of liability under the Act, although it is not compulsory for employers so to insure.

2.11 Where the wrong-doer is insured, either as a matter of practice or of law, any increase in the class of claimants under the *Fatal Accidents Act*, or in the amount of the compensation payable under the Act, would accordingly be met by a general increase in insurance premiums.

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8 (1871) LR 3A & E 460. In *McKenzie v McNamara* (1970) 3 NSWR 421, an appeal to the New South Wales Court of Appeal against the quantum of an award to the deceased's widow and his posthumous child was dismissed. The right of the posthumous child to recover damages was not challenged in the appeal.

9 See paragraph 2.15 of the working paper.

10 Their legal obligation is to insure in respect of liability under the *Workers' Compensation Act*: see paragraphs 3.6 to 3.11 of the working paper.
CHAPTER 3 - EXTENSION OF CLASS OF CLAIMANTS: DISCUSSION AND RECOMMENDATIONS

GENERAL

3.1 A present day dependant would not be left destitute on the death of the breadwinner as he or she might have been in earlier times. Even if he was not an eligible claimant under the Fatal Accidents Act, he could make a claim under the Social Services Act 1947 of the Commonwealth for a benefit of one kind or another in case of need. Depending on the circumstances, for example, a claimant could obtain an age or invalid pension, a sickness or unemployed benefit, a widow's pension (which is available to de facto widows in certain cases) with supplementary benefits if she has dependent children, or an orphan's pension.

3.2 If the breadwinner were killed in a work-related accident, a dependant who could not claim under the Fatal Accidents Act might nevertheless be able to claim under the Workers' Compensation Act. The class of claimants under the Workers' Compensation Act includes not only those prescribed in the Fatal Accidents Act, but also brothers and sisters of the deceased (including half-brothers and sisters) a person who stood in loco parentis to the deceased, a person to whom the deceased stood in loco parentis, a de facto wife (in certain cases)\(^1\) and a former wife if he were legally obliged to make financial provision for her.\(^2\) The circumstances under which a claim can be made under the Workers' Compensation Act, are set out in paragraphs 3.6 to 3.11 of the working paper.\(^3\)

3.3 In addition, the dependant may be a beneficiary of the deceased person's estate which may have substantial assets or which may have been augmented by the proceeds of an insurance policy or of an award of damages as a result of the personal representative suing the wrong-doer under the Law Reform (Miscellaneous Provisions) Act 1941. This Act permits

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\(^1\) To be eligible, a woman must have –
(a) lived with the deceased on a permanent and bona fide domestic basis immediately before his death, if he leaves a dependant who is a child of him and the claimant; or
(b) lived with him on such a basis for not less than three years if he does not leave any such dependant: Workers' Compensation Act, s.5(1).

\(^2\) Workers' Compensation Act, s.5(1). The provision as to former wives was added in May 1978 by Act No. 28 of 1978.

\(^3\) Lump sum payments prescribed by the Workers' Compensation Act are altered each year by applying the formula described in the interpretation of "prescribed amount" in s.5 of the Act. Since the working paper was issued, the total amount of compensation payable to dependants (other than a child) of the deceased worker who are wholly dependent upon his earnings has been increased in accordance with this formula from $35,042.10 to $38,136.10.
recovery of medical and like expenses incurred by the deceased before his death and, possibly, compensation for loss of earnings on the basis of his pre-accident life expectancy after taking into account the expenditure he would have incurred in maintaining himself and his dependants.\textsuperscript{4}

3.4 The Commission is satisfied, however, that the \textit{Fatal Accidents Act} fulfils a real and separate community need. The legislation helps ensure that members of a deceased's family are able to maintain broadly the same standard of living as they had before his death. The benefits of the Act are therefore real and substantial, for which no adequate alternative is provided elsewhere in the law.

3.5 In the working paper, the Commission pointed out that the Western Australian legislation differs only in comparatively minor respects from the original English version, and that it was not difficult to imagine cases where compensation would not be available to a survivor even though he or she was as fully a member of the deceased's household, and as fully dependent upon him as others who would be entitled to claim. A de facto adopted child (as distinct from a legally adopted child) is an example of such a person.

3.6 The Commission also pointed out in the working paper that a number of other jurisdictions had made significant extensions to the original list contained in \textit{Lord Campbell's Act}, the most extensive now being contained in the fatal accidents legislation of England and Scotland.\textsuperscript{5} The other Australian jurisdictions which have given recent attention to the question have also extended the list.

**COMMISSION'S GENERAL CONCLUSION**

3.7 After reconsidering the question in the light of the comments received on the working paper, the Commission is of the view that the present class of eligible claimants is too restrictive and should be extended. Of those who commented on this issue, only the Motor Vehicle Insurance Trust was not in favour of any extension. It considered that the inclusion of further persons could lead to abuses, especially where insurance was involved. Although the Commission concedes that there would be some possibility of abuse, it does not regard this as

\textsuperscript{4} See paragraphs 3.3 and 3.4 of the working paper. The law is not settled on the question of whether a claim for loss of earnings based on pre-accident life expectancy would succeed: ibid.

\textsuperscript{5} See paragraph 4.1 of the working paper. In those jurisdictions, even aunts and uncles are included, including those who are related only by marriage.
a sufficient ground for denying relief in bona fide cases. In any event, the Commission does not consider that the extensions which it recommends should be made are of such a nature that serious abuse would be likely to occur.

METHOD OF EXTENDING CLASS OF ELIGIBLE CLAIMANTS

3.8 In the working paper, the Commission discussed three possible ways in which an extension could be achieved. These were -

(a) by amending the legislation to add further designated relatives to the existing list;

(b) by enacting a general rule that any member of the deceased's family be entitled to claim;  

(c) by enacting a general rule that any person, who could show loss of financial dependency be entitled to claim whether or not a member of the deceased's family.

3.9 After further consideration, the Commission is of the view that neither approach (b) nor (c) should be adopted. It is true that approach (b) would have the advantage of ensuring that no member of a deceased's family was denied compensation merely because he was not included in the list of designated relatives. On the other hand, implementation of this approach could result in uncertainty, with attendant cost and delay. Arguments would often arise as to whether a particular relationship was a familial one. Argument could, for example, centre around the question whether the members of a particular commune or religious sect had a familial relationship with the deceased.

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6 See paragraph 5.1 below.
7 To succeed in a claim, the person would have to establish not only that he was a member of the deceased's family but also loss of financial support.
8 A less extreme example would be whether a de facto adopted child of a person was a “brother” of the natural son or daughter of that person.
3.10 No commentator favoured approach (b). Mr. P.L. Sharp Q.C., who had put forward a similar proposal in a paper he gave at the Law Summer School in 1976, has since informed the Commission that the practical difficulties associated with such an approach (particularly those faced by the deceased's personal representative) have caused him to withdraw his support for it.

3.11 Approach (c) 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.

3.12 The Commission accordingly considers that approach (a) in paragraph 3.8 above is to be preferred. Having decided this, the question is what additions should be made to the existing list of designated relatives. Having considered the matter in the light of the comments on the working paper, the Commission is of the view that the following additional categories should be included -

(a) a person to whom a deceased stood in loco parentis and a person who stood in loco parentis to a deceased;
(b) brothers and sisters of a deceased, including half brothers and sisters;
(c) divorced spouses;
(d) de facto spouses (in certain cases).

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9 The paper was entitled, Methodology in Assessment of Damages in Personal Accidents. The Law Summer School is an annual event organised by the Law Society of Western Australia in conjunction with the Law School.
10 Under the Fatal Accidents Act, it is the personal representative who has the responsibility of commencing proceedings on behalf of the claimants. It is his duty to take all reasonable steps to see that the dependants are informed of the action and, if they wish to claim, are named as persons on whose behalf it is brought: see paragraph 2.16 of the working paper.
11 Under the Fatal Accidents Act, compensation is not necessarily limited to the amount the deceased would have paid to the claimant out of his pocket. The measure of damages under s.6(2) is that which is "proportioned to the injury resulting from the death to the [person] for whose benefit the action is brought". A successful partnership could generate great financial benefits to each partner. If one partner is killed, the survivor would lose his share of those benefits. Under approach (c) he could claim this loss from the wrong-doer: see paragraph 5.20 of the working paper.
12 See paragraphs 2.7 and 2.8 above.
3.13 The Commission's reasons for recommending these extensions are as follows.\(^{13}\)

(a) **The in loco parentis relationship**

3.14 The Commission considers that a child who had been treated by the deceased as his own, including the acceptance of financial responsibility for his maintenance, should be included in the designated list. A person may take on the responsibility of bringing up as his own children those of his brother who, together with the brother's wife, had been killed in a car accident. If that person is himself later killed in an accident for which a third party is to blame it does not seem unreasonable that the brother's children whom he had reared as his own should be able to claim compensation for his death. The *Fatal Accidents Act* already enables a claim to be made by a step child of the deceased, and the effect of the Commission's recommendation would be to extend that principle to de facto adopted children.

3.15 Having brought in cases where the claim is made by a de facto adopted child of the deceased, it also seems appropriate to include the converse case, namely where it is the de facto adopted child who has been killed and the de facto adoptive parent is the one who has lost his or her financial dependency. Such a claim would only be likely to succeed if the foster child had grown up and was contributing to his de facto adoptive parent's support in repayment of the money they had spent on him as a child.\(^{14}\) The Commission recommends accordingly.

3.16 An amendment to the *Fatal Accidents Act* to provide for eligibility to claim in the case of the loco parentis situation would bring Western Australian law into line with that in New South Wales, Queensland, the Australian Capital Territory, the Northern Territory and Scotland. A similar amendment has been recommended by the English Law Commission.\(^{15}\)

3.17 Under the *Fatal Accidents Act*, the legally adopted child may not claim in respect of natural relatives but only relatives acquired in consequence of his adoption.\(^{16}\) However, where there has been a legal adoption, it is unlikely that the adopted child will receive financial

\(^{13}\) It is important to remember that the inclusion of a particular relation in the designated list does not automatically entitle that person to compensation. The relative must show loss of financial dependency.

\(^{14}\) See paragraph 2.13 of the working paper.

\(^{15}\) In its report, *Personal Injury Litigation - Assessment of Damages* (1973), paragraphs 257 and 262.

\(^{16}\) See paragraph 2.14 of the working paper.
support from its natural parents or from a relative whose relationship to him is traced through his natural parents. Where there is a de facto adoption the natural relatives will be much more likely to maintain contact with the child and assist him financially. Often the de facto adoptive parents will be relatives of the natural parents who by arrangement with the natural parent or parents accepted the responsibility of bringing up the child when circumstances had arisen which prevented the natural parent or parents from doing so. The Commission considers that a de facto adopted child should be able to make a claim in respect of the death of a natural or legitimate relative and also of his de facto adoptive parent, but not in respect of the death of a relative of his de facto adoptive parent. This is the approach under the Scottish fatal accidents legislation.

(b) Brothers and sisters

3.18 Sometimes one brother or sister will assist another brother or sister financially while the latter is receiving further education, the parents being unable to do so themselves. Although the Commission does not consider that such a situation is very common, there seems no reason why a person being supported in this way should not be able to claim under the Fatal Accidents Act; and the Commission recommends accordingly. The provision should also apply to half-brothers and sisters, since the situation could equally arise in cases where they had only one parent in common.

3.19 Such an amendment would bring the Western Australian legislation in this respect into line with the legislation in New South Wales, South Australia, Tasmania, the Australian Capital Territory, the Northern Territory, England and Scotland.

3.20 The Commission considers that the deceased's brother, sister, half-brother or half-sister should be able to claim whether their relationship to the deceased was legitimate, illegitimate or the consequence of adoption. The Commission therefore recommends that in determining whether or not a person was a brother, sister, half-brother or half-sister of the deceased, an illegitimate person or an adopted person should be treated as the legitimate child.

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17 When the mother and father of the deceased and his brother had never married, the surviving brother would be able to claim in respect of his brother's death. Also, where the deceased was born in lawful wedlock but the mother had a child by an association with a man (other than her husband), that child could make a claim in respect of his half-brother's death.
of his mother and reputed father, or as the case may be, of his adopters. This is already the position in New South Wales, South Australia, Tasmania, the Australian Capital Territory, England and Scotland.

(e) A divorce spouse

3.21 A divorced woman could suffer serious hardship if her former husband was killed and she was not recognised as a dependant for the purposes of the Fatal Accidents Act. He may have made arrangements to maintain her after the divorce, whether voluntarily or as a result of an order made by the Family Court. In many cases, such maintenance arrangements are made not only in recognition of the woman's need, but also because of the contribution she had made to the family finances during the marriage. She may have the custody of the children of the marriage and it would therefore create hardship for them if she could not obtain compensation to help her look after them. The same argument would apply in the case of a divorced man. If he could show loss of financial dependency in respect of his former wife, he should likewise be able to claim.

3.22 The Commission accordingly considers that the category of divorced spouse should be added to the class of designated persons. The divorced spouse can already claim under the fatal accidents legislation of the Australian Capital Territory, the Northern Territory and also Scotland.

3.23 The Workers' Compensation Act of this State was recently amended to enable a former wife of a deceased male worker to claim compensation under that Act if he was legally obliged immediately before his death to make provision for her with respect to financial matters. It may be suggested that a former spouse should only be able to claim under the Fatal Accidents Act where there had been a legal obligation to maintain that former spouse.

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18 Under s.7(1)(a) of Western Australia’s Adoption of Children Act, upon the making of an order of adoption under that Act, the adopted child becomes a child of the adopting parents, and the adopting parents become the parents of the child, as if the child had been born to the adopting parents in lawful wedlock. The relationship to one another of all persons is determined on this basis: s.7(1)(c). However, as ss.7(1)(a) and 7(1)(c) only apply to adoptions made under the Western Australian Act, it would be desirable in this instance to have provisions in the Fatal Accidents Act itself ensuring that the relationship is protected by the Act whether the adoption took place in Western Australia or elsewhere. Such provisions already exist in the Act in respect of the categories of claimants listed in (b) to (e) of paragraph 2.7: see paragraph 2.8 above.

19 By the Workers’ Compensation Act Amendment Act 1978.

20 In its comments on the working paper the Law Society submitted that the class of claimants under the Fatal Accidents Act, and the circumstances under which they could claim should be identical with those
However, the Commission is of the view that such a restriction is undesirable. The general principle of the fatal accidents legislation is that a claimant must show a reasonable expectation of financial support had the deceased lived, but need not show that the expectation arose out of a legal obligation. The Commission does not consider that departure from this principle would be justified.  

This was also the view of the three Commissions in the United Kingdom which recently considered the question.

(d) **De facto spouse**

3.24 In South Australia, a de facto husband or wife can in certain circumstances make a claim under the fatal accidents legislation of that State. To be entitled to make a claim, the claimant must obtain a court order under the *Family Relationships Act*, which involves satisfying the court that he or she 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.

An order may not be made unless the application is supported by credible corroborative evidence.

3.25 The Australian Capital Territory and the Northern Territory are the only other jurisdictions of those examined by the Commission in which a de facto husband or wife may claim under the *Workers' Compensation Act*. This would produce certainty and uniformity in the law relating to compensation arising out of accidental death. The Commission agrees that these attributes are desirable but it does not consider them to be of such overwhelming importance that any deviation is to be avoided at all costs.

A condition that there must have been a legal obligation on the deceased to maintain the former spouse does not exist under the fatal accidents legislation of the jurisdictions noted in paragraph 3.22 above where a former spouse can claim.


Wrongs Act 1936-1975 (SA), ss.20(1) and 3a; *Family Relationships Act 1975* (SA), s.11.

Ibid.

*Family Relationships Act 1975* (SA), s.11(5).
make a claim. 26 The strict preconditions to a claim by a de facto husband or wife in South Australia do not apply in those jurisdictions.

3.26 The question of admitting de facto relationships under fatal accidents legislation was considered by the English and Scottish Law Commissions and the English Royal Commission on Civil Liability for Personal Injury. 27 The two Law Commissions declined to make any recommendation as they felt the question should be considered in the wider context of the reform of family law. The Royal Commission on Civil Liability and Compensation for Personal Injury also declined to make a recommendation on this point. Its basic recommendation was that the system of liability in tort should be co-ordinated with the English and Scottish social security position. Since de facto widows are not entitled to a widow's benefit under the National Insurance Acts, 28 it felt unable to make any recommendation in this respect as regards the Fatal Accidents Act.

3.27 Only three commentators discussed this aspect. Two (the Law Society and Mr. P.L. Sharp Q.C.) submitted that de facto husband-wife relationships should (in certain circumstances) be recognised under the Fatal Accidents Act. Professor Payne inclined to the view that such relationships should not be included.

3.28 The Commission considers that the basic purpose of the Fatal Accidents Act is to protect the family unit. It ensures that members obtain compensation from the wrong-doer in regard to the loss of their expectation of support due to the death of the breadwinner. The Commission is of the view that this entitlement should not be confined to a de jure or legitimate family, but should also include de facto family units as well. It is the existence of a family unit, and the unfortunate effect which the death of the breadwinner can have upon it, which the Commission regards as important.

3.29 Such a step would not be unprecedented in Western Australia. De facto relationships are recognised in the following cases -

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26 Compensation (Fatal Injuries) Ordinance 1968 (ACT), ss.8(2) and 4(2)(h); Compensation (Fatal Injuries) Ordinance 1974 (NT), ss.8(2), 4(2) and 4(3)(c).
27 The reports are listed in note 22 above.
28 In England, de facto widows are, however, entitled to a supplementary benefit under the Ministry of Social Security Act 1966.
(a) The Social Services Act 1947 (Cwth) provides for a widow's benefit to be paid to the survivor of a de facto relationship in certain cases. In this respect the Australian law is different from that in England and Scotland.

(b) Illegitimate children are eligible claimants under the Fatal Accidents Act.

(c) A de facto widow can claim under the Inheritance (Family and Dependents Provision) Act 1972, for a share, or a larger share, out of her de facto husband's estate.

(d) In certain circumstances, the de facto wife of a deceased worker can make a claim for compensation under the Workers' Compensation Act 1912.

3.30 Under the existing Fatal Accidents Act, the children of a de facto association can claim in respect of the death of either of their parents. The children are, broadly speaking, entitled to enjoy the same material standard of life as they would have enjoyed if their father had continued to support them, and the defendant must pay them enough to maintain them in the enjoyment to which the financial support of their father had accustomed them. Hence, for example, the children must be compensated not only for the cost of their food and clothing but also for the whole of the cost of the rent of the home and its services such as lighting and heating, even though these are shared by the mother. If de facto spouses are to be permitted to claim under the Fatal Accidents Act, some of the compensation which would otherwise have been paid to the children will be included in the compensation paid to the de facto spouse on the basis of the parent's legal duty to provide reasonable maintenance for the

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29 See paragraph 3.12 of the working paper.
30 See note 1, paragraph 3.2 above.
31 K. v JMP Co. Ltd. [1975] 1 All ER 1030.
32 Ibid. It seems that the defendant would have to pay the cost of the mother's food and clothing, if without that payment the care which she was previously able to give to the children would be diminished despite the compensation otherwise payable to the children. In K. v JMP Co. Ltd., a claim by the children for the mother's food and clothing was rejected because she was entitled to a supplementary benefit under the Ministry of Social Security Act 1966 intended to pay for her food and clothing. However, under s.5(2) of the Western Australian Fatal Accidents Act, payments under the Social Services Act 1947 may not be taken into account in assessing damages and in Western Australia, given the same facts, the children's claim for her food and clothing would probably have succeeded. However, even in Western Australia, such a decision would not have indirectly placed the de facto wife in the same position as a lawful wife. If she was a lawful wife she could expect to have been supported for many years to come and any multiplier used in her case, in that capacity, would be quite different from and much larger than any used in the case of her support as a mother until the children became independent.
child.\textsuperscript{33} Where there are children of the de facto union, the proposal to allow a de facto wife to claim would result, at least to some extent, merely in the de facto wife being compensated directly instead of indirectly through the application by the Public Trustee of damages recovered for the benefit of the children.\textsuperscript{34}

3.31 In these circumstances, the Commission considers that, subject to proper safeguards to ensure that temporary relationships are not included and that the possibility of abuse is kept to a minimum, a de facto spouse should be eligible to claim under the \textit{Fatal Accidents Act}.

3.32 The Commission accordingly recommends that a person, although not legally married to the deceased, should be able to claim damages under the \textit{Fatal Accidents Act} if he or she -

(a) was immediately before the death of the deceased, living with the deceased as wife or husband, as the case may be, on a permanent and bona fide domestic basis, if the deceased leaves a child who is the child of the union between the deceased and that person, or

(b) had lived with the deceased on a permanent and bona fide domestic basis continuously for a period of at least five years immediately preceding the death of the deceased, if the deceased does not leave any such child.

3.33 The suggested safeguards are broadly along the lines of the South Australian legislation,\textsuperscript{35} except that the Commission does not consider that it is necessary to make credible corroborative evidence a statutory requirement. This is a matter which can safely be left to the court.

3.34 In making these recommendations, the Commission has not overlooked the views of Professor Payne who pointed out that insurance under the \textit{Workers' Compensation Act} was compulsory, whereas this was not so under the \textit{Fatal Accidents Act}. He also submitted that it did not follow that because a claimant was entitled to claim compensation under the \textit{Workers' Compensation Act}.

\textsuperscript{33} The position would thus become similar to that where a person is killed and survived by a lawful spouse and children of the marriage.

\textsuperscript{34} In Western Australia, damages recovered for the benefit of an infant must, unless otherwise ordered by the court, be paid to the Public Trustee as trustee for the infant: see Order 70 rule 12 of the \textit{Rules of the Supreme Court 1971}.

\textsuperscript{35} See paragraph 3.24 above.
Compensation Act, he should also be eligible as a claimant under the Fatal Accidents Act, since "the philosophy of workers compensation is that the blood of the workman is part of the price of the product". He also submitted that because certain collateral benefits received under the Fatal Accidents Act are ignored in the calculation of damages under the Fatal Accidents Act, a widow is not uncommonly overcompensated and that the justification of extending the protection of the Act to a de facto wife may therefore be questioned.

3.35 The Commission agrees with Professor Payne that one is not entitled to argue that entitlement to claim under the Workers’ Compensation Act should automatically justify entitlement to claim under the Fatal Accidents Act. The reference in paragraph 3.29 above to de facto spouses is intended only to illustrate that such persons have already been accorded legislative recognition in certain cases. The Commission also agrees that a widow may sometimes be overcompensated under the Fatal Accidents Act. However, the Commission does not regard this as a reason for limiting compensation to de jure, as distinct from de facto, spouses. A de facto spouse is less likely than a lawful spouse to receive certain of the collateral benefits which are ignored in the calculation of damages under the Fatal Accidents Act. For example, it is unlikely that a de facto spouse will have taken out a policy of insurance on the deceased’s life. Under some superannuation schemes, only a lawful spouse can benefit from the scheme on the death of a member.

3.36 As the Commission has pointed out in paragraph 2.10 above, the accidents in which liability arises under the Act usually occur on the roads or at work. In the former case, insurance is compulsory while in the latter case virtually all employers do in fact insure in respect of liability under the Fatal Accidents Act. Thus in most instances, the cost of adding de facto spouses in certain cases to the list of claimants under the Fatal Accidents Act would be borne by the general body of policy holders in the form of marginally increased premiums. The Commission does not regard the fact that there may be some cases where the defendant is not insured as a good ground for denying the protection of the Act to de facto spouses.
OTHER RELATIVES

3.37 In the working paper, the Commission discussed the question of whether certain other relatives of a deceased should be able to claim. These were -

(a) uncle, aunt;
(b) great-uncle, great-aunt;
(c) issue of uncle or aunt;
(d) issue of brother or sister;
(e) great-grandson and great-grandfather;
(f) relationships by affinity (i.e. by marriage).  

3.38 None of the commentators on the working paper seemed in favour of any of these extensions. The Commission does not consider that at this stage an extension to include any of these relatives would be justified. It would make for administrative complexity and could cause delay while these persons were being approached about any possible dependency, and there could be protracted litigation on this point. The Commission considers that the basic purpose of the legislation is to protect the family unit. With the additions proposed in this report, only in a very rare case will a relative not covered by the amended legislation be receiving substantial financial support from the deceased.

OTHER MATTERS

Posthumous children

3.39 Although it is fairly certain that in Western Australia the deceased's posthumous legitimate child is within the class of relatives protected by the *Fatal Accidents Act*, the matter should be put beyond doubt by enacting an express provision and the Commission recommends accordingly. The Commission also recommends that a similar provision should be enacted in regard to a deceased's posthumous illegitimate child.

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36 In England, with the exception of (b) and (e), these relatives can claim: see paragraph 4.1 of the working paper. In Scotland, all except (b), can claim.
37 See paragraph 2.9 above.
Illegitimate children

3.40 Although, for the purposes of the Fatal Accidents Act, an illegitimate relation is deemed to be legitimate, this is subject to the qualification that an illegitimate "relationship shall not be taken to have been proved unless paternity had been admitted by or established against the father during the lifetime of the deceased person". 38

3.41 This restriction means that where the mother of an illegitimate child is killed in an accident, the child could only bring an action in respect of the loss resulting from his mother's death if his father had admitted paternity, or had paternity established against him, during his mother's lifetime. But since the child is claiming in respect of his mother's death, the question of who his father was ought to be completely irrelevant.

3.42 The Commission in the working paper suggested that the provision should be amended to confine the qualification to the case where an action is brought for the benefit of the father of an illegitimate child in respect of the child's death. 39 The Law Society agreed with this suggestion.

3.43 The Commission has given further consideration to the question, and now considers that, if there is to be any restriction as regards illegitimates at all, it should be that -

(a) where the illegitimate claimant is claiming in respect of his father's death, or the death of another relative traced through the father (e.g. a grandfather), the claim shall only be recognised if paternity is admitted by or established against the father in the father's lifetime;

(b) where a father is claiming in respect of his illegitimate child's death, or where another relation is claiming through the father (e.g. a grandfather), the claim shall not be recognised unless paternity is admitted by the father or established against him in the lifetime of the child.

3.44 However, the Commission is not convinced that any restriction at all is desirable.

38 s.6(3).
39 Working paper, paragraph 5.49.
3.45 The Commission has a project dealing with all aspects of the status and rights of illegitimate children and their fathers, and will consider in the course of that project the question of claims of whatever sort arising out of an illegitimate relationship. It suggests that if the Government decides to amend the Fatal Accidents Act before the report of the Commission on this latter project is available, it should amend the provision dealing with illegitimate relationships along the lines suggested in paragraph 3.43 above. Further amendment could, if necessary, be made when the Commission's report on Project No. 68 (illegitimacy) has been submitted.

Prospects of surviving spouse's remarriage

3.46 In England, in assessing damages payable to a widow in respect of the death of her husband under the Fatal Accidents Act, the court is prohibited from taking into account the remarriage of the widow or her prospects of remarriage. The provision was first enacted in s.4(1) of the Law Reform (Miscellaneous Provisions) Act 1971 and was later re-enacted in the Fatal Accidents Act 1976. The same provision applies under the fatal accidents legislation in Scotland. The object is to protect the widow from distasteful cross-examination. There is no equivalent provision in Western Australia, and in assessing her damages in this State a widow's prospects of remarrying must be taken into account.

3.47 There has been criticism of the provision which operates in England and Scotland. An account of the criticism is contained in the Law Commission's report, Personal Injury Litigation – Assessment of Damages. Objections had been made at the way the provision affected the damage paid to different classes of widows. A young widow who had already remarried a wealthier man got far higher damages than did a middle-aged widow with four children but slight prospects of remarriage. The Scottish Law Commission reported similar criticisms.

40 Project No. 68 (illegitimacy).
41 s.3(2).
43 The fatal accidents legislation in the Northern Territory provides that in assessing damages no reduction is to be made on account of the remarriage or prospects of remarriage of the surviving spouse. In no other Australian jurisdiction is there an equivalent provision.
44 Law Com. No. 56 (1973).
45 See report at paragraph 247.
46 In its report, The Law Relating to Damages for Injuries Causing Death (Scot. Law Com. No. 31 (1973)).
3.48 In their comments on the Commission's working paper the Law Society\textsuperscript{47} and Mr. Atkins submitted that the prospects of remarriage of the surviving spouse should be disregarded in assessing damages. The Law Society went further and suggested that an actual remarriage should also be disregarded. On the other hand, Professor Payne and Mr. Sharp submitted that there should be no alteration to the existing law on this issue.

3.49 The Commission has concluded that a provision to the effect that the remarriage or prospects of remarriage of a surviving spouse should be disregarded in assessing damages would operate unfairly and should not be introduced. Assessing the prospects of remarriage may be distasteful both to the spouse and the court, but seems necessary if justice is to be done.

Dependant omitted from the proceedings

3.50 Under the \textit{Fatal Accidents Act}, only one action may be brought.\textsuperscript{48} That action must be brought in the name of the executor or administrator of the deceased.\textsuperscript{49} However, where there is no executor or administrator or where the executor or administrator does not bring an action within six months after the death of the deceased, anyone or more of the designated relatives may bring the action (for the benefit of all the designated relatives).\textsuperscript{50} The plaintiff must deliver to the defendant or his solicitor, full particulars of the person or persons on whose behalf the action is brought and of the nature of the claim in respect of which damages are sought.\textsuperscript{51} It appears that while the action is in existence, the plaintiff, subject to the rules of court, may have the particulars amended.\textsuperscript{52} However, the requirement that only one action may be brought raises problems where the person bringing the action refuses to include a dependant in the particulars of persons on whose behalf the action is brought. The court can probably order that the dependant be named as one of the persons for whose benefit the action is brought.\textsuperscript{53} In order to put the issue beyond doubt, the Commission recommends that the \textit{Fatal Accidents Act} be amended to provide that where -

\textsuperscript{47} The Law Society's comments were in the form of recommendations by the Law Reform Committee of that Society. On this issue, the Committee was not unanimous.

\textsuperscript{48} s.7(1).

\textsuperscript{49} s.6(1)(b).

\textsuperscript{50} s.9(1) and (2).

\textsuperscript{51} s.8.

\textsuperscript{52} See \textit{Haddrill v South Australian Railways Commissioner} [1968] SASR 78 at 82.

\textsuperscript{53} See \textit{Haddrill v South Australian Railways Commissioner} [1968] SASR 78 and \textit{Cooper v Williams} [1963] 2 All ER 282.
(a) an action has been commenced; and

(b) the court is satisfied that a person whose name is not included in the names of the persons for whose benefit the action is stated to have been brought is a person whose name should have been so included.

the court may, on application made by or on behalf of that person, or of its own motion, order the action to proceed as if the name of that person has been so included.\(^{54}\)

**Separate representation of a dependant**

3.51 Sometimes it may be desirable for a dependant to be separately represented at the proceedings. Under the *Legal Representation of Infants Act 1977*, Western Australian courts are empowered to order the appointment of a suitable person as guardian ad litem for a child when the court is of the view that the interest of the child is involved.\(^{55}\) It is the responsibility of the guardian ad litem to safeguard the interests of the infant in the proceedings.

3.52 However, in proceedings under the *Fatal Accidents Act*, a conflict of interest may arise between dependants who are not minors e.g. between the deceased's lawful widow and an adult child of the deceased by an earlier marriage. The possibility of a conflict of interest between adult dependants will greatly increase if either divorced spouses or de facto spouses are to be able to make a claim. The Commission therefore recommends that the Act be amended to provide that where the court considers it desirable that a person (other than an infant) for whose benefit an action lies under the Act should present an independent claim for the benefit of an action under the Act, the court at any stage of the proceedings may permit or require that person to appear or be represented in the proceedings in all respects as if he were a separate party to the proceedings.\(^{56}\)

\(^{54}\) This provision is already contained in the Australian Capital Territory's *Compensation (Fatal Injuries) Ordinance 1968* (s.15(1)) and the Northern Territory's *Compensation (Fatal Injuries) Ordinance 1974* (s.15(1)).

\(^{55}\) s.5.

\(^{56}\) Such a provision is already contained in s.20(6) of the South Australian *Wrongs Act 1936-1975*. Under the Australian Capital Territory's *Compensation (Fatal Injuries) Ordinance 1968* (s.15(2)) and the Northern Territory's *Compensation (Fatal Injuries) Ordinance 1974* (s.15(2)), the court "may order that anyone or more of the persons for whose benefit an action has been brought be separately represented by counsel or solicitor, or both".
Procedure where dependant added or separate representation ordered

3.53 The Commission recommends that where the court adds the name of a person to those on whose behalf the action is brought or where it orders separate representation, the legislation should also empower the court, at the same time or subsequently, to make such orders in relation to procedure in the action as it thinks fit.\(^{57}\) The legislation should also make it clear that the powers to add a name, order separate representation and to prescribe procedure are in addition to, and not in derogation of, any other powers of the court, and in particular the powers of the court under the *Legal Representation of Infants Act 1977*.

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\(^{57}\) This provision is already contained in the Australian Capital Territory's *Compensation (Fatal Injuries) Ordinance 1968* (s.15(3)) and the Northern Territory's *Compensation (Fatal Injuries) Ordinance 1974* (s.15(3)).
CHAPTER 4 - COMPENSATION FOR LOSS OF
ASSISTANCE AND GUIDANCE

Present law in Western Australia

4.1 In an action under Western Australia’s Fatal Accidents Act 1959, only recovery of economic or material loss is allowed. Where the deceased is a wife and mother, damages can be claimed for loss, not only of outside earnings by which she contributed to the family purse, but also of her domestic services in looking after the home, husband and children.

4.2 But the husband cannot recover for the loss of her companionship or for the loss of her love. Nor can he recover for grief or mental suffering which he endures because of her death. The child cannot recover for the loss of its mother's guidance and of help not capable of translation into money’s worth. Similarly, where the deceased is a husband and father, there can be no recovery for matters such as loss of companionship, loss of love, for grief or for the loss of the deceased's guidance as a husband and father and for his non-pecuniary help.

The law elsewhere

4.3 Of the jurisdictions which have been referred to in this report, only South Australia and the Northern Territory make provision for solatium. Scotland now provides for a "loss of society award". The history of the Scottish scheme is set out in the following paragraphs.

4.4 Prior to 1976, the common law in Scotland had recognised the right of relatives of a deceased person to recover as damages an award of solatium as "pecuniary acknowledgment of their grief and suffering". The Damages (Scotland) Act 1976 abolished the award of solatium and replaced it by a loss of society award. This award constitutes damages by way of compensation for the loss of such non-pecuniary benefit as the relative might have expected to derive from the deceased’s society and guidance if he had not died. Under the Act the following may claim a loss of society award:

1. The details of the legislation in these jurisdictions are contained in paragraphs 6.4 to 6.11 of the working paper.
2. s.1(4) and (7).
(a) the deceased's spouse;
(b) a parent of the deceased;
(c) a child of the deceased;
(d) a person who was not a child of the deceased but who was accepted by the deceased as a child of his family. ³

The amount of damages payable is such sum “as the court thinks just by way of compensation” and there is no upper limit on the amount which the court may award. ⁴

4.5 The Damages (Scotland) Act 1976 implemented the recommendations made by the Scottish Law Commission in its Report on the Law relating to Damages for Injuries causing Death.⁵ In its report, the Scottish Commission said the basis of the solatium award, which depended on grief and sorrow and not on loss of society, lead to the anomaly that the very young or posthumous child, whose need was greatest, would be awarded little or nothing in the name of solatium. Its view was that awards for non-pecuniary loss suffered by the close relatives of the deceased should be directed at loss of society, rather than at sorrow or suffering. It said: ⁶

"... over and above the quantifiable loss of income which they sustain when a man is killed, we think that a wife and children suffer damage through the loss of his help as a member of the household and of his counsel and guidance as a husband and father. A similar situation arises when a wife is killed leaving a husband and young family: even if she was not herself earning, her husband and family suffer considerable loss on her death, which is only partially quantifiable in financial terms. These are facts which ought to be acknowledged by the law".

Proposals for reform

4.6 In addition to the Scottish Law Commission, the question of solatium has been considered recently by two English Commissions.

4.7 The English Law Commission in its Report on Personal Injury Litigation - Assessment of Damages⁷ recommended that there should be an award of damages for the bereavement

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³ s.10(2) and Schedule 1 to the Act.
⁴ s.1(4).
⁵ Scot. Law Com. No. 31 (1973).
⁶ Report, at paragraph 106.
caused by the death of a close relative in two circumstances. These were an award to parents for the death of a child; and to a husband or wife for the death of the other. In the first case the parents should be able to recover a fixed amount of one thousand pounds, and in the second case the surviving spouse should be able to recover one thousand pounds. The Law Commission based its recommendation on the belief that an award of damages, even though it was small, could have some slight consoling effect in the two circumstances mentioned. The English Commission considered that the purpose of the award should comprehend not only grief and mental suffering but the non-pecuniary loss suffered by a person who was either the husband, wife or parent of the deceased.

4.8 The English Royal Commission on Civil Liability in its report\(^8\) was of the view that awards for non-pecuniary loss suffered by the close relatives of the deceased should be directed at loss of society and guidance rather than at sorrow or suffering. In this it concurred with the view of the Scottish Law Commission which was given effect to when the Damages (Scotland) Act replaced the award of solatium by a new head of damages entitled "loss of society". However, it favoured a fixed award related to the level of average annual industrial earnings.

The submissions on the working paper

4.9 Four of those who commented on the Commission's working paper dealt with this issue. They were the Law Society, Mr. P.L. Sharp Q.C., Mr. P.H. Atkins and Professor D. Payne. The Law Society and Mr. Sharp considered that there should be provision for solatium.\(^9\)

4.10 Mr. Atkins and Professor Payne disagreed. Mr. Atkins considered that the amount would never be the correct amount. It was better to be allowed to suffer one's anguish unaffected by an inadequate solatium than to receive a sum which would probably be an insult. Professor Payne said he was against any change in the present law, for the reasons set out in paragraphs 6.18 and 6.25 of the working paper. He was very much against the form of the South Australian legislation in this matter.

\(^8\) Cmnd. 7054-1 (1978).
\(^9\) The Law Society's comments were in the form of recommendations by the Law Reform Committee of that Society. On this issue, the Committee was not unanimous but a majority considered that there should be provision for solatium.
The Commission's recommendation

4.11 The Commission agrees that an award for solatium for grief and suffering could lead to unsatisfactory consequences. If the award was too small, it could be regarded with contempt by those whose grief was greatest. If the award was too large it could amount to a gratuity to those who felt no grief at all. Some persons could be affronted by any award of this nature at all. The Commission does not favour recovery of damages in the nature of solatium.

4.12 However, the Commission sees merit in the loss of society award which is now provided for in the Damages (Scotland) Act 1976. This award represents compensation for the loss of such non-pecuniary benefit as the relative might have expected to derive from the deceased's society and guidance if he had not died. The Commission considers that there should be an award of damages by way of compensation for the loss of such non-pecuniary benefit as the relative might have expected to derive from the deceased's assistance and guidance if he had not died. Assistance which can theoretically be replaced in return for money, or can at least be valued in terms of money, should be included in the pecuniary damages already recoverable under the Fatal Accidents Act. Assistance which would defy attempts at valuation would be compensated under the proposed new head of damages by way of a lump sum in the same way as pain and suffering or loss of enjoyment of life, in personal injury claims. The damages should be known as a "loss of assistance and guidance award" which the Commission considers is a more accurate description of the losses which are compensable under the Scottish provision. The Commission's intention is that its proposed award for loss of assistance and guidance should comprise the same losses as those comprised by the Scottish loss of society award.

4.13 The Commission accordingly recommends that the Fatal Accidents Act should be amended to provide for the award of damages to compensate certain close relatives of the deceased for the loss of such non-pecuniary benefit as they might have expected to derive

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10 See paragraph 4.5 above.
11 In his comments on the working paper, Mr. Atkins said that it was very rarely that a widow was able to mention all the relevant matters which were pertinent to her loss of financial dependency. He instanced "the million and one odd jobs" which most husbands do around the house. In his opinion, judges tended to discount rather than to inflate the figure they arrived at. In his view, damages under the Fatal Accidents Act should have a 10% loading. The award for damages for loss of assistance and guidance which is proposed by the Commission is not intended to compensate for assistance which can be replaced in return for money and therefore not directed to the matters to which Mr. Atkins refers. Under the existing law, the judge ought to include damages for services which can be quantified in money terms.
from the deceased's assistance and guidance if he had not died. The damages should be known as a "loss of assistance and guidance award" and should be recoverable under the *Fatal Accidents Act*. ¹²

**Those entitled to claim**

4.14 The Commission recommends that the following should be entitled to claim damages for "loss of assistance and guidance" -

(a) the deceased's husband or wife;
(b) the deceased's de facto spouse (where he or she would be entitled under the Commission's recommendations to make a claim for pecuniary loss);
(c) a parent of the deceased;
(d) an unmarried child (whether or not a minor) of the deceased;
(e) an unmarried person to whom the deceased stood in loco parentis.

For the purposes of the recommendation, a person would be deemed to be the parent or child of a deceased, notwithstanding that he was only related to him illegitimately or in consequence of adoption.

4.15 If a person entitled to claim damages for "loss of assistance and guidance" dies before an award is made or his claim is settled out of court, the question arises as to whether the claim should survive for the benefit of his estate. The award proposed by the Commission is a personal award to the person who suffered the loss. The Commission therefore recommends that a subsisting claim for "loss of assistance and guidance" should not survive for the benefit of the estate of the claimants. ¹³

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¹² Hence, for example, the plaintiff would have to establish that there would have been a liability to the deceased had he survived (see paragraph 2.4 above); and where the defendant is liable in negligence, damages for "loss of assistance and guidance" would be reduced in proportion to any contributory negligence by the deceased (*Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (WA), s.4).

¹³ This is the position in Scotland: *Damages (Scotland) Act 1976*, s.3.
Amount of damages

4.16 It can be argued that the damages to be awarded to the entitled relatives under the proposed award should be fixed amounts. This would avoid enquiry into the nature of family relationships. It would also substantially lessen the legal expense and delay in finalising claims. On the other hand, cases would arise where automatic entitlement to a fixed sum could easily cause an injustice. An example would be where the deceased had left his wife and children some months or years before his death. Furthermore, provision of fixed sums of compensation would create probably a unique exception to the general principles under which damages are assessed under the civil law of this State. The Commission has decided not to recommend that the damages should be a fixed sum.

4.17 In South Australia damages for solatium have been left to the court to determine but with a maximum prescribed by legislation. Prescribing a maximum is also contrary to the general principles under which damages are assessed. However, the Commission has decided to recommend that maximum amounts be prescribed by the legislation. In reaching this conclusion it has been influenced by the fact that the reform would be breaking new ground and by the fact that the South Australian Legislature fixed maximum amounts for solatium (which is a different but in some ways similar head of loss). The Commission suggests that the question whether or not there should be prescribed maximum amounts should be reviewed in the light of experience following the introduction of legislation along the lines recommended in this report.

4.18 The Commission accordingly recommends that the award be subject to the following limits -

(a) an award to a lawful spouse - $5,000;
(b) an award to a de facto spouse - $5,000;
(c) an award to a parent of the deceased - $2,500;
(d) an award to an unmarried child (whether or not a minor) of the deceased - $2,500;
(e) an award to an unmarried person to whom the deceased stood in loco parentis - $2,500.
4.19 The legislation should make it clear that an award for loss of assistance and guidance is in addition to any award for pecuniary loss under the *Fatal Accidents Act*.

4.20 The Commission also recommends that power to increase the maximum amounts be given to the Governor in Council so that the amounts are kept broadly in line with inflation.
5.1 The Commission recommends that -

(a) The class of eligible claimants under the *Fatal Accidents Act* be extended to include -

(i) a person to whom the deceased stood in loco parentis;
(ii) a person who stood in loco parentis to a deceased;
(iii) brothers and sisters (including half-brothers and sisters);
(iv) any person who having been a spouse of the deceased, had ceased to be so by virtue of a divorce;
(v) a de facto spouse (in certain circumstances).

(paragraphs 3.12, 3.14, 3.15, 3.17, 3.18, 3.22 and 3.32)

(b) In determining whether a person is eligible to claim as a brother, sister, half-brother or half-sister of the deceased, an illegitimate person should be treated as the legitimate child of his mother and reputed father, and an adopted person as the legitimate child of his adopters.

(paragraph 3.20)

(c) The Act should be amended to make it clear that the deceased's posthumous child (whether legitimate or illegitimate) is within the class of relatives protected by the Act.

(paragraph 3.39)

(d) If the *Fatal Accidents Act* is amended before the Commission's report on Project No. 68 (illegitimacy) is available, then s.6(3) of the Act should be repealed and replaced by a provision that -

(i) where an illegitimate claimant is claiming in respect of his father's death, or the death of another relative traced through the father (e.g. a grandfather), the claim shall only be recognised if paternity is admitted by or established against the father in the father's lifetime;
(ii) where a father is claiming in respect of his illegitimate child's death, or where another relative is claiming through the father (e.g. a grandfather), the claim shall not be recognised unless paternity is admitted by the father or established against him in the lifetime of the child.

(paragraph 3.45)

(e) The Act should expressly empower the court to order that a person be added to those for whose benefit an action has been brought.

(paragraphs 3.50 and 3.53)

(f) The court should be expressly empowered to permit or require separate representation for a person for whose benefit an action lies under the Act.

(paragraphs 3.52 and 3.53)

(g) The Act should be amended to provide for the award of damages (to be known as a "loss of assistance and guidance award") to compensate certain close relatives of the deceased for the loss of such non-pecuniary benefit as they might have expected to derive from the deceased's assistance and guidance if he had not died.

(paragraphs 4.12 and 4.13)

(h) The following should be able to claim damages for "loss of assistance and guidance" -

(i) the deceased's lawful spouse;
(ii) the deceased's de facto spouse (in certain circumstances);
(iii) a parent of the deceased;
(iv) an unmarried child (whether or not a minor) of the deceased;
(v) an unmarried person to whom the deceased stood in loco parentis.

A person would be deemed to be the parent or child of a deceased, notwithstanding that he was only related to him illegitimately or in consequence of adoption.
(paragraph 4.14)

(i) A subsisting claim for "loss of assistance and guidance" should not survive for the benefit of the estate of the claimant.

(paragraph 4.15)

(j) Awards for "loss of assistance and guidance" should be subject to the following limits -

(i) an award to a lawful spouse - $5,000;
(ii) an award to a de facto spouse - $5,000;
(iii) an award to a parent of a deceased - $2,500;
(iv) an award to an unmarried child (whether or not a minor) of the deceased - $2,500;
(v) an award to an unmarried person to whom the deceased stood in loco parentis - $2,500.

(paragraph 4.18)

(k) The legislation should make it clear that an award for "loss of assistance and guidance" is to be in addition to any award for pecuniary loss under the Fatal Accidents Act.

(paragraph 4.19)

(l) Power to increase the maximum amounts should be given to the Governor in Council so that the amounts are kept broadly in line with inflation.

(paragraph 4.20)

(Signed) Neville H. Crago
Chairman

Eric Freeman
Member

David K. Malcolm
Member

19 December 1978
APPENDIX I

List of those who commented on the working paper

Atkins, P.H.
Law Society of Western Australia
Professor D. Payne
Robinson, F.M.
Sharp P.L., Q.C.
The Motor Vehicle Insurance Trust.

(Mr. P.H. Atkins, Mr. F.M. Robinson and Mr. P.L. Sharp Q.C. are Western Australian practitioners with specialist experience in the area).
APPENDIX II

THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

Project No 66

Fatal Accidents

WORKING PAPER

FEBRUARY 1978
The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972.*

The Commissioners are -

- Mr. N.H. Crago, Chairman
- Mr. E.G. Freeman
- Mr. D.K. Malcolm.

The Executive Officer of the Commission is Mr. C.W. Ogilvie, and the Commission's offices are on the 16th floor, City Centre Tower, 44 St. George's Terrace, Perth, Western Australia, 6000. Telephone: 3256022.
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PRESENT LAW IN WESTERN AUSTRALIA

THE LAW IN OTHER PLACES

- South Australia
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CHAPTER 7 - QUESTIONS AT ISSUE

APPENDIX - COPY OF THE SECTIONS RELATING TO SOLATIUM
IN SOUTH AUSTRALIA’S WRONGS ACT 1936-1975
PREFACE

The Law Reform Commission has been asked to consider and report on whether the *Fatal Accidents Act 1959* should be amended -

(a) to widen the class of persons (including any posthumous child) entitled to claim;
(b) to provide for an amount to be awarded in the nature of a solatium.

The Commission having completed its first consideration of the matter now issues this working paper. The paper does not necessarily represent the final views of the Commission.

Comments and criticisms on individual issues raised in the working paper, on the paper as a whole or on any other aspect coming within the terms of reference, are invited. The Commission requests that they be submitted by 21 April 1978.

Copies of the paper are being sent to the -

Chief Justice and Judges of the Supreme Court
Citizens Advice Bureau
Institute of Legal Executives
Insurance Council of Australia
Judges of the District Court
Judges of the Family Court
Law School of the University of W.A.
Law Society of W.A.
Magistrates' Institute
Motor Vehicle Insurance Trust
Parliamentary Counsel
P.L. Sharp, Q.C.
Solicitor General
State Government Insurance Office
Under Secretary for Law
Workers' Compensation Board
Law Reform Commissions and Committees with which this Commission is in correspondence, and to other persons on the Commission's mailing list.

A notice has been placed in *The West Australian* inviting anyone interested to obtain a copy of the paper and to submit comments.

The research material on which the paper is based is at the offices of the Commission and will be made available there on request.
1.1 The Commission's terms of reference are:

"To consider and report on whether the Fatal Accidents Act 1959 should be amended -

(a) to widen the class of persons (including any posthumous child) entitled to claim;

(b) to provide for an amount to be awarded in the nature of a solatium".
CHAPTER 2 - OUTLINE OF THE FATAL ACCIDENTS ACT

History of Act

2.1 At common law, no one could receive damages in tort for the death of another. In *Baker v Bolton*, 1 Lord Ellenborough enunciated the principle in the following terms:

"In a civil court the death of a human being cannot be complained of as an injury".

2.2 However, by a statute of 1846, generally known as *Lord Campbell's Act*, protection was given in England to certain close relatives who had lost the expectation of support by the deceased. The impetus for reform was the increase in fatal accidents towards the middle of the nineteenth century due to the advent of railways in England.

2.3 *Lord Campbell's Act* was adopted in Western Australia in 1849. 2 The Act was repealed in this State and replaced (with some modifications) by the *Fatal Accidents Act 1959*.

Scope of Act

2.4 Section 4 of the *Fatal Accidents Act* provides that where the death of a person is caused by a wrongful act, neglect or default, which is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued is liable to an action for damages, notwithstanding the death of the person injured. 3

2.5 The action may only be brought for the benefit of certain designated relatives of the deceased. 4 The claim is limited to the loss of economic or material advantages which the deceased would have given them had he lived. The dependants cannot receive compensation

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1 (1808) 1 Camp 493.
2 By Ordinance 12 Vict. No.21 (1849).
3 The provision applies notwithstanding that the death was caused under such circumstances as amount in law to a crime: s.4.
4 See paragraphs 2.14 to 2.15 below for the designated relatives. The action must be brought in the name of the executor or administrator of the deceased: *Fatal Accidents Act 1959*, s.6(1)(b). However, where there is no executor or administrator or where the executor or administrator does not bring an action within six months after the death of the deceased, any one or more of the designated relatives may bring the action (for the benefit of all the designated relatives): s.9(1) and (2).
for non-economic loss, such as loss of companionship, or grief or mental suffering caused by the death.\(^5\)

2.6 Although the prime object of the *Fatal Accidents Act* is to provide a remedy for death caused by tort (e.g. negligence in the driving of a motor vehicle), the Act extends to fatalities resulting from such other defaults as breach of contract. This is illustrated in *Woolworths v Crotty*\(^6\). In that case the plaintiff's son bought an electric light globe from the defendant. The globe was imperfectly constructed and electrocuted the son. Negligence by the retailers could not be established but the High Court of Australia held that it was sufficient to rely on breach of the implied warranty of fitness which would have conferred a right of action on the deceased son.

2.7 However, the circumstances in which liability usually arises are in the case of deaths caused by negligence on the roads or by accidents at work caused, for example, by an unsafe system of work or the negligence of a fellow employee. In the case of death caused by negligence on the roads, defendants are virtually always insured against their liability under the *Fatal Accidents Act* because of the third party insurance which owners of vehicles are compelled by law to take out in Western Australia. The insurance covers not only the owner but any person who drives the vehicle. Where an employee is fatally injured at work and his employer is liable under the *Fatal Accidents Act* in respect of his death, usually the employer will be insured against liability under that Act but it is not obligatory for him to be so insured.

2.8 Occasional instances arise, such as sporting and social occasions, where it can be expected that the defendant will not be insured, for example, where a man negligently discharges a bullet from a rifle which kills a fellow member of a shooting expedition.\(^7\)

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\(^5\) The Act itself does not expressly exclude such claims. The limitation has been the result of judicial interpretation: see Fleming, *The Law of Torts* (5th ed. 1977) at 652, and the cases referred to therein.

\(^6\) (1942) 66 CLR 603.

\(^7\) Houseowners and householders insurance policies now normally provide fairly extensive public risk cover for the insured (or any member of his family ordinarily residing with him) as *owner or occupier* of the building. Such a provision would clearly not extend to include the defendant in the accidental shooting example.
Calculation of damages

2.9 In an action under the *Fatal Accidents Act*, the court may give "such damages as it thinks proportioned to the injury resulting from the death of the parties respectively for whom and for whose benefit the action is brought". 8

2.10 For one of the relatives designated in the Act to be entitled to damages, he or she must have a reasonable expectation of pecuniary benefit from the continuance of the life and his or her pecuniary gains resulting from the death of the deceased must not outweigh the pecuniary losses (although not all gains have to be deducted10). It is in this sense that the expressions "dependant" and "dependency" are used by judges and text book writers when discussing fatal accidents legislation. The terms are not used in the Act itself.

2.11 As Windeyer J. said in *Parker v The Commonwealth*,11 the governing principles in assessing damages under the fatal accidents legislation are that -

1. Damages should be calculated by reference to a reasonable expectation of pecuniary benefit as of right or otherwise from the continuance of the life.

2. Damages are awarded to compensate the recipient on a balance of gains and losses for the injury sustained by the death.

As explained above,13 damages in the nature of a solatium for injured feelings and affection are excluded.

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8 *Fatal Accidents Act* (WA), s.6(2).
9 See judgment of Windeyer J. in *Parker v The Commonwealth* (1964) 112 CLR 297.
10 See note 12 below.
11 (1964) 112 CLR 295 at 308.
12 The Act specifically states in s.5(2), however, that the following gains are not to be taken into account -
(a) insurance money;
(b) money paid or payable out of a superannuation, provident or like fund or scheme, or by way of benefit from a friendly society, benefit society or trade union; and
(c) pensions.
"...[Any] disposition in favour of the widow under the will of the deceased [has to be taken into account], though by no means all of it since she may have gained little by merely stepping into full control of assets which had formerly been at her disposal anyway, such as the home and furniture or even capital. The full amount will only be deducted for true "windfalls", such as damages recovered by the estate from the tortfeasor (and devolving on the dependant) for the deceased’s clothing destroyed in the accident ...": Fleming, *The Law of Torts* (5th ed. 1977) at 656.
13 See paragraph 2.5 above.
2.12 Where the person killed was a wage earner, the normal method of assessment of damages by the courts in Western Australia is to make an assessment of the present financial advantages that the dependants of the deceased were receiving at the time of his death. The sum is then multiplied by a certain number of years purchase so as to yield the present value of a notional annuity, calculated by reference to the joint span of the deceased's prospective working life and the claimants' dependency. A percentage is then deducted for contingencies such as ill health or unemployment of the wage earner or re-marriage in the case of a dependent widow. Then the gains to the dependant resulting from the deceased's death must be deducted, although some gains do not have to be brought into account.\(^\text{14}\)

2.13 In establishing the "reasonable expectation of pecuniary benefit",\(^\text{15}\) it need not be shown on the balance of probabilities that the claimant would have received any particular benefit.\(^\text{16}\) The court has to value the chance that the particular claimant would have derived some financial benefit from the deceased had he or she lived. The injury for which damages are given is the loss of that chance. This was explained by Lord Reid in his judgment in *Davies v Taylor* where he put the illustration of two widows who had separated from their husbands in circumstances in which they were not entitled to and did not receive maintenance:\(^\text{17}\)

"...[in the one case] it is estimated that the chance that she would have returned to him is a sixty percent probability (more likely than not) but in the other the estimate of that chance is a forty percent probability (quite likely but less than an even chance). In each case the tribunal would determine what its award would have been if the spouses had been living together when the husband was killed, and then discount it or scale it down to take account of the probability of her not returning to him."

But the chance must be substantial, and not merely speculative.\(^\text{18}\) Thus the question whether the death of a young child will entitle the parent to compensation under the *Fatal Accidents Act* is dependent upon whether the chance of pecuniary benefit can be established as substantial, and is not a mere speculative possibility. Sometimes the matter is beset with so many doubts and uncertainties that the claim is "pressed to extinction by the weight of multiplied contingencies".\(^\text{19}\)

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\(^\text{14}\) See note 12 above.
\(^\text{15}\) See paragraph 2.11 above.
\(^\text{16}\) *Davies v Taylor* [1972] 3 All ER 836, a decision of the House of Lords.
\(^\text{17}\) Ibid., at 838.
\(^\text{18}\) Ibid., at 848, per Lord Cross of Chelsea.
\(^\text{19}\) *Barnett v Cohen* [1921] 2 KB 461 at 472.
Class of claimants

2.14 Under the *Fatal Accidents Act* an action can only be brought for certain designated relatives of the deceased. To be entitled to damages under the Act, a person must not only show dependency but must also establish that he is one of the relatives designated by the Act. These are -

(a.) husband or wife;
(b) "child" which is defined to mean son, daughter, grandson, granddaughter, stepson and stepdaughter; and
(c) "parent" which is defined to mean father, mother, grandfather, grandmother, stepfather and stepmother.

For the purposes of the Act, a person is deemed to be the parent or child of a deceased person notwithstanding that he was only related to him illegitimately or in consequence of adoption: s 3(2). Accordingly, in "deducing" any relationship which under the Act is included within the meaning of the expressions "parent" and "child", any illegitimate person and any adopted person are treated as being or as having been the legitimate child of his mother and reputed father, or as the case may be, of his adopters. For the purposes of the Act, an "adopted person" is one who is legally adopted whether in Western Australia or elsewhere. However, in any action under the Act where the question of illegitimacy arises, the relationship shall not be taken to have been proved unless paternity had been admitted by or established against the father during the lifetime of the deceased person (i.e. the father or the illegitimate child, who has died).

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20 See s.6(1)(a) and s.3(1).
21 Even where there were no children and the deceased’s wife was not contributing to the family purse from outside earnings and there was no probability that she would be, her surviving husband can recover damages in respect of her domestic services in looking after the home and the husband. However, the wife’s "cost" to the husband had she remained alive has to be deducted from the value of her services in the calculation of the damages.
22 This is the word used in the *Fatal Accidents Act* itself: see s 3(2).
23 See s.3(2).
24 s 3(2). When a child born illegitimate is adopted under Western Australia’s *Adoption of Children Act 1896-1976*, his illegitimate relationships determine upon his adoption: s.7(1) of the *Adoption of Children Act 1896-1976* (WA). Hence, for example, such an adopted child could not make a claim under the *Fatal Accidents Act 1959* (WA) in the event of the death of his natural father but he could make a claim if his adoptive father died.
25 See s.6(3).
2.15 There is no express provision in the Western Australian Act regarding a posthumous child of the deceased. However, in an English case *The George and Richard*, a decision of a single judge, it was held that a posthumous child was within the class of relatives protected by the original English Act (the *Fatal Accidents Act 1846*). It would seem to be fairly certain that the position would be the same under the Western Australian Act.

2.16 It would seem that if the personal representative brings an action under the *Fatal Accidents Act*, it is the duty of that person to take all reasonable steps to see that the dependants are informed of the action and, if they wish to claim, are named as persons on whose behalf it is brought.

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26 (1871) LR 3 A & E 460.
27 See judgment of Lord Denning M.R. in *Cooper v Williams* [1963] 2 All ER 282.
CHAPTER 3 - OTHER LEGISLATION

3.1 The Fatal Accidents Act is not the only statute under which compensation may be payable where a person dies as a result of the act or omission of another. Before one can properly decide whether the present class of claimants under the Act should be widened, or provision made for the payment of a solatium, it is desirable to have regard to the provisions of other enactments in this area.

3.2 The other enactments are the -

(a) Law Reform (Miscellaneous Provisions) Act 1941;
(b) Workers' Compensation Act 1912-76;
(c) Criminal Injuries Compensation Act 1970-76;
(d) Social Services Act 1947 (Cwth).

THE LAW REFORM (MISCELLANEOUS PROVISIONS) ACT 1941

3.3 At common law, a personal representative could not sue for any tort committed against the deceased in his lifetime. However, under the Law Reform (Miscellaneous Provisions) Act which was passed in 1941, on the death of any person any cause of action vested in him survives for the benefit of his estate. This is different from the cause of action given by the Fatal Accidents Act, which is one in favour of specified dependants of the deceased and not his estate.

3.4 The cause of action covers both the case where the injury caused the death, and where the death was unrelated. In this latter case, the claim would be limited to any loss of earnings caused by the injury between the date of the injury and death and any expenses arising out of the injury. Where the injury caused the death, it seems the estate can claim for loss of earnings on the basis of the pre-accident life expectancy of the deceased, and that damages would be assessed having regard to the gain, if any, which would have accrued to the deceased from his

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1 Law Reform (Miscellaneous Provisions) Act 1941 (WA), s.4(1). This Act was based on the English Law Reform (Miscellaneous Provisions) Act 1934. As in England, the Western Australian Act does not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims under s.94 of the Supreme Court Act 1935 for damages on the ground of adultery: s.4(1). The latter two causes of action have now been abolished: see Family Law Act 1975 (Cwth), s.120.

2 Damages are not recoverable under the Act for pain or suffering, or for bodily or mental harm or loss of expectation of life: s.4(2)(d).
future probable earnings after taking into account the expenditure which he would have incurred, if he had survived, in maintaining himself and his dependents, if any.³ Medical expenses and other special damages incurred before death will be recoverable by the estate and the Act specifically provides that a sum in respect of funeral expenses may be included.⁴

3.5 Normally then when a person dies as a result of the wrongful act or omission of another, there will be two causes of action - that under the Law Reform (Miscellaneous Provisions) Act accruing to his estate and that under the Fatal Accidents Act accruing to a specified class of relatives. There seems to be no overlap between the two actions, except possibly as to medical and funeral expenses when one of the relatives has incurred them.

WORKERS' COMPENSATION ACT 1912-1976

3.6 Where an employee dies as a result of an accident which arose out of or in the course of his employment, compensation is payable by his employer under the Workers' Compensation Act to specified relatives if they were wholly or partly dependent upon, or wholly or partly supported by, his earnings at the date of his death. The legislation is analogous to the Fatal Accidents Act but, unlike the position under that Act, the amount of compensation payable is fixed by the Workers' Compensation Act and is not calculated by reference to the earnings of the deceased. The sum is payable by the employer irrespective of fault.

3.7 The total amount of compensation payable to dependants (other than a child) of the deceased worker who are wholly dependent upon his earnings is at present $35,042.10.⁵ The Act provides that if the deceased worker leaves a dependant (wholly dependent on his earnings) who is a child or step child under the age of sixteen years the sum of seven dollars fifty cents per week in compensation is payable in respect of the child until the child reaches that age.⁶ Normally the deceased's wife will be the only person wholly dependent on the

³ See Fleming, The Law of Torts (5th ed. 1977) at 661 and 220. The author's view is based on the decision in Shelton v Collins (1965-66) 115 CLR 94. In this respect the law in England is different. The claim for loss of earnings there is limited to the period between injury and death.

⁴ s.4(2)(c).

⁵ Workers' Compensation Act 1912-1976, First Schedule, clause 1(a). Lump sum payments prescribed by that Act are altered each year by applying the formula described in the interpretation of "prescribed amount" in s.5 of that Act.

⁶ Workers' Compensation Act 1912-1976, First Schedule, clause 1(a). Seven dollars and fifty cents per week is also payable in respect of a fully dependent student child or step child who has attained the age of sixteen years but is under the age of twenty-one years or in respect of a fully dependent child or step child
deceased's earnings, apart from any children, and where this is so she will receive the whole of the $35,042.10. If there were two people wholly dependent on his earnings, for example, the deceased's lawful wife and his de facto wife, the Board would have to divide the $35,042.10 between them.\(^7\)

3.8 If the deceased worker leaves dependants in part dependent upon his earnings,\(^8\) they are entitled to such amount not exceeding $35,042.10 as may be agreed upon, or in default of agreement as may be determined, by proceedings under the Act, to be reasonable and proportional to the injury to those dependants.\(^9\) It may be that part dependants are only entitled to compensation if there is no one wholly dependent on the deceased. The Act is not clear on this point.

3.9 The following relatives of a deceased worker may claim compensation under the *Workers' Compensation Act*.\(^10\)

- wife or husband;
- father, mother;
- grandfather, grandmother;
- stepfather, stepmother;
- any person who stands in the place of a parent to another person and also that other person;
- son, daughter, (whether ex-nuptial or not);
- grandson, granddaughter;
- stepson, stepdaughter;
- brother, sister, half brother and half sister.

In the case of an ex-nuptial worker, his mother, and his brothers and sisters, whether legitimate or not, by the same father and mother, can claim.

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\(^7\) Clauses I(a)(i)(I) and IA of the *Workers' Compensation Act 1912-1976*.

\(^8\) It is a question of fact whether any person was a dependant of the deceased: *Re Hendrik de Haan* [1969] WAR 161.


\(^10\) See definition of "member of a family" in s.5(1) of the *Workers' Compensation Act*. 
3.10 It is compulsory for employers to insure with an insurance company against liability to pay compensation under the *Workers’ Compensation Act*.\(^{11}\) Insurance premiums are normally charged to production expenses and the cost of the scheme would in the normal course be ultimately borne by the consumer public.

3.11 Co-existence of liability under the *Fatal Accidents Act* and the *Workers’ Compensation Act* raises the question of overlapping benefits. The position in Western Australia appears to be that the dependants are permitted to exercise both rights cumulatively, subject to the following provisions -

(a) workers’ compensation received from the employer is to be deducted from the amount of a judgment for damages;\(^{12}\)

(b) money paid towards a judgment for damages is to be deducted from the amount of workers’ compensation payable;\(^{13}\) and

(c) where a judgment for damages has been paid in full, the dependants may not commence or continue proceedings for workers’ compensation.\(^{14}\)

**SOCIAL SERVICES ACT 1947 (CWT H)**

3.12 Where a husband dies, his widow is entitled to a pension under the *Social Services Act 1947-1976* (Cwth), provided her income does not exceed that permitted by the means test. The present rates\(^{15}\) for widows’ pensions, where the widow’s “other income” is sufficiently low\(^{16}\) for her to receive the full pension, are as follows -

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\(^{11}\) s.13(1). In this context, the expression “worker” extends to any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work or otherwise: see definition of “worker” in s.5(1) of the *Workers’ Compensation Act*. There is, of course, no liability to insure with respect to independent contractors. Nor is there a liability to insure with respect to a person whose employment is of a casual nature where that person is employed otherwise than for the purpose of the employer's trade or business: ibid. But, for example, where a man employs a woman on a permanent footing (as distinct from a casual one) to assist his wife in the housework for a half a day each week, he must insure.

\(^{12}\) *Workers’ Compensation Act 1912-1976*, ss.7(13) and 5(1).

\(^{13}\) Ibid.

\(^{14}\) Ibid.

\(^{15}\) As at November 1977. The basic widows’ pension is now increased each May and November in line with increases in the consumer price index. It is at present $49.30.

\(^{16}\) A widow with no children, can have “other income” up to $20 a week and still receive the full pension. This limit increases by $6 for each child she has in her care. A widow with no children can have “other income” up to $118.60 a week before entitlement to some pension ceases. This cut off point is $147.60 if she has one child over six years of age ($151.60 if the child is under six). The cut off point increases, after the first child by $21 for every other child in her care.
Widow without children $49.30 a week
If with children under 16 or dependent
full time students, the following additional amounts:

- mother's allowance 4.00 a week
- ($6 a week if there is a child under 6)
- Plus a payment for each child of 7.50 a week

For the purposes of this pension, the term “widow” includes a de facto wife who has lived with a man for at least three years immediately before his death.

3.13 People bringing up children or supporting full time students are also entitled to a family allowance which in 1976 replaced child endowment. For one child, the amount is $3.50 a week. Where there is more than one child, the rate is $3.50 for the first child, $5 for the second, $6 each for the third and fourth and $7 for each other child. The family allowance is not subject to a means test.

3.14 Where a child is orphaned a pension of $11 a week is paid to his guardian who will also receive a family allowance in respect of the child. The orphan’s pension is not subject to a means test.

CRIMINAL INJURIES (COMPENSATION) ACT 1970-1976

3.15 Under the Criminal Injuries (Compensation) Act 1970-1976 (WA) where a person has died as a result of the commission of an offence committed by some other person, the court may make an order that a sum not exceeding $7,500 be paid out of the property of the offender and apportioning the sum among the deceased's wife or husband, parents and children.17 "Parent" and "child" are defined in the same way as in the Fatal Accidents Act.18 The court is required to assess the sum in the same way as damages are assessed under the Fatal Accidents Act,19 subject to the cut off point. If the offender does not pay the amount of the order, the personal representative may apply to the Government for payment of the amount out of the Consolidated Revenue Fund. Before the Government will make any

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17 Criminal Injuries (Compensation) Act 1970-1976, s.4(1a). See also s.4(2b), s.6 and s.6A.
18 Ibid., s.3.
19 Ibid., ss.4(1a) and 3. See also s.4(2b), s.6 and s.6A.
payment, there must be deducted from the sum ordered to be paid by the offender the amounts that in the opinion of the Under-Secretary for Law the husband or wife, parents and children of the deceased have received or would receive if they exhausted "all relevant rights of action and other legal remedies available to [them], independently of [the] Act by reason of the loss to which the application relates". This would include, for example, a widow's pension. The Treasurer may, in his discretion, pay to the dependants the balance remaining.

**INTERACTION OF THE VARIOUS PROVISIONS**

3.16 The interaction of the *Fatal Accidents Act* with the other provisions referred to above can perhaps best be illustrated by an example. Suppose a worker, H, is seriously injured in the course of his employment. He lingers for two months in hospital and then dies. He is survived by his wife, W, (who was fully dependent) and three children C1, C2 and C3 aged three, six and nine. During the period while H was in hospital, his employer's insurance company was paying him an amount equal to his weekly earnings and also paid his medical expenses. These payments were made pursuant to the *Workers' Compensation Act*. H's personal representative is advised by his solicitors that his prospects of succeeding in a damages claim against the employers, on the ground that the death was caused by an unsafe system of work, are good. If they do succeed the damages will exceed the amount payable under the *Workers' Compensation Act*. H's personal representative decides to commence proceedings before the Workers' Compensation Board for compensation and in the Supreme Court for damages. The Supreme Court proceedings comprise two causes of action: the first is under the *Law Reform (Miscellaneous Provisions) Act 1941* and is for loss of earnings for the period between injury and death and for the deceased's medical expenses and funeral expenses; the second is for damages under the *Fatal Accidents Act 1959*. H's personal representative obtains an award before the Board for $35,042.10 plus $7.50 per week for each of the three children and these amounts are paid by the insurance company. Six months after the Board's award, the Supreme Court gives judgment in favour of H's personal representative in the action before that Court. The Judge assessed general damages under the *Fatal Accidents Act* at $70,000, of which he apportioned $51,000 to W and $7,600, $6,400 and $5,000 to C1, C2 and C3 respectively. The

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20 *Criminal Injuries (Compensation) Act 1970-1976*, s.7. Where the offence has resulted in death the amounts to be deducted must include "the amounts of any sums of the kind described in paragraphs (a), (b) and (c) of subsection (2) of Section 5 of the *Fatal Accidents Act 1959*": ibid. These include sums paid or payable by way of pension under the *Social Services Act 1947-1976* (Cwth).

21 See paragraph 3.12 above.

Judge also found that the employer was liable to pay the deceased's loss of earnings for the period between injury and death and his medical expenses and funeral expenses. The Judge deducted the amounts paid under the *Workers' Compensation Act* from the amounts which he found the employer was liable for in the Supreme Court action and entered judgment for the balance.

3.17 In this example, if the system of work was so unsafe that his death constituted manslaughter by his employer, then although H died as a result of the commission of an offence, his personal representative would not be able to recover any compensation under the *Criminal Injuries (Compensation) Act 1970*. The reason is that by enforcing the remedies available to him he would be able to recover more than the maximum payable under the Act - $7,500. However, if instead of dying as a result of an accident at work, H whilst on his way home from visiting his parents was attacked in the street and later died because of the injuries, his personal representative would almost certainly receive compensation under the *Criminal Injuries (Compensation) Act*.

3.18 If, however, H had been killed in an accident for which no one else was to blame, or which did not occur in the course of his work, his wife and children would only be able to claim under the *Social Services Act* (Cwth).

**POSSIBLE SIMPLIFICATION OF THE LAW**

**Should the Fatal Accidents Act be repealed?**

3.19 The number of statutory provisions which can come into operation when a person dies as a result of an act or omission of another raises the question whether the law is too fragmented.

3.20 The position would be simplified if the *Fatal Accidents Act 1959* were repealed and the *Law Reform (Miscellaneous Provisions) Act 1941* clarified so as to provide expressly that the deceased's estate could recover damages on the basis of his pre-accident life expectancy for his future probable earnings after taking into account the expenditure which he would have incurred in maintaining himself. The amount he would have spent on his dependants would therefore become part of his estate.
3.21 There is something to be said for such a step. A right of action under the fatal accidents legislation is anomalous in that it is at odds with the general principle of tort law that the law compensates the victim of the person immediately injured - and not those who suffer loss because of their association with them.

3.22 When the fatal accidents legislation was first enacted, there was a doctrinal difficulty in conferring a right of action on the deceased’s estate. This was the principle that personal representatives could not sue for a tort committed against the deceased in his lifetime.

However, this difficulty was removed in Western Australia in 1941 when the *Law Reform (Miscellaneous Provisions) Act* was passed.23

3.23 There are, however, arguments against the proposal. The damages, which would include the amount he would have used to maintain his dependants, could be a windfall to non-dependent beneficiaries. If the dependants were not beneficiaries under the deceased's will, they could no doubt claim under the *Inheritance (Family and Dependents Provision) Act 1972*, but it could be strongly argued that the *Fatal Accidents Act* assists in avoiding the necessity and inconvenience of applications under the former Act. Furthermore, the damages would be added to the deceased's estate for death and estate duty purposes, and this could result in the dependants receiving less than they would have under the *Fatal Accidents Act*, as damages under that Act do not attract duties.24

3.24 The Commission accordingly considers that such a simplification could well result in injustice, and it would be reluctant to recommend such a course, assuming the matter lay within the Commission’s terms of reference. The *Fatal Accidents Act* and the *Law Reform (Miscellaneous Provisions) Act* provide independent causes of action for the benefit of different persons and it would seem to be undesirable to assimilate the two causes of action into one.

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23 See paragraph 3.3 above.
24 The proposed amendments to the law relating to death and estate duties lessen the importance of this point.
National Compensation Bill

3.25 In New Zealand, the Legislature effected a far more radical simplification. Legislation was enacted in 1972\textsuperscript{25} which abolished all rights of action in tort for personal injury or death and provided instead for State funded compensation in respect of all those who suffered injury or death due to an accident, whether or not caused by the act or default of another. An attempt was made in Australia in 1974 to enact similar legislation. The then Commonwealth Government introduced into the Federal Parliament a bill called the National Compensation Bill, which was designed in part to replace all rights of action in tort for personal injury or death throughout Australia by a State funded compensation scheme. The Commonwealth bill went further than the New Zealand legislation, since it also contained provisions for compensation for disabilities due to illness or disease. The bill lapsed when Parliament was dissolved in November 1975, and has not been reintroduced.

3.26 Questions of the desirability or otherwise of such a radical change in the law relating to actions for personal injury claims are clearly outside the Commission's terms of reference, and therefore the Commission does no more than draw the reader's attention to them. In any event, whether or not the present multiplicity of statutory compensation provisions were to be replaced by a single scheme, the question of what classes of dependants of a deceased person should be compensated for the loss of their dependency would remain.

CHAPTER 4 - THE LAW ELSEWHERE

4.1 The legislative enactments in England, New Zealand, the Australian Capital Territory and the other Australian States corresponding to the Fatal Accidents Act of this State are as follows:

- England: *Fatal Accidents Act 1976* (this was a consolidation and did not effect any reform)
- New Zealand: *Death by Accidents Compensation Act 1952*¹
- New South Wales: *Compensation to Relatives Act 1897*
- Victoria: *Wrongs Act 1958*
- Queensland: *Common Law Practice Act 1867*
- South Australia: *Wrongs Act 1936*
- Tasmania: *Fatal Accidents Act 1934*
- Australian Capital Territory: *Compensation (Fatal Injuries) Ordinance 1968*
- Northern Territory: *Compensation (Fatal Injuries) Ordinance 1974*

Full particulars of the dependants who may claim under each of these Acts are set out in the following table.

¹ In New Zealand in 1972 the Accidents Compensation Act established a national compensation scheme which virtually took the place of damages actions arising out of personal injury: see paragraph 3.25 above. References in this working paper to the New Zealand fatal accidents legislation are references to the *Death by Accidents Compensation Act 1952* which was virtually superseded by the Accidents Compensation Act 1972.
### Persons Entitled to Claim in Jurisdictions Which Have Fatal Accidents Legislation

<table>
<thead>
<tr>
<th>WHO CAN CLAIM</th>
<th>JURISDICTION ¹</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>W.A.</td>
</tr>
<tr>
<td>Marriage</td>
<td></td>
</tr>
<tr>
<td>spouse</td>
<td>Yes</td>
</tr>
<tr>
<td>Lineal relatives</td>
<td></td>
</tr>
<tr>
<td>(a) children</td>
<td>Yes</td>
</tr>
<tr>
<td>(b) grandchildren</td>
<td>Yes</td>
</tr>
<tr>
<td>(c) more remote descendants</td>
<td>No</td>
</tr>
<tr>
<td>(d) parents</td>
<td>Yes</td>
</tr>
<tr>
<td>(e) grandparents</td>
<td>Yes</td>
</tr>
<tr>
<td>(f) more remote ancestors</td>
<td>No</td>
</tr>
</tbody>
</table>

1. The relevant legislation is as follows -

- **Western Australia**
  - **Fatal Accidents Act 1959**
- **England**
  - **Fatal Accidents Act 1976**
- **New Zealand**
  - **Deaths by Accident Compensation Act 1952**
  - **Compensation (Fatal Injuries) Ordinance 1968**
- **Australian Capital Territory**
  - **Compensation (Fatal Injuries) Ordinance 1968**
- **New South Wales**
  - **Compensation to Relatives Act 1897**
- **Victoria**
  - **Wrong Act 1958**
- **Queensland**
  - **Wrong Act 1936**
- **South Australia**
  - **Wrong Act 1936**
- **Tasmania**
  - **Wrong Act 1936**
- **Northern Territory**
  - **Wrong Act 1936**
- **Northern Territory**
  - **Wrong Act 1936**
2. In those jurisdictions which permit collaterals to claim, a relationship of the half blood is treated as one of the whole blood.

3. The English Act provides that in deducing any relationship a stepchild of a person shall be treated as his child. Hence where a stepchild has a child of his own that child would be a “grandson” of the stepfather.

4. The Act is not absolutely clear on this point.

<table>
<thead>
<tr>
<th>Collateral²</th>
<th>W.A.</th>
<th>England</th>
<th>N.Z.</th>
<th>A.C.T.</th>
<th>N.S.W.</th>
<th>VIC.</th>
<th>QLD.</th>
<th>S.A.</th>
<th>TAS.</th>
<th>N.T.</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) brothers &amp; sisters</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>(b) uncles &amp; aunts</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>(c) issue of (a) or (b)</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
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</tbody>
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<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) step child</td>
<td>Yes</td>
<td>Yes³</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>(b) Step parent</td>
<td>Yes</td>
<td>Yes⁴</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>

2. In those jurisdictions which permit collaterals to claim, a relationship of the half blood is treated as one of the whole blood.

3. The English Act provides that in deducing any relationship a stepchild of a person shall be treated as his child. Hence where a stepchild has a child of his own that child would be a “grandson” of the stepfather.

4. The Act is not absolutely clear on this point.
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<thead>
<tr>
<th></th>
<th>W.A.</th>
<th>England</th>
<th>N.Z.</th>
<th>A.C.T.</th>
<th>N.S.W.</th>
<th>VIC.</th>
<th>QLD.</th>
<th>S.A.</th>
<th>TAS.</th>
<th>N.T.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Former husband or wife</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>De facto spouse</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td><strong>Illegitimacy</strong>&lt;sup&gt;6&lt;/sup&gt;</td>
<td></td>
<td></td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>whether illegitimate relationships are included</td>
<td></td>
<td></td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td><strong>Adoption</strong>&lt;sup&gt;7&lt;/sup&gt;</td>
<td></td>
<td></td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>whether relationships by adoption are included</td>
<td></td>
<td></td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Relatives by marriage</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
</tbody>
</table>

5. Provided she was maintained or entitled to be maintained by the deceased either wholly or in part at the time of his death, or would have been so maintained or entitled but for the incapacity due to the accident from which his death resulted.


7. In the case of England, New Zealand, Australian Capital Territory, New South Wales, Queensland, South Australia, Tasmania and Northern Territory, the provision as to adopted children is contained in legislation dealing with adoption: see *Adoption Act 1976* (Eng), *Adoption Act 1955* (NZ), *Adoption of Children Ordinance 1965* (ACT), *Adoption of Children Act 1965* (NSW), *Adoption of Children Act 1964* (Qld), *Adoption of Children Act 1966* (SA), *Adoption of Children Act 1968* (Tas) and *Adoption of Children Ordinance 1964* (NT).
4.2 The following are the principal points of difference and similarity which emerge from the table.

**Lineal relatives**

4.3 The table shows that, as far as lineal relatives are concerned, all jurisdictions have the same provisions - the children, grandchildren, parents and grandparents, but no others, can claim. All jurisdictions include stepchildren and stepparents and relationships by adoption. However, in regard to other relationships, there is no common factor. The following sets out the most significant differences.

**Collateral relatives**

4.4 The Western Australian Act does not include any collateral relatives, such as brother and sister. In New South Wales, South Australia, Tasmania, the Australian Capital Territory and the Northern Territory brothers and sisters (including half brothers and sisters) can claim. The English legislation goes even further, and also includes uncles, aunts and their issue (including, in the case of all collateral relatives relationships of the half blood).

**Divorced spouse**

4.5 In the Australian Capital Territory and the Northern Territory, a former husband or wife of the deceased may claim. In New Zealand, a former wife could claim, provided she was being maintained by the deceased, or was entitled to be so maintained. In none of the other jurisdictions, including Western Australia, can a divorced spouse claim.

**De facto husband or wife**

4.6 In the Australian Capital Territory and the Northern Territory, a de facto husband or wife of the deceased can claim. In South Australia, such a person can claim, provided a court order has been obtained that he or she -
(a) had cohabited continuously with the deceased for five years immediately before his or her death or for five years in the aggregate in the six years immediately before the death, or

(b) had had sexual relations with the deceased which resulted in the birth of a child.

None of the other jurisdictions, including Western Australia, makes provision for such a relationship.

**In loco parentis**

4.7 In New South Wales, Queensland, the Australian Capital Territory and the Northern Territory -

(a) a person to whom the deceased stood in loco parentis; and

(b) a person who stood in loco parentis to the deceased person

is entitled to claim. No other jurisdictions studied, including Western Australia, covers such a relationship.

**Relatives by marriage**

4.8 Of the jurisdictions studied, the English legislation is unique in that it provides that a relationship of affinity (i.e. by marriage) shall be treated as a blood relationship. This means that in England, for example, a sister-in-law of the deceased and the wife of the deceased's half brother fall within the class of claimants.
CHAPTER 5 - DISCUSSION: CLASS OF CLAIMANTS

THE RATIONALE OF FATAL ACCIDENTS LEGISLATION

5.1 The reason given by Lord Campbell when moving the second reading of the bill in the United Kingdom Parliament in 1846 was that if a man was injured due to the negligence of another he had a remedy in a court of justice but if he died as a result of the negligence of another, there was no remedy, despite the loss to his family. This was unjust and in contrast to the position "in Scotland and foreign countries" where the law gave compensation.\(^1\) The remedy provided by the new legislation ensured that immediate dependants were compensated for their pecuniary loss. Nowadays, the legislation serves a similar purpose, although because of modern social welfare legislation\(^2\) survivors would not face destitution, as many of them would have in the nineteenth century.

5.2 Although the existing Western Australian legislation, which differs only in comparatively minor respects from the original English legislation,\(^3\) probably adequately protects the immediate dependants of a deceased in most family situations, it is not difficult to imagine cases where compensation would be denied to a survivor even though he was as fully a member of the deceased's household, and was as fully dependent upon him as other persons who would be entitled to claim. A foster child, for example, would be such a person.

5.3 It can be argued that the extensions which have been made in other jurisdictions to the list of the claimants contained in \textit{Lord Campbell's Act}\(^4\) have been to provide for more unusual family situations. For example, the extension to certain collateral relatives such as brothers and sisters and their issue\(^5\) means that if A's brother B and B's wife are both killed in a car accident, and A takes on responsibility of bringing up B's children and then A is later killed in a further accident, then those children can make a claim under the English \textit{Fatal Accidents Act}. A further example occurs in the New South Wales legislation where amendments have brought foster children within the protection of the Act.

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\(^2\) See paragraph 3.12 above. If the deceased had been killed while at work, his dependants would receive compensation, even though the employer was not negligent.
\(^3\) See footnote 4 for position under original English legislation and, paragraph 2.14 for the position under the existing Western Australian legislation.
\(^4\) The list of claimants contained in \textit{Lord Campbell's Act} was: wife, husband, parents, grandparents, step parents, children, grandchildren and step children.
\(^5\) See table in paragraph 4.1 above.
5.4 It is noteworthy that the class of claimants under the *Workers’ Compensation Act* of this State is wider than that specified in the *Fatal Accidents Act*. Under the former Act, claims can be made by brothers and sisters of the deceased, by any person who stands in loco parentis to the deceased and any person to whom the deceased stood in loco parentis, and (in certain circumstances) by the de facto wife of the deceased. These persons are not included in the *Fatal Accidents Act*.

**Possible extenstions**

5.5 It could accordingly be suggested that the range of dependants who are able to claim under the Western Australian fatal accidents legislation is too limited, even if in principle the protection of the legislation should not extend beyond the deceased's family circle, since it can result in arbitrary exclusions in unusual types of family situations.

5.6 It would seem that the community at large has an interest in extending the class of persons entitled to claim under the *Fatal Accidents Act*. Dependants at present not entitled to claim are very often thrown back on the State for support by means of social welfare payments. An extension of the class entitled to claim would mean some saving (admittedly small) of social welfare funds. In the main, defendants are insured against liability under the *Fatal Accidents Act* and hence the damages payable to those dependants who had hitherto been unable to claim would usually be paid by the defendant's insurers.

5.7 Possibly one reason why the list of dependants entitled to claim was so narrowly drawn in *Lord Campbell's Act* when it was enacted in 1846 was that it may have been considered to be unduly oppressive to defendants for them to be required to compensate other than close relatives in the absence of generally available liability insurance.

5.8 However, because of the modern prevalence of liability insurance, some extension of the existing class of claimants would not now be considered oppressive. Since most of the fatal accidents in which liability under the Act arises occur on the roads or at work, the Motor Vehicle Insurance Trust and insurers of employers' liability would bear most of the additional costs.
claims. Higher insurance premiums might result, although any increase would be small.\(^9\) Any higher premiums would be borne by those sections of the community who participate in or profit from the risk-creating activity.

5.9 Broadly speaking, an extension of the Act in keeping with the present rationale could be achieved in two ways -

(a) by prescribing additional classes of relatives who would be entitled to claim, as has been done in various ways in other jurisdictions,

(b) by enacting a general provision which would extend protection to any person who could establish a "familial relationship" with the deceased (possibly with certain prescribed exclusions that may be required on the grounds of social policy).\(^10\)

5.10 Each of these approaches has its advantages and disadvantages. The advantage of approach (a) is that it leaves no room for argument as to who is, or is not, within the protected categories.\(^11\)

The disadvantage is that, no matter how wide the net was cast, it would still be possible for some family situations not to be covered.

5.11 An advantage of approach (b) is that it would ensure that all family situations were covered, no matter how unusual the situation was.\(^12\) A disadvantage of this approach is its uncertainty, with its attendant litigation, cost and delay. Argument would often arise as to whether a particular relationship could properly be classified as a familial relationship. For example, would members of a commune or a religious sect be considered to be members of a family? Would a foster child of a person be considered to be the de facto "brother" of the

\(^9\) If the principle in *Shelton v Collins* (see note 30 above) applies to death caused by injury, then there might not be any increase in premiums brought about by an extension of the class of claimants under the *Fatal Accidents Act*. There would merely be a transfer of compensation from the estate to the additional dependants.

\(^10\) See paragraph 5.23 below.

\(^11\) This would not be altogether true if a relatively vague category such as de facto spouse was included.

\(^12\) This would, however, depend on how "family relationship" was defined in the legislation. For example, if a former spouse was to be covered, the definition would have to be drawn so as to cover former family relationships.
natural son or daughter of that person? These are just some examples of difficult cases which come to mind.

5.12 It would be possible to combine the two approaches by specifying those relatives who would be entitled to claim as of right and by providing in addition that any other dependants who could satisfy the court that they were a member of the deceased's family or had a familial relationship with the deceased could claim. However, although this approach would reduce uncertainty, it would not eradicate it altogether.

**CHANGING THE RATIONALE**

5.13 The suggested imposition of the uncertain test of familial relationship, even as an ancillary test, raises the question why the benefit of the fatal accidents legislation should be restricted to those who had a certain sort of relationship with the deceased, whether by blood or as a member of the deceased's household or family. Why should not any person who can satisfy the test of dependency be entitled to compensation, whether or not he also satisfies these other tests?

5.14 A deceased person may have been wholly or partly maintaining someone who did not happen to be a relation. He may have been supporting a child over whom he had accepted the obligations of guardianship. He may have been supporting, or helping to support, an elderly parent of a friend who had died earlier. He may have been contributing to the support of a hospital, school or charitable organisation.

5.15 The suggestion that the protection of the fatal accidents legislation should be extended to any person who could show that he was dependent on the deceased was actually made in the Western Australian Parliament in 1947, when the Government introduced a bill in the Legislative Assembly aimed at replacing *Lord Campbell's Act* in this State. The bill, among other things, proposed that the protection of the legislation be extended to illegitimate children and adopted children, and also to the brothers and sisters of the deceased. A member of the Opposition, Mr. H.E. Graham, gave notice that he intended to move that the...
list of the persons in the bill as those for whose benefit an action could be brought should be deleted and replaced by a provision giving a right of action to - 15

"any person who at the time of the death of the deceased person was being financially maintained, either wholly or in part, by such deceased person."

Mr. Graham's motion was never put to the vote, as the bill lapsed.

5. 16 The issue again came under notice in this State in 1976 when Mr. P.L. Sharp Q.C. delivered a paper at the 1976 Western Australian Law Summer School entitled Methodology in Assessment of Damages in Personal Accidents. In the paper, Mr. Sharp said: 16

"Clearly there may be people outside the group specified [in the Western Australian Act] who were dependent upon the deceased and, without at all being exhaustive, these include a de facto wife, brothers and sisters and children who have been de facto adopted and as such maintained by the deceased.

Rather than have an exhaustive list of entitled dependants it is submitted it would be simpler to enact that any person is entitled to claim who can show a relationship of dependency upon the deceased, irrespective as to whether the relationship is legitimate or illegitimate.

... In case public morals are shocked, the definition could exclude the case of a dependent mistress when the husband is living with his wife and supporting her".

5.17 The general view expressed by Mr. Sharp has subsequently been supported by the Council of the Law Society of Western Australia in a letter to the Attorney General. The Council, however, considered that care should be taken to ensure that employees as such were excluded, and that difficulties created by definitions such as those appearing in the Workers Compensation Act should be avoided. 17

15 W.A. Parl. Deb. 1947 at 593: see also W.A. Parl. Deb 1959 at 1205. A difficulty with Mr. Graham's proposal is that it would appear to exclude a claimant who was not presently being maintained by the deceased. Another difficulty is that the use of the word "maintain" might limit compensation to those who were being supported in a subsistence sense.

16 A similar proposal has also been made in McGregor on Damages (13 ed. 1972) paragraph 1186. The author explicitly recognises that, under the proposal, persons whose dependency on the deceased rested on no family ties would be able to claim.

17 The definition of "dependants" in s.5 of that Act has caused difficulty: see Re Hendrik de Haan [1969] WAR 161.
5.18 However, there seem to be two principal arguments against the proposal -

(a) Relationships of a purely commercial sort would be included, a step which not only would be against the principles adopted elsewhere in the law of tort, but would also be oppressive to the defendant.

(b) Relationships of a socially undesirable sort would be included, to which the law should not extend protection. (This objection could also be made to approach (b) in paragraph 5.9 above).

(a) Commercial relationships

5.19 Under the existing Fatal Accidents Act, it is not enough for a claimant to show he was a relative of a prescribed class of the deceased and that he suffered pecuniary loss as a result of the death of the deceased. The claimant must also show that the pecuniary benefit he would have received had the deceased lived would have accrued to him by virtue of the fact that he was a prescribed relative of the deceased.

This was explained by Devlin J. in Burgess v Florence Nightingale Hospital\(^ {18} \) where he said:

"Let me take for example the case of a man in the prime of life, who takes into partnership a young man, and within two or three years the senior partner is killed. The junior partner's prospects may be grievously injured; he may not have had time to establish himself in the good graces of the clients of the firm, and the result may be that a lot of work goes elsewhere. At common law there would be no claim by the junior partner. Can it make any difference that the senior partner is a father who has taken a son into the family business? Plainly, in the mind of the law, no; and, therefore, counsel for the defendant submits that relationship, in such a case as that, is purely incidental, and he submits that that is also the position in this case. The loss claimed is claimed in that case qua junior partner, not qua son, and to allow the loss under the Fatal Accidents Act, 1846, merely because of the incidental factor that the senior and junior partner happen to be father and son would be wrong. Therefore, one must cut down the wide words of the Act by reading into them an implication that the loss must result from one or other of the relationships which are specified in the section."

In Burgess v Florence Nightingale Hospital,\(^ {19} \) the plaintiff husband and his deceased wife had been professional dancing partners. They shared their earnings equally but their joint earning

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\(^ {18} \) [1955] 1 All ER 511 at 515.
capacity greatly exceeded that of either of them individually. Each derived an advantage from the arrangement. However, Devlin J. said that the wife was receiving the market rate so far as there was any evidence before him. She was not rendering any services to her husband which he got either free or at less than market value. He further held that as no benefit arose from the dancing partnership of the plaintiff and his wife which could properly be attributed to their relationship as husband and wife, no damages were recoverable for the value of the wife to the plaintiff as his dancing partner.

5.20 In the Commission's view, the decision of Devlin J. is in accordance with the purpose of the fatal accidents legislation. Generally, the law has only afforded compensation to persons immediately injured by the wrongful act or omission of another and does not compensate third persons who in consequence lose their livelihood, support or expected benefits for their association with him.\footnote{19} For example, where because of injuries caused to him by the negligence of another in an accident, an employer is forced to close down his business and dismiss his employees, those employees cannot recover damages from the person whose negligence caused the injury, even though they are unable to find positions which earn them comparable wages.\footnote{20} Similarly, if a member of a long established professional two-man comedy team is forced into immediate and permanent retirement because of serious injuries received in a traffic accident as a result of the negligence of his taxi driver, the surviving member of the team will not be entitled to damages from the taxi driver, even though it appears that his income in the future will be less than he could earn with his old partner. In these types of cases, liability would be denied on the ground that either the damage is too remote or that there is no duty of care because the injury is said to be unforeseeable. No doubt the real reason is that it is considered to be unduly oppressive to burden defendants with responsibility for unpredictably heavy economic loss in such cases.

5.21 The right of action for damages under the fatal accidents legislation could therefore be said to be anomalous in that it is at odds with the general principle that the law compensates the victim - the party immediately injured - and not those who suffer loss because of their association with him. But the Act, as at present drafted, circumscribes the anomaly by firstly confining the action to prescribed classes of relatives and secondly requiring the applicant to

\footnote{19}{[1955] 1 All ER 511.}
\footnote{20}{See Fleming, \textit{The Law of Torts} (5th ed. 1977) at 170 and 171.}
\footnote{21}{See Best v Fox [1952] 2 All ER 394 at 398.}
satisfy the court that the pecuniary benefit would have come to him by virtue of that relationship.

5.22 If however, the requirement that an applicant must be a prescribed relative is dropped, there may be nothing for the court to rely on to distinguish clearly cases for which compensation should be paid from those cases for which compensation should not. It would perhaps be possible for the legislation to provide guidelines for the court, such as that it must be satisfied that the benefit would have accrued only because the claimant was a relative of the deceased, or was his friend or because the deceased would have made the payment out of charity or moral obligation. Another alternative might be to put the limit negatively by providing that a claimant could not succeed if the benefit would have accrued because of a purely commercial relationship with the deceased. However, this test, as well as its alternatives, would be very imprecise and difficult to apply. Whichever one was chosen might include undeserving cases and exclude deserving ones.

(b) Socially undesirable relationships

5.23 The other objections to the proposal is that compensation could be recoverable in respect of socially undesirable relationships. This objection could also be made against the test suggested above of "familial relationships". Mr. Sharp drew attention to the possibility of the deceased's mistress recovering compensation if dependency were to be the sole test, and suggested that the proposed enactment could expressly exclude such a case. However, this is only one sort of case where recovery may be considered inappropriate. Other examples which the community might consider to be inappropriate would be homosexual or lesbian relationships, cases where the dependency arose out of membership of a socially undesirable religious or political group, or even cases where the relationship was a criminal one.

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22 See paragraph 5.9(b) above.
23 See paragraph 5.16 above.
24 A witches coven, for example.
25 A Neo-Nazi Party, for example.
26 For example, blackmail.
EXTENSION BY ADDING TO PRESCRIBED CLASS

5.24 Assuming that a general test of dependency\(^{27}\) (whether absolute or qualified) or of "familial relationship"\(^{28}\) as a substitute for the present method of prescribing eligible relationships is considered undesirable, the question arises what extensions should be made to the prescribed class of relatives. \(^{29}\)

5.25 At present in Western Australia the prescribed class consists of -

(a) husband or wife;

(b) children (including step children) and grandchildren; and

(c) parents (including step parents) and grandparents.

The only alteration effected since 1849 when *Lord Campbell's Act* was adopted in Western Australia has been to bring within the definition of “parent” and “child” persons related to the deceased illegitimately or by consequence of adoption. \(^{30}\)

5.26 In paragraphs 5.27 to 5.47 below, the Commission discusses the desirability of covering certain other relatives.

**Divorced spouse**

5.27 This category is covered in the legislation of the Australian Capital and Northern Territories and of New Zealand. The English Law Commission has also recommended its inclusion in the English legislation. \(^{31}\) The English Commission said that a divorced wife who had been awarded maintenance may well suffer serious hardship if her former husband is killed and she is not recognised as a dependant for the purposes of a claim under the *Fatal

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\(^{27}\) See paragraphs 5.13 to 5.23 above.

\(^{28}\) See paragraphs 5.9(b) and 5.11 above.

\(^{29}\) The Commission considers that *some* extension is justified: see paragraphs 5.7 and 5.8 above.

\(^{30}\) These extensions were made by the *Fatal Accidents Act 1959*.

\(^{31}\) Report, *Personal Injury Litigation - Assessment of Damages* (Law Com. No.56, 1973) paragraph 262. This report has not yet been acted on by the United Kingdom Parliament.
The same position would apply in Western Australia. The *Family Law Act 1975* (Cwlth) gives a party to a marriage a right to be maintained by the other party in certain circumstances, and empowers the Court to make appropriate orders as to maintenance. In many cases, no doubt, the former husband, if he had lived, would have made payments to his ex-wife even though there was no court order. If a former spouse is killed due to the fault of another, it does not seem unreasonable that the defendant should be obliged to compensate the survivor if it can be shown that the deceased would have continued to support him or her.\(^\text{34}\)

The omission of the class of divorced spouse from the original Act is no doubt explicable on the grounds that in 1846 divorces were difficult to obtain and were very rare.

**De facto husband or wife**

5.28 In South Australia, a de facto husband or wife can in certain circumstances make a claim under the fatal accidents legislation of that State. To be entitled to make a claim, he or she must first obtain a court order under the *Family Relationships Act 1975*.\(^\text{35}\) To obtain the order, the applicant must prove to the satisfaction of the court that he or she was at the time of the deceased's death cohabiting with the deceased as de facto husband or wife and -

(a) he or she -

(i) had so cohabited with the deceased continuously for the period of five years immediately preceding the death; or

(ii) had during the period of six years immediately preceding that date so cohabited with the deceased for periods aggregating not less than five years; or

\(^{32}\) Report, paragraph 259.

\(^{33}\) ss.71-75.

\(^{34}\) That is, the defendant would not be liable to pay compensation merely because the deceased had been ordered by the Family Court to pay compensation, but only if the dependant can show that payment *would in fact have been made*.

\(^{35}\) *Wrongs Act 1936-1975* (SA), ss.20(1) and 3a; *Family Relationships Act 1975* (SA), s.11.
he or she had sexual relations with the deceased which resulted in the birth of a child.\textsuperscript{36}

An order may not be made unless the application is supported by credible corroborative evidence.\textsuperscript{37}

5.29 Apart from South Australia, the Australian Capital Territory and the Northern Territory are the only jurisdictions of those examined by the Commission\textsuperscript{38} in which a de facto husband or wife may make a claim.\textsuperscript{39} The strict preconditions to a claim by a de facto husband or wife which exist in South Australia do not apply in the Australian Capital Territory and the Northern Territory.

5.30 Statutory recognition of the interests of de facto spouses would not be new in Western Australia. The list of those who may make a claim for compensation under the \textit{Workers' Compensation Act} was amended in 1973\textsuperscript{40} to include a woman who, although not legally married to him, -

(i) lived with him as his de facto wife immediately before his death, if he leaves any dependant who is the child of the union between him and the woman; or

(ii) lived with him on such a basis for not less than three years immediately before his death, if he does not leave any such dependant.

5.31 In 1972, the Western Australian Parliament enacted the \textit{Inheritance (Family and Dependents Provision) Act} which enables a de facto widow\textsuperscript{41} of the deceased to claim against his estate if she has not been left enough for her proper support. This legislation is not, of course, parallel with the \textit{Fatal Accidents Act}, since it concerns claims against the estate of the deceased, not against third parties.

\begin{itemize}
\item \textsuperscript{36} Ibid.
\item \textsuperscript{37} \textit{Family Relationships Act 1975 (SA)}, s.11(5).
\item \textsuperscript{38} See paragraph 4.1 above.
\item \textsuperscript{39} \textit{Compensation (Fatal Injuries) Ordinance 1968 (ACT)}, ss.8(2) and 4(2)(h); \textit{Compensation (Fatal Injuries) Ordinance 1974 (NT)}, ss.8(2), 4(2) and 4(3)(c). Both of these Ordinances give a right to claim to "a person who, although not legally married to the deceased person, was, immediately before the death of the deceased person, living with the deceased person as wife or husband, as the case may be, on a permanent and bona fide domestic basis". The expression "de facto" spouse is not used in the Ordinances.
\item \textsuperscript{40} No. 96 of 1973.
\item \textsuperscript{41} These are the words used in the statute: see s.7(1)(f).
\end{itemize}
5.32 However, a de facto relationship cannot be proved by production of official certificates, as it can in the lawful relationship, and there may be the temptation for some claimants to exaggerate the extent of their relationship to the deceased. On the other hand, the preconditions which have to be fulfilled under the South Australian fatal accidents legislation before a court order can be obtained would significantly lessen the possibilities of false claims succeeding.

5.33 The English Law Commission in its report, *Personal Injury Litigation - Assessment of Damages* said that it had contemplated extending the ambit of the Act to such persons as a fiancée and a de facto wife, but difficulties of definition and social policy had persuaded it not to propose any such extension. The Commission thought, however, that there might be a case for examining the legal position of a de facto wife in all its aspects.

5.34 The Commission has formed no final view on whether a de facto spouse should be covered by the *Fatal Accidents Act* and invites comment.

**In loco parentis**

5.35 In New South Wales, Queensland, the Australian Capital Territory and the Northern Territory, the statutory list of those entitled to claim under the fatal accidents legislation includes -

(a) a person to whom the deceased stood in loco parentis; and

(b) a person who stood in loco parentis to the deceased person.

The expression "in loco parentis" in New South Wales legislation was considered by the Full Court of that State in *Commissioner for Railways v Nash*. In a joint judgment, the Court said:

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42 Report, paragraph 258.
43 Ibid.
44 See table in paragraph 4.1 above.
46 [1963] NSWR 30 at 34.
"It would accordingly not appear to be sufficient, to found a claim under the 'in loco parentis' relationship, merely to show that the deceased, either in the role of 'father', or of 'child', provided, or might reasonably have been expected to provide, benefits or services measurable in money to another member of the family. It is necessary to show that the 'father' stood in the shoes of an actual father, and the 'child' in the shoes of an actual child, looking to the 'father' for care, protection, maintenance and upbringing, as the 'father' looked to him, perhaps, ultimately, for some support in his declining years. We are, in other words, not concerned. ...merely to seek a person taking upon himself the duty of making financial provision for a child and a child so provided for; what must be shown is a relationship of foster parent and foster child with all its incidents".

5.36 The list of those who may make a claim under the Workers' Compensation Act 1912 (WA) includes "any person who stands in the place of a parent of another person and also that other person". The phrase was considered by the Full Court of Western Australia in Re Hendrik de Haan. Jackson J. who was one of the members of the Court said in his judgment:

"...the words 'any person' in the passage under consideration should be taken to denote...a person who stands in the place of a parent to the worker, one who has taken upon himself (or herself) the duties of a parent to the worker; or, in other words, one who is in fact but not in law an adoptive parent of the worker. Then follows the curious and difficult phrase 'and also that other person'... If the preceding words mean, as I would hold, the worker's adoptive parent, in fact but not in law, then 'that other person' can reasonably be interpreted as describing the reverse side of the coin, that is the child whom the worker has adopted in fact though not in law".

5.37 The English Law Commission in its report, Personal Injury Litigation - Assessment of Damages recommended that the class of claimants under the English Act should be extended to include any person (not being a child of the deceased person) who, in the case of any marriage to which the deceased person was at any time a party, was treated by the deceased person as a child of that family in relation to that marriage. The Law Commission thought the justification for admitting the claims of such children as dependants every bit as strong, if not stronger, than for admitting those of step children, who were already recognised under the Fatal Accidents Act.

5.38 Under the English Commission's recommendation only the child treated as a member of the family could claim: in the reverse situation, where the child is killed, the person who treated him as a member of the family could not claim. The proposal would also only apply in

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47 See Workers' Compensation Act 1912, s.5.
50 Report at paragraphs 257, 262 and clause 8 of the draft bill which constitutes Appendix 5 to the report.
51 Report, paragraph 257.
relation to a marriage to which the deceased was a party. It would not apply to a relationship of foster parent and foster child where the foster parent is unmarried. This Commission considers that these limitations are unnecessary, and prefers the legislation as it exists in the Australian jurisdictions which have provided for such relationships.

Collateral relatives such as brother and sister

5.39 The bill referred to in paragraph 5.15 above which was introduced into Parliament of Western Australia in 1947 proposed, among other things, to extend the class of claimants to include the brothers and sisters of the deceased. Referring to this provision the Attorney General said:\(^52\)

"I am not wedded to the inclusion of brothers and sisters in this Bill, but I have included them in order that the matter may receive the consideration of the House and because the recent Act in South Australia extended legislation there to brothers and sisters".

However, the bill lapsed and the provision was not voted on. The position in this State is still that no collateral relatives are protected by the legislation.

5.40 The English Fatal Accidents Act 1976 includes in its list of those entitled to claim "any person who is, or is the issue of, a brother, sister, uncle or aunt of the deceased": s.1(3). These relatives were first brought into the statutory list of dependants in 1959.\(^53\) Prima facie, "issue" means not simply children but descendants of all generations.\(^54\) It would appear that in s.1(3) of the English Fatal Accidents Act 1976, "issue" would in fact have its prima facie meaning. This creates an anomaly in that under the English Act the deceased's great grandson would be unable to make a claim but the great grandson of the deceased's brother would be entitled to claim.

5.41 In New South Wales, South Australia, Tasmania, the Australian Capital Territory and the Northern Territory brothers and sisters fall within the statutory list, but not uncles, aunts or

\(^{52}\) W.A. Parl. Deb. [1947] at 520.
\(^{53}\) By s.1(1) of the Fatal Accidents Act 1959 (UK).
\(^{54}\) Re Burnham, Corrick & Corrick [1918] 2 Ch 196, at 201, 202, 204.
issue of uncles, aunts, brothers and sisters.\(^{55}\) The list\(^{56}\) of those who may make a claim under the *Workers' Compensation Act 1912* of Western Australia includes the deceased's brothers and sisters.\(^{57}\)

\[5.42\] If reform is to be effected by extending the present statutory list, then bearing in mind that only a right to claim would be conferred, one view might be that at least the following collateral relatives should be included in the list -

\[\begin{align*}
(a) & \quad \text{great-uncle, great-aunt;} \\
(b) & \quad \text{uncle, aunt;} \\
(c) & \quad \text{child, grandchild and great-grandchild of uncle or aunt;} \\
(d) & \quad \text{brother, sister;} \\
(e) & \quad \text{child and grandchild of brother or sister.}
\end{align*}\]

Great-uncles and great-aunts are not included in the English list but if the grandsons of brothers are to be included as they are in England,\(^ {58}\) then it seems reasonable that great-uncles and great-aunts should be included.

**Collateral half blood relatives and relationships deduced through them**

\[5.43\] The English legislation was altered in 1959\(^ {59}\) to provide that in deducing a relationship for the purposes of the Act a relationship of the half blood (i.e. a half brother or half sister) was to be treated as a relationship of the whole blood (i.e. as a brother or sister). The provision was carried forward into the English *Fatal Accidents Act 1976*.

\[5.44\] In New South Wales, South Australia, Tasmania, the Australian Capital Territory and the Northern Territory, the list of those entitled to claim includes the half brother and the half sister of the deceased.\(^ {60}\) The list\(^ {61}\) of those who may make a claim under the *Workers' Compensation Act 1912* (WA) includes the deceased's half brother and half sister.\(^ {62}\)

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\(^{55}\) See table in paragraph 4.1 above.

\(^{56}\) See *Workers' Compensation Act 1912*, s.5.

\(^{57}\) The position may be that dependants who are only part dependent upon the employee's earnings can only recover compensation if there are no dependants wholly dependent upon his earnings: see paragraph 3.8 above.

\(^{58}\) Because the grandson of a brother is issue of that brother.

\(^{59}\) See *Fatal Accidents Act 1959* (UK).

\(^{60}\) See table in paragraph 4.1 above.
5.45 It would seem reasonable that the English provision should be adopted in Western Australia if the statutory list of dependants entitled to make a claim in this State is to be extended to include brothers and sisters.

** Relatives by marriage, and not by blood **

5.46 The English *Fatal Accidents Act 1976* also provides that in deducing a relationship for the purposes of the Act a relationship by affinity (i.e. by marriage) is to be treated as a relationship by consanguinity (i.e. a blood relationship). This provision was also first brought into the English legislation in 1959. There seems to be a fairly strong argument in favour of incorporating such a provision into the Western Australian legislation. It is quite common for people to assist financially others who are only related to them by marriage. Examples which come readily to mind are: the man who assists his son-in-law financially in the son-in-law's business; the man who financially assists his daughter-in-law who has been widowed at an early age, and the man who supports or helps to support his aging father-in-law or mother-in-law.

** Other relationships: great-grandson and great-grandfather **

5.47 In the light of the fact that people are now living longer than ever before and that life expectancy will probably increase rather than diminish, the Commission's tentative view is that the great-grandson of a deceased should probably be included in the list and that if this is done that it would only be reasonable to include in the list the great-grandfather of a deceased. (Neither the great-grandson of the deceased nor the great-grandfather of the deceased are included in the list of claimants under any of the enactments studied by the Commission).

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61 See *Workers' Compensation Act 1912*, s.5.
62 But see footnote 110 above.
63 *Fatal Accidents Act 1976* (UK), s.1(4).
OTHER MATTERS

Posthumous child

5.48 The fatal accidents legislation in the Australian Capital Territory and the Northern Territory both expressly provide that a child of the deceased person born alive after the death of that person is to be treated as having been born before the death of the deceased person. Although it is fairly certain that in Western Australia the deceased's posthumous child is within the relatives protected by the Act, the Commission considers that the matter should be put beyond doubt by enacting the express provision.

Illegitimate children

5.49 For the purposes of the Fatal Accidents Act of Western Australia, a person is deemed to be the parent or child of a deceased person notwithstanding that he was only related to him illegitimately. Accordingly, in deducing any relationship which under the Act is included within the meaning of the expressions, "parent" and "child", any illegitimate person is to be treated as being or as having been the legitimate child of his mother and reputed father. However, s.6(3) of the Act provides that:

"Where in any action under this Act the question of illegitimacy arises in respect of any relationship, that relationship shall not be taken to have been proved unless paternity had been admitted by or established against the father during the lifetime of the deceased person."

In the view of the Commission, s.6(3) is defective. As s.6(3) at present stands, where the mother of an illegitimate child is killed in an accident, the child could only bring an action in respect of the loss resulting to him from his mother's death if paternity had been admitted by or established against his father during his mother's lifetime. However, as the child is claiming in respect of his mother's death, the question of paternity ought to be completely irrelevant. It also seems that even where an illegitimate child brings a claim in respect of the death of his father the subsection could operate unfairly against the child. There is a fairly strong argument

64 Compensation (Fatal Injuries) Ordinance 1968 (ACT), ss.8(2), 4(2)(b) and (3)(b); Compensation (Fatal Injuries) Ordinance 1974 (NT), s .4(3)(b).
65 See paragraph 2.15 above.
66 Fatal Accidents Act 1959 (WA), s.3(1) and (2).
67 Ibid.
that the child ought to be able to claim even though the paternity of the child's father is only established after the father's death. A solution might be to amend the subsection to confine the qualification to the case where an action is brought for the benefit of the father of an illegitimate child in respect of the child's death. The Commission invites comments on this suggestion.

**Prospects of surviving spouse's remarriage**

5.50 In England, in assessing damages payable to a widow in respect of the death of her husband in an action under the *Fatal Accidents Act*, the court is prohibited from taking into account the remarriage of the widow or her prospects of remarriage.\(^{68}\) The object of the provision is to protect the widow from distasteful cross-examination on these questions. An equivalent provision does not operate in Western Australia and in assessing her damages in this State a widow's prospects of remarrying must be taken into account.\(^{69}\) The English Law Commission in its report, *Personal Injury Litigation - Assessment of Damages*\(^{70}\) made no comment on the provision as it related to widows but said it was a policy decision as to whether the provision should be extended to a dependent divorced wife, should the Act be amended to enable her to claim. Beyond drawing attention to the question it made no recommendation for any extension of the provision to divorcees, although it did say that it would be absurd if the actual remarriage of a divorcee after the death of her former husband could not be taken into account.\(^{71}\)

5.51 The Commission welcomes comment on whether the court should be prohibited from taking into account a remarriage of the widow or widower, or their prospects of remarriage. Whatever rule is decided upon for a claim by a surviving spouse should also apply to a claim by a divorced spouse, were he or she to be covered by the legislation.

\(^{68}\) *Fatal Accidents Act 1976* (UK), s.3(2).

\(^{69}\) In the Northern Territory, a divorcee is entitled to make a claim and the Ordinance provides that in assessing damages, no reduction shall be made on account of "the remarriage or prospects of remarriage of the surviving former spouse": *Compensation (Fatal Injuries) Ordinance 1974*, ss.4(2) and 10(4)(h). In no other Australian jurisdiction is there an equivalent provision.

\(^{70}\) Report, paragraph 260.

\(^{71}\) Ibid.
CHAPTER 6 - DISCUSSION: SOLATIUM

PRESENT LAW IN WESTERN AUSTRALIA

6.1 In an action under Western Australia's Fatal Accidents Act 1959, only recovery of economic or material advantages to the survivor is allowed. Where the deceased is a wife and mother, damages can be claimed for loss, not only of outside earnings by which she contributed to the family purse, but also of her domestic services in looking after the home, husband and children. Her medical expenses and funeral expenses may be recovered under the Fatal Accidents Act, if they have been incurred by the parties for whose benefit the action is brought.

6.2 But the husband cannot recover for the loss of her companionship or for the loss of her love. Nor can he recover for grief or mental suffering which he endures because of her death. The child cannot recover for the loss of its mother's guidance and of help not capable of translation into money's worth. Similarly, where the deceased is a husband and father, there can be no recovery for matters such as loss of companionship, loss of love, for grief or for the loss of the deceased's guidance as a husband and father and for his non-pecuniary help.

6.3 Where the deceased is a child, for the parents to recover any damages there must be a loss of a reasonable expectation of pecuniary benefit. Sometimes, the claim is pressed to extinction.

"Adverse factors are the extreme youth of the child, the risks of illness, disease, accidents and death, the expense of bringing him up before he could be expected to contribute to his parent's income, and the possibility that the parents might not have survived their child. When damages are awarded, the reasons usually are that the child had already made contributions to the home budget, that his prospects in life were good, and that there was a strong likelihood of household services (like baby sitting) or financial support forthcoming or continuing".  

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1 See paragraph 2.5 above. In the case of domestic airline fatalities solatium can be awarded under the Civil Aviation (Carriers' Liability) Act 1959 (Cwth). Section 35(8) of that Act provides that "in awarding damages, the court....is not limited to the financial loss resulting from the death of the passenger". Any of the designated relatives entitled to claim damages under the Act would be entitled to claim solatium.

2 Fatal Accidents Act 1959 (WA), s.5(1). As to the damages recoverable by the wife's estate under the survival legislation (Law Reform (Miscellaneous Provisions) Act 1941): see paragraph 3.4 above.

The child's parents are unable to recover anything for grief or mental suffering, the loss of the pleasure derived from having the child in the family circle and from their hopes and thoughts upon the future of the child.

THE LAW IN OTHER PLACES

South Australia

6.4 Of the jurisdictions which have been referred to in this paper, only South Australia and the Northern Territory have made provision for a solatium. It was in 1940 that the South Australian fatal accidents legislation was amended to provide for the payment of solatium. The concept was first introduced into the law of the Northern Territory as part of the Compensation (Fatal Injuries) Ordinance 1974 which repealed and replaced an earlier Ordinance.

6.5 Under the South Australian legislation the court may, in the case of a deceased child, award to the surviving parents a sum not exceeding $3,000 as it thinks just, by way of solatium for the suffering caused to them by the death. For the purposes of this provision, "parent" means the father or mother of the child. Where both parents of a child claim solatium, the amount awarded after deducting the costs not recovered from the defendant is to be divided between them in such shares as the court directs. If one of two parents does not join in bringing the action for payment of solatium, the other may bring an action for the amount which he or she claims to be due to him or her.

6.6 Under the South Australian legislation, in the case of a deceased spouse, the court may award to the surviving spouse a sum not exceeding $4,200, as it thinks just, by way of solatium for suffering caused to the spouse by the death. A de facto spouse can claim under this provision but must first obtain a court order under the South Australian Family

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4 Eire also provides for compensation by way of solatium. The total amount that may be awarded for mental distress is one thousand pounds: Civil Liability Act 1961 (Eire), s.49.
5 Wrongs Act 1936-1975 (SA), s.23a(1).
6 The natural mother of an illegitimate child is a "parent" for the purposes of the provision: see Family Relationships Act 1975 (SA), s.6(1). There are limitations to when the natural father of an illegitimate child will be recognised as a parent for the purposes of the provision: see Family Relationships Act 1975 (SA), s.7.
7 Wrongs Act 1936-1975 (SA), s.23a(2).
8 Ibid. s.23a(3).
9 Ibid. s.23b(1).
*Relationships Act 1975.*\(^{10}\) To obtain that order the de facto spouse must establish that the preconditions set out in paragraph 5.30 above have been fulfilled. Where the deceased is survived by a lawful spouse and a de facto spouse they may both claim solatium, but the aggregate awarded by the court may not exceed $4,200 and is to be apportioned between the two claimants as the court thinks fit.\(^{11}\)

6.7 An award for solatium under the South Australian legislation is in addition to any award for pecuniary loss consequent upon the death of the deceased.\(^{12}\) The claim for solatium cannot be set off against the award for pecuniary loss.\(^{13}\) If a person entitled to solatium dies before an award is made or his claim is settled out of court, the claim does not survive for the benefit of his estate.\(^{14}\)

6.8 Under the South Australian *Wrongs Act*, the amount of the solatium is not a fixed sum. Subject to the maximum prescribed by the Act, the amount payable is in the discretion of the court.\(^{15}\)

The court can refuse to order the payment of any sum by way of solatium, if having regard to the conduct of the plaintiff in relation to the deceased, or to the relations which existed between the plaintiff and the deceased, or for any other sufficient reason, the court considers that no such payment should be made.\(^{16}\)

6.9 Decisions of the Supreme Court of South Australia have shown that the concept of solatium complements on the emotional side the conventional recovery which looks only to the purely material aspects of the injury.\(^{17}\) Primary consideration must be given to the suffering\(^{18}\) of the claimants and to the loss to the claimants of pleasure derived from having the deceased in the family circle and from their hopes and thoughts (in case of parents) upon the future of their children.\(^{19}\) The nature of the relations between the claimant and the

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10 Ibid., s.23b(1) and 3a, *Family Relationships Act 1975* (SA), s.11.
11 Ibid.: , s.23b(2) and (3).
12 Ibid.: , s.23c(1).
13 *Public Trustee v Zoonetti* (1945) 70 CLR 266.
14 *Wrongs Act 1936-1975* (SA), s.23c(3).
15 Ibid., ss.23a and 23b.
16 Ibid., s.23c(2). The Appendix to this working paper contains a copy of the sections relating to solatium in the South Australian Act.
17 See *Taverner v Swanbury* [1944] SASR 194.
18 See *Wrongs Act 1936-1975* (SA), ss.23a(1) and 23b(1).
19 See *Jeffries v The Commonwealth* [1946] SASR 106 at 108.
deceased is relevant. The nature and circumstances of the death may be taken into account. In short, the court should have regard to the whole situation - to the past, and to the future, as well as to the pain suffered by the claimant.

Northern Territory

6.10  Section 10(3)(f) of the Northern Territory's *Compensation (Fatal Injuries) Ordinance 1974* provides that:

"Damages in an action may include solatium".

The provision is much wider than that in South Australia. In South Australia, the only possible claimants for solatium are the parents of a deceased child and the surviving spouse of a deceased husband or wife.

A child of the deceased, for example, cannot claim. In the Northern Territory, however, the class of claimants for solatium is the same as that for pecuniary loss. Furthermore, in the Northern Territory there is no upper limit on the amount which the court may award for solatium.

6.11  Not only does the Northern Territory legislation contain provision for the payment of solatium to the child, but it also contains provision for damages to the child on account of loss of care and guidance by the deceased parent. Section 10(3)(e) of the Territory's *Compensation (Fatal Injuries) Ordinance 1974* provides that -

"Damages in an action may include if the deceased person is survived by a child of his who is an infant damages on account of loss of care and guidance of the child by the deceased person as a parent".

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20  *Taverner v Swanbury* SASR 194 at 198.
21  Ibid.
23  See table in paragraph 4.1 above
PROPOSALS FOR REFORM

6.12 As has already been mentioned, in 1947 the Western Australian Government introduced a bill into Parliament aimed at repealing and replacing Lord Campbell's Act in this State. One of the innovations proposed in the bill was the adoption of the South Australian provisions relating to solatium.24 The bill lapsed but there was some discussion on the proposal relating to solatium in the Legislative Assembly. Mr. H.E. Graham M.L.A. pointed to the fact that under the South Australian enactment there was no provision for a payment of this nature to a child who had lost its parents in an accident. He suggested that a child should be entitled to some payment for the loss of the natural love and affection to which it was normally entitled and of the discipline and guidance exercised by its parents.25

6.13 When the present Western Australian fatal accidents legislation was introduced into Parliament in 1959, Mr. H.N. Guthrie M.L.A. moved an amendment aimed at incorporating the South Australian provisions relating to solatium into the bill.26 However, the motion was defeated. In opposing it, the Attorney General said that the whole purpose of the Act was to compensate the relatives for the actual loss they had sustained. The South Australian provisions fixed an arbitrary sum for the grief and suffering of the parents or surviving spouse, and he thought that one could not reasonably assess that loss in monetary value. The general policy of the law was against the payment of solatium, he said.27

6.14 In his paper, Methodology in Assessment of Damages in Personal Accidents delivered at the 1976 Western Australian Law Summer School, Mr. P.L. Sharp Q.C. submitted that Western Australia should introduce a provision for solatium in terms similar to the South Australian legislation.

6.15 In its report, Personal Injury Litigation - Assessment of Damages the English Law Commission recommended that -

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25 Ibid., at 591 and 592. The Scottish Law Commission has recently suggested the enactment of a provision which would have the effect of entitling a child to compensation for the loss of a parent's guidance and other non-pecuniary help. Under the suggested provision, the relatives' existing right in Scotland to solatium would be replaced by a head of damages acknowledging the non-pecuniary loss suffered by a person who was the husband, wife, parent or child of the deceased: Scottish Law Commission, Memorandum No. 17 (1972) at pages 73 to 76 and 81. (The existing law in Scotland already entitles the relatives of a deceased to an award of solatium for their grief and suffering).
26 Ibid., at 1207 and 1208.
27 Ibid., at 1207.
(a) the parents of an unmarried minor child should be entitled to recover one thousand pounds in an action under the *Fatal Accidents Act*;

(b) if both parents are included in the claim, each should be awarded five hundred pounds;

(c) in the case of an illegitimate child, only the mother should be able to claim;

(d) the surviving spouse should be entitled to recover one thousand pounds;

(e) there should be included a provision permitting the variation of the figure of one thousand pounds by statutory instrument;

(f) awards should bear interest from the date of death;

(g) any subsisting claim for solatium should not survive to the estate of a claimant who dies before a judgment;

(h) the specified sum of one thousand pounds be liable to proportionate reduction (for example, because of the deceased's contributory negligence) in the same way as other damages under the *Fatal Accidents Act* (UK) are liable to be reduced.  

The English Commission considered that the purpose of the award should comprehend not only grief and mental suffering but the non-pecuniary loss suffered by a person who was either the husband, wife or parent of the deceased. In this connection by "non-pecuniary loss", the Commission meant the sort of loss which a man's wife and children suffer through the loss of his help as a member of the household and of his counsel and guidance as a husband and father.  

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28 Report at paragraphs 176 to 180 and clause 10 of the draft bill which constitutes Appendix 5 to the Report.
29 Report at paragraphs 172 and 169.
6.16 The English Commission said that it followed - 30

"the South Australian example in believing that an award of damages, albeit small, can have some slight consoling effect where parents lose an infant child or where a spouse loses husband or wife. If money can, even minimally, compensate for such bereavement we think that it should be recoverable".

6.17 The English Commission said that it made the recommendation for a fixed tariff figure because it was anxious that there should be no judicial enquiry at all into the consequences of bereavement. 31 It had indicated the reasons for this anxiety in its working paper when it quoted with approval the following passage from a submission of the Bar Council - 32

"There will undoubtedly be cases in which widows will be put forward as grief-stricken, when this is wholly untrue. With substantial sums at stake, defendants will feel obliged to probe the evidence and, perhaps, to employ inquiry agents in an attempt to test the truth of the allegations".

No doubt for the same reason, the Commission recommended that if both parents were included in the claim they should be awarded solatium in equal shares.

6.18 The English Commission did not follow the South Australian example in distinguishing between the different amounts recoverable in differing relationships " 33

"...it is, we think, fruitless to try to distinguish between the loss suffered by a parent and that suffered by a spouse; we accept that the award is no more than an arbitrary figure, but, despite its arbitrariness, we think it is something that ought to be, in these two limited contexts, recoverable. We recognise that the effects of bereavement will be greater in some cases than others but to avoid any judicial enquiry into degrees of grief we are prepared to accept this disparity".

6.19 The English Commission considered that the only claimants should be the parents (in the case of the death of an unmarried minor child) and the surviving spouse (in the case of the death of a spouse). It said that it did not feel justified in recommending any further extension, particularly as it had departed from the South Australian example in recommending a fixed tariff figure rather than an upper limit to an award otherwise at large. 34

30 Report at paragraph 173.
31 Report at paragraph 175.
32 The Law Commission's published working paper No. 41, Personal Injury Litigation - Assessment of Damages at paragraph 201.
33 Report at paragraph 175.
34 Report at paragraph 174.
ARGUMENTS FOR AND AGAINST

Arguments for

6.20 It seems harsh to many people that only recovery of economic or material advantages lost to the survivor is allowed. A husband's loss of his wife's companionship and love and the grief suffered by him are real losses and it can be argued that he should be compensated for them. Similarly a parent's grief on the death of a child and the loss of the pleasure of having that child in the family circle are real losses. It is a traumatic experience for a parent to lose a child, as it is for someone to lose his or her spouse. There is an injury to that parent or spouse.

6.21 It can be strongly argued that where an injured person survived an accident, damages paid to him for pain and suffering, loss of expectation of life and loss of amenities are a solace not only to the victim but also to his wife and children. But if the victim is killed, rather than seriously injured, damages for these matters are, in Western Australia, not payable.

6.22 In the main, defendants are insured against liability under the Fatal Accidents Act. If the Act is amended to provide for the payment of solatium, compulsory third party vehicle insurance and employers liability insurance would bear most of the claims. Provision for the payment of solatium would no doubt result in the payment of higher insurance premiums, but if the solatium is fixed at modest levels (as is the case in South Australia and under the English Law Commission's recommendations) any increase in premiums would be small.

Arguments against

6.23 In a claim for personal injury, a person is never entitled to recover damages for grief, anguish, unhappiness, outrage and so on unless they follow on a physical injury to him. Only if the plaintiff suffers an actual illness usually referred to in the law of tort as "nervous shock" but recently said to mean "a recognizable psychiatric illness" does any question of compensation arise. Even where such an illness occurs a firm line is drawn between those who are merely told of the distressing occurrence and those who witness some of the things

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35 See paragraph 2.7 above.
36 Ibid.
37 See the judgment of Lord Pearson in Hinz v Berry [1970] 1 All ER 1074 at 1077.
which go to make up the accident as an entire event.\textsuperscript{38} Only the latter may recover damages. The proposal for the payment of solatium which is under consideration in this working paper would, if implemented, be a departure from general principle.

6.24 The amounts of the upper limits for solatium which can be awarded in South Australia are arbitrary. This comment applies even more so to the English Commission’s recommendations, as the Commission recommended a fixed figure, and not an upper limit.

6.25 The other principal arguments against provision for the payment of solatium seem to be summed up by P.S. Atiyah in his book \textit{Accidents, Compensation and the Law}.\textsuperscript{39} Writing of the English Law Commission’s proposal referred to earlier in this paper, he said -\textsuperscript{40}

“...there are two main objections to all awards by way of solatium. The first is that 'they tend to be sought by vindictive survivors, either by way of penalizing the party thought to be responsible (although it is of course the insurers who will pay) or else as a form of distasteful gold-digging. The second main objection is that it seems so very arbitrary to select the death of a close relative as the criterion for paying what is still to many people a substantial capital sum of money. In addition, the Law Commission's insistence that 'there should be no judicial enquiry at all into the consequences of bereavement means that the same sum would be awarded in a very wide variety of situations, e.g. to a mother for the death of a newly born child, to parents of an older child irrespective whether he was a comfort or a trial to his parents, and to a spouse irrespective of the age, state of health, or even relationship to the other spouse. The same sum would, indeed, be payable to a wife whose husband had deserted and refused to maintain her, as to a devoted and faithful husband still living with her - though in this latter case there would of course be a substantial difference in the sums awarded under the \textit{Fatal Accidents Act}. Apart from all these criticisms, there is the further fundamental point that damages by way of solatium ought to be a very low priority in any legal system which still denies adequate compensation for loss of income to so many of those injured in accidents or crippled by disabling illness.'”

Later, when speaking of this type of compensation (solatium), the author points out that the compensation will be paid by parties other than the wrongdoer himself, such as the road traffic premium payers, or some other wide public group like a local authority.\textsuperscript{41}

\begin{footnotesize}
\begin{itemize}
\item[38] See \textit{Benson v Lee} 1972 VR 879 and \textit{Andrews v Williams} 1967 VR 831. See also Fleming, \textit{Law of Torts} (5th ed. 1977) at 152 to 157.
\item[39] (2nd ed. 1975).
\item[40] Page 85.
\item[41] Page 485.
\end{itemize}
\end{footnotesize}
so that the more that is paid to one class of victims, the less there may be available for another class. All this may be thought to justify placing this type of compensation in a low priority category”.

6.26 The Commission at this stage has no firm view on whether there should be a provision for solatium but invites comment on this and on the other issues which have been raised in this part of the working paper. 42

42 See paragraph 7.1 below.
CHAPTER 7 - QUESTIONS AT ISSUE

7.1 The Commission invites comment on the issues raised in this paper or on any other matters within the terms of reference. In particular, the Commission invites answers to the following questions. It would be helpful if reasons were given, where appropriate, for the views expressed.

Class of claimants

(1) Should the class of persons entitled to claim under the Fatal Accidents Act be extended?

(2) If the answer to (1) is "yes", should this be done -

(a) by enacting that any person is entitled to claim who can show a familial relationship of dependency upon the deceased;

(b) by enacting that any person is entitled to claim who can show a relationship of dependency upon the deceased (excluding commercial relationships); or

(c) by extending the class of those entitled to claim by adding new members (who would be specified) to the class?

(3) If the proposal referred to in (2)(c) is adopted, what new members should be added to the present class of claimants?

(4) (a) Should s.6(3) of the Fatal Accidents Act (relating to illegitimates) be modified, and if so, in what way?

(b) Should the remarriage or prospects of remarriage of a surviving spouse be disregarded in assessing damages?

(c) Should the remarriage or prospects of remarriage of a divorcee (if he or she is to be covered by the legislation) be disregarded in assessing damages?
Solatium

(5) Should there be provision for solatium?

(6) If the answer to (5) is "yes", then in the event of a death by accident who should be able to recover solatium?

(7) If the answer to (5) is "yes", then what should the damages cover?

(8) Should the damages be -

(a) a fixed sum or sums?

(b) left to the court to determine with a maximum prescribed by the legislation? or

(c) left to the court to determine with a minimum and maximum prescribed by the legislation? or

(d) left to the court to determine with no minimum or maximum prescribed by the legislation?

(9) (a) If the answer to 8(a) is "yes", what should the fixed sum or sums be?

(b) If the answer to 8(b) is "yes", what should the maximum sum be?

(c) If the answer to 8(c) is "yes", what should the minimum and maximum sums be?

(10) If the parents are to be able to claim solatium in the case of a deceased child, and both parents join in bringing the action, how should the amount awarded be divided between them?
(11) If the parents are to be able to claim solatium in the case of a deceased child, what should be the position where one of two surviving parents does not join in bringing the action?

(12) If new legislation is to contain references to fixed, maximum, or minimum amounts, should it contain provision permitting the variation of these amounts, and if so, how should the variation be?

(13) Should a subsisting claim for solatium survive for the benefit of the estate of the claimant?
APPENDIX

COPY OF THE SECTIONS RELATING TO SOLATIUM IN SOUTH AUSTRALIA'S WRONGS ACT 1936-1975

Liability to parents of person wrongfully killed.

23a. (1) Whenever the death of an infant is caused by a wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the infant to maintain an action to recover damages, the person who would have been liable if death had not ensued shall be liable to pay to the surviving parents or parent of the child such sum -

(a) where the death occurred before the commencement of the Wrongs Act Amendment Act, 1974 - not exceeding one thousand dollars;

or

(b) where the death occurred after the commencement of the Wrongs Act Amendment Act, 1974 - not exceeding three thousand dollars,

as the court thinks just by way of solatium for the suffering caused to the parents or parent by the death of the child.;

(2) Where both parents bring an action to recover any sum of money payable under this section, the amount recovered after deducting the costs not recovered from the defendant, shall be divided between the parents in such shares as the court directs.

(3) Where both parents survive the child and either of them does not join in bringing an action under this section, the other may bring an action for such amount as he claims to be due to him or her.

(4) In this section "parent" means the father or mother of a child.

Liability to surviving spouse of person wrongfully killed.

23b. (1) Whenever the death of a person is caused by a wrongful act, neglect or default and the act, neglect or default is such as would, if death had not ensued, have entitled that person to maintain an action to recover damages, the person who would have been liable if death had not ensued shall be liable to pay to the surviving spouse of the deceased person such sum -

(a) where the death occurred before the commencement of the Wrongs Act Amendment Act, 1974 - not exceeding one thousand four hundred dollars;

or

(b) where the death occurred after the commencement of the Wrongs Act Amendment Act, 1974 not exceeding four thousand two hundred dollars,
as the court thinks just by way of solatium for the suffering caused to the spouse by that death.

(2) Where the deceased person is survived by a lawful spouse and a putative spouse, they may both claim solatium under this section, but the total amount awarded by way of solatium in any such case shall not exceed the amount that could have been awarded if the deceased had been survived by a single spouse.

(3) Where, in any proceedings under this section, a lawful spouse and a putative spouse both claim solatium under this section, any solatium awarded by the court shall be apportioned between the claimants in such manner as the court thinks just.

(4) In any proceeding by a lawful spouse for solatium it is not necessary for the court to inquire if the deceased was also survived by a putative spouse, but any such spouse may, at any time before the proceedings are finally determined, apply to the court to be joined as a party to the proceedings.

23c. (1) The rights conferred by sections 23a and 23b shall be in addition to and not in derogation of any rights conferred on the parent, husband or wife by any other provision of this Act.

(2) In an action brought to enforce any right given under section 23a or 23b of this Act the court may in its discretion refuse to order the payment of any sum by way of solatium if, having regard to the conduct of the plaintiff in relation to the deceased person, or to the relations which existed between the plaintiff and the deceased person, or for any other sufficient reason, it considers that no such payment should be made.

(3) Any cause of action conferred on any person by section 23a or 23b of this Act shall not, on the death of that person, survive for the benefit of his estate.

(4) A cause of action conferred on a person by section 23a or section 23b of this Act is exercisable notwithstanding that the death of the person injured by the wrongful act, neglect or default was caused in circumstances which in law amount to felony.