THE LAW REFORM COMMISSION

THE LAW RELATING TO LOSS OF CONSORTIUM AND LOSS OF SERVICES OF A CHILD

CHAPTER 1 A THE PRESENT LAW

(a) Action for Loss of Consortium

The right of one spouse to the society or services of the other spouse is generally referred to as the right of consortium - or, more accurately, consortium et servitium.

It would be difficult to explain it more clearly than was done by a Canadian judge in the following words:

> "The term 'consortium' is not susceptible of precise or complete definition but, broadly speaking, companionship, love, affection, comfort, mutual services, sexual intercourse - all belonging to the marriage state - taken together make up what we refer to as consortium."
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> Kungl v. Schiefer (1960) 25 D.L.R. (2d) 344 per Schroeder J.A.

Any tortious act committed against one spouse that results in a deprivation of consortium may be actionable by the spouse who has suffered the deprivation.

Consortium

The law relating to the tortious interference with marital consortium is a matter of considerable uncertainty in a number of important respects. Set out below are the main features of the law, together with a discussion of the areas of uncertainty.

History

For many centuries the courts have recognised the right of a husband to sue for damages for the loss of the consortium of his wife. The right was originally based on the husband's position as a master[1] of the household although gradually the element of consortium was stressed more than that of servitium.

Extent of Recovery

The extent of recovery is a matter of uncertainty. In England, the House of Lords in Best v. Samuel Fox & Co Ltd[2] was divided on the question whether a husband might recover damages only where there was a total loss of consortium, but the problem has since been resolved there in favour of recovery even in cases of partial loss.[3]

In this country, the former Supreme Court, in Spaight v. Dundon[4] in 1960, stated:

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[1] The action in question was entitled actio per quod servitium amisit. This action still exists, being confined to injury to 'menial' servants: cf. A.G. v. Ryan's Car Hire Ltd [1965] I.R. 642 (Sup. Ct). See also Byrne v. Ireland [1972] I.R. 241 at 286 (Sup. Ct per Walsh J.).

[2] [1952] A.C. 716.

[3] Hare v. British Transport Commission [1956] 1 W.L.R. 250 (Lord Goddard C.J.), Lawrence v. Biddle [1966] 2 Q.B. 504 (Brabin J.), Cutts v. Chumley [1967] 1 W.L.R. 742 (Willis J.) (subsequent petition for leave to appeal to the House of Lords from the decision of the Court of Appeal on appeal dismissed by the Appeal Committee of the House of Lords [1968] 1 W.L.R. 668).

[4] [1961] I.R. 201, analysed by Delany, "Damages for the Impairment of Consortium" (1961) 27 Ir. Jur. 44; Hudson, "Impairment of Consortium" (1962) 25 M.L.R. 580.

> "There is no doubt that the husband can recover for the medical and surgical expenses which he has been put to by the injury of his wife and for extra domestic expenses in which he has been involved.... These are pecuniary losses easily ascertained where already incurred and capable of fair estimation for the future. In addition he is entitled to damages for the total deprivation of his wife's company, even if such deprivation is for a limited period or periods. Such damages should not be too generous.... No further grounds for awarding damages can be entertained."[5]

Four years later, however, in O'Haran v. Divine[6], the present Supreme Court appears on one view to have

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[5] Supra fn. 4 at 215 (per Kingsmill Moore J.). Kingsmill Moore J's judgment was concurred in by Lavery and O'Dalaigh JJ. Martin Maguire J. agreed generally with the judgment of Kingsmill Moore J., expressing the opinion that

> "there is in the common law of Ireland no authority and no precedent for the recovery of damages for partial loss of consortium in an action for damages for negligence against a third party, a complete stranger, who has accidentally caused personal injuries to a plaintiff's wife in a road accident". (Id. at 216).

Maguire C.J., dissenting, could see

> "no reason if damages may be recovered for complete loss of consortium why they may not be recovered for a partial loss. It is true of course that drawing a line poses a difficulty. In my opinion, however a jury should be able from the evidence to form an opinion as to the extent which the bundle of rights which make up the consortium have been interfered with. It is to my mind not proper to take into consideration, as some of the Judges in Best v. Samuel Fox & Co. Ltd..... did, that the right to damages for loss of consortium is based upon a conception of the relationship of husband and wife which in modern times may be regarded as an anomaly. The alteration in the position of a wife vis-a-vis her husband by various legislative enactments may be a good reason for changing the law and abolishing the right of the husband to damages for loss of consortium. While the right exists it seems to me illogical to deny a husband a right to damages for its impairment."
> Id. at 206.

[6] (1964) 100 I.L.T.R. 53 (Sup. Ct).

qualified the position somewhat. The facts in O'Haran v. Divine were similar to those in Spaight v. Dundon. In both cases the plaintiff had been separated from his wife for a long period during which she received medical treatment in hospital. In Spaight v. Dundon, recovery for the loss of the consortium was denied on the basis that there had not been a total loss of consortium, even for a limited period or periods. Yet in O'Haran v. Divine recovery was allowed, Mr Justice Kingsmill Moore stating (at p. 56):

> "It seems to me that the question must be looked at somewhat broadly. A healthy companion and helper was reduced to a condition where she had to be separated from her husband for restoration of her health. All the innumerable advantages, pleasures and consolations of married life were brought to an end - save a limited measure of communication. I hold that such deprivation may and should be regarded as sufficient to give a claim for damages."

This may be viewed as a liberal application of the concept of "total deprivation of /the plaintiff's/ wife's company... for a limited period or periods"[7]; alternatively, it may be regarded as relaxing the previous requirement that the loss of consortium must be total.

Entitlement of Wife to Sue

Whilst it is clear that a husband has a right of action in respect of loss of consortium resulting from wrongful injury to his wife, the question whether a wife may sue in respect of loss of consortium resulting from injury to her husband has not so far been determined in this country. In support of the view that the wife has not a right of action are the following arguments:

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[7] Spaight v. Dundon, supra fn. 4, at 215 (per Kingsmill Moore J.) quoted supra p. 3.

(a) Historically, the action is supposed to be based on the servile position of wives relative to their husbands and on the quasi-proprietary rights that husbands had in their wives.

(b) In England, the House of Lords in Best v. Fox[8] held that a wife has no right of action. The husband's right of action was regarded as anomalous and the House of Lords considered that there was "no good reason" for extending the anomaly by permitting wives to sue. In this country, the Supreme Court in Spaight v. Dundon[9] and O'Haran v. Divine[10] evinced support for the general approach adopted in Best v. Fox and did not appear to support the view that the wife has a right of action. In Spaight v. Dundon Kingsmill Moore J. said at pp. 214-215:

> "I agree with the eminent judges [in Best v. Fox] who considered the action for loss of consortium to be anomalous and founded on a medieval view that the husband had a proprietary - or at least a quasi-proprietary right - in his wife, analogous to his right to the servitium of his servant.... It appears to me that in general policy the law is sound in refusing to extend liability for a tort beyond the injuries to the person against whom the tort is directly committed.... It does appear that the law has made one exception - the husband - in respect of one type of claim - total loss of consortium. But there does not seem to me any reason to extend the exception in regard to the nature of the claim any more than in regard to the persons who can claim."

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[8] [1952] A.C. 716.

[9] Supra fn. 4.

[10] Supra fn. 6.

In support of the view that the wife has a right of action are the following arguments:

(a) The historical origins and conceptual basis of the action should not prevent the law from recognising the wife's claim where the gravamen of the action is clearly damage to the marriage relationship rather than interference with some right of property that a husband was formerly considered to have in his wife.

(b) The extent of entitlement to recover for injuries sustained indirectly has increased considerably since 1951[11], and the general judicial approach today towards compensation in the law of tort is very different from that which prevailed a quarter of a century ago. The English view, as expressed in Best v. Fox,[12] that the husband's action was anomalous needs re-examination in the light of these developments.

(c) The legal position of married women has changed greatly in recent years. They have full contractual capacity, the same liability in tort - and for jury service - as their husbands, equal maintenance rights and obligations, equal succession rights and equal rights to the guardianship and custody of their children. Also they may since the Married Women's Status Act 1957 sue their husbands for any tort. The argument that the wife's action for interference with consortium has remained

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11 Cf. Heuston, "Donoghue v. Stevenson: A Fresh Appraisal" (1971) 24 Current Legal Problems 37 and Symmons, "The Duty of Care in Negligence: Recently Expressed Policy Elements" (1971) 34 M.L.R. 394, 528.

12 Supra

frozen in its historical condition in the face of these legislative developments is not convincing.

(d) The discrimination between the sexes which denial of the wife's right of action for loss of consortium would involve, might be regarded as contrary to Article 40 of the Constitution.

In de Burca v. Attorney General[13], Mr Justice Walsh stated in relation to Article 40, section 1:

> "To be of either sex, without more, is not per se to have a social function within the meaning of Article 40 of the Constitution. To be an architect or a doctor, for example, is to have a social function, but the function does not depend on the sex of the person exercising the profession. Clearly some functions must necessarily depend upon sex, such as motherhood or fatherhood. In the proper context, due recognition may also be given by the law to the fact that certain social functions are more usually performed by one sex rather than by the other. The essential test in each such case is the function and not the sex of the functionary."

Even on the assumption that a married woman is performing a different "social function" from a married man, it may be doubted if the law may validly distinguish between these different functions by permitting a husband to recover for loss of consortium but preventing a wife from doing so. It has been suggested that such a distinction would be difficult to justify, since the essential element of loss - the damage to the marital relationship - is common to both parties to a marriage. It might, however, be argued that the servitium aspect should not be totally ignored. Irrespective of how the legal obligations may be expressed, the fact remains that most wives perform domestic duties when their husbands are earning a living outside the home whereas relatively few husbands perform

[13] [1976] I.R. 38 at 72.

such duties when their wives are so engaged. Therefore, it is appropriate that the action for loss of consortium should distinguish between the sexes, on the basis that "certain social functions" - namely, housekeeping and other domestic duties - "are more usually performed by one sex rather than by the other."

However, it should be noted that a similar argument was rejected in the United States case of Hitaffer v. Argonne Co. Inc.[14] as being

> "nothing more than an arbitrary separation of the various elements of consortium devised to circumvent the logic of allowing the wife such an action."

(e) It may be argued that if a wife may recover damages for enticement she should be entitled to recover for loss of consortium resulting from the infliction of injury on her husband.

Overall, the better view appears to be that the wife has a right of action for interference with the marital consortium.

Effect of Victim's Contributory Negligence or other Default on Plaintiff's Claim

Section 35(2) of the Civil Liability Act 1961 (as amended[15]) provides that the contributory negligence of

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[14] (1950) 183 F. 2d 811, at 813 (per Clark J.). See further infra, pp. 20 to 23. In the United States, the right of action of the wife has been recognised in a number of decisions on the constitutional ground of equal protection.

[15] By section 4 of the Civil Liability (Amendment) Act 1964 (clarifying the position regarding vicarious liability). It should be pointed out that, under section 21 of the 1961 Act, as the nominal plaintiff or the spouse, child or servant is in the same position as a concurrent wrong-doer, the defendant may claim contribution. See further R.F.V. Heuston, Salmond on the Law of Torts, 356 fn. 76 (17th ed. 1977).

"a wife[16], child or servant" is not to affect the right of the plaintiff in an action brought "for the loss of consortium or services of a wife or for the loss of the services of a child or servant". This is also the position in England, Australia and New Zealand, but not in the United States or Canada.

(b) Action for Loss of Services of a Child

Where a defendant by his wrongful conduct causes injury to a child as a result of which the parents are deprived of the services of the child, the parents may recover damages from the wrongdoer. The principles relating to the nature of the service relationship, the concept of loss of services and other relevant aspects of the subject have been discussed in the Commission Working Paper No. 6 - 1979 (February) on the law relating to seduction and the enticement and harbouring of a child.

B NORTHERN IRELAND

There are no reported decisions on actions for loss of consortium or for loss of services of a child and the law would appear to be more or less the same as in England. The Office of Law Reform's Consultative Document, The Reform of Family Law in Northern Ireland (OLR 1 1977), does not discuss these actions.

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[16] The section appears to have been drafted on the assumption that the wife has not a claim for loss of consortium. Were the Supreme Court now to hold that she has, an interesting question of statutory interpretation would arise as to whether the subsection should apply to cases where the husband was contributorily negligent. It is suggested that the better view is that it should.

CHAPTER 2 THE LAW IN ENGLAND AND WALES AND IN SCOTLAND

(a) England and Wales

The English Law Reform Committee Eleventh Report (1963)

In 1961, the Law Reform Committee was invited by the Lord Chancellor to consider the desirability of abolishing the right of action by a master for loss of his servant's services and of enabling an employer to recover damages for loss suffered by him in consequence of a wrong done to his employee by a third person. It reported in 1963.

The Committee unanimously recommended[17] the abolition of the employer's action per quod servitium amisit on the basis that it was "out of accord with modern ideas" and that its results were "capricious". In its place, the majority recommended that any employer who had incurred expense in consequence of a tortious injury done to his employee should be entitled to be reimbursed to the extent that the wrong-doer's liability to the employee had thereby been reduced.

Turning to the action for loss of consortium, the Committee, after a brief description of its principal aspects, expressed its recommendations on the subject as follows (p. 9):

> "We think the action for loss of consortium is now an anachronism and that it ought to be abolished. But merely to abolish the action without putting anything in its place would lead to injustice. For this reason it has been suggested (see, for example, the article by Dr Glanville Williams in the Modern Law

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[17] Law Reform Committee Eleventh Report (Loss of Services, etc.) (Cmnd 2017 (1963)).

> Review for January, 1961, 24 M.L.R. 101, at p. 104)[18] that where a husband or a wife is tortiously injured the other spouse should be able to recover reasonable medical and nursing expenses and all other costs properly incurred in consequence of the injury, such as reasonable visits to hospital and the reasonable cost of providing domestic help to replace the injured partner. We agree with this suggestion. Whatever the present legal position may be, we think that in cases of this kind it is immaterial whether it is the husband or the wife who has been injured."

The Committee's recommendations in respect of the action for loss of the services of a child were that the action should be abolished and that in its place a new right of action should be available to the child's parents "to recover reasonable medical expenses incurred in respect of a dependent child who is injured as well as the reasonable cost of visiting such a child in hospital or elsewhere" (para. 20 (p. 9)).

The English Law Commission Working Paper No. 19 (1968)

In 1968, the Law Commission examined the subject in a Working Paper entitled The Actions for Loss of Service, Loss of Consortium, Seduction and Enticement. It would take up

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[18] "The solution suggested is this: that when a married person is tortiously injured, the spouse should be allowed recovery of medical and nursing expenses, and all other costs properly incurred in connection with the illness, as well as the cost of providing domestic help to replace the injured partner. In practice this action would benefit the husband on an injury to the wife rather than the wife on an injury to the husband, but theoretically it would be open to both, and this would be free from the reproach of the present law that it provides a one-sided remedy. The remedy proposed should be in substitution for the husband's present action for loss of consortium and services. In effect it would mean abolishing the right to general damages for loss of consortium, while retaining the substance of the action with limited damages and extending it to both marital partners". (Glanville Williams, "Some Reforms in the Law of Tort" (1961) 24 M.L.R. 101 at 104-105).

too much space in the present Paper to set out in any detail the matters that the Commission discussed and only a summary of their provisional conclusions is given below. The Commission considered:

(a) that the actions for loss of consortium and loss of services should be abolished;

(b) that pecuniary losses suffered by members of the family of a victim as a result of his being injured by the defendant should be recoverable whether or not the injuries were fatal;

(c) that recovery should extend to the reasonable cost of such visits to the victim's hospital or sick-bed as were naturally to be expected in the circumstances;

(d) that claimants should not be restricted to a prescribed class of relatives and dependants, but that anyone who had suffered pecuniary loss which followed from or was a reasonable consequence of the wrongful injury or death should be entitled to recover;

(e) that if non-pecuniary losses were to be recoverable - a matter on which the Commission formed no final view[19] - a class of relatives and dependants entitled to claim should be prescribed, unless either

(i) non-pecuniary losses were restricted to fatal cases and compensated by a payment of a fixed sum, or

(ii) claims were limited to those who had also suffered pecuniary loss;[20]

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[19] Paras 69-75.

[20] The Commission considered that, if a class of relatives and dependants were to be prescribed, it should probably exclude minor children (para. 74).

(f) that only one action should be brought on behalf of all those entitled to claim;

(g) that the victim's contributory negligence should reduce the amount recoverable;[21]

(h) that, in the victim's claim for damages against the tortfeasor, payments or other benefits received by him from relatives or other benefactors should be ignored, but that the court should have power in appropriate cases to give directions or obtain undertakings regarding restoration to the benefactor.

The English Law Commission Working Paper No. 41 (1971)

Three years later the Law Commission returned to the subject in its Working Paper entitled Personal Injury Litigation: Assessment of Damages. The Commission stated that, "in the light of our consultation on Working Paper No. 19", it had decided to recommend[22] the abolition of the actions for loss of consortium and for loss of services and their replacement by a new legislative provision for the recovery, in proper cases, of damages for pecuniary loss suffered by members of the family and other persons.

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21 This recommendation was supported by the Commission as being "clear/ly/.... right" on the basis that

"part of the loss flows not from the tort but from the victim's own negligence and the tortfeasor should not be required to pay for this". (para. 85).

22 As it had provisionally done in Working Paper No. 19, paras 46, 86.

The Commission altered its conceptual approach to the problem from that which it had favoured in Working Paper No. 19. It divided the losses into two categories: losses incurred by others on the victim's account and losses incurred by others on their own account. In the first category, the Commission included

> "all heads of damage in respect of which the victim could have recovered if someone else had not helped out. These heads of damage are, more or less easily, capable of direct translation into money terms." (para. 195)

Examples of such heads of damage included services for the benefit of the victim performed voluntarily by members of his family, hospital visits, attention given to him by a member of the family (such as nursing attention) and the loss of services performed voluntarily by a member of the family, as where, for example, a wife was so injured that she was unable any longer to care for her family or do any housework.

With regard to losses falling within this category the Commission expressed its provisional view that they should be recoverable by the victim where they were reasonably sustained, whether by a relative or close friend of his "or even /by7 a charitable stranger" - para. 207. The Commission considered that the victim should be the person who should claim for such losses but that the court should be given power to give directions as to the disposal of the money awarded. The Commission appreciated that

> "this solution may occasionally raise difficulties in cases which are settled, but in the great majority of cases the plaintiff will be recovering compensation for loss sustained by those near and dear to him and we think it would be altogether too cynical to suggest that this is likely to be a real problem." (para. 207)

With regard to the second category (losses incurred by others on their own account) the Commission considered that so far as pecuniary losses were concerned no problem would arise, since the extent to which the victim's dependants suffered such loss in consequence of his injury was normally dependent on the extent to which his earnings were reduced and his expenses increased - matters for which the victim would recover damages in his own action.

With regard to non-pecuniary losses, the Commission expressed the provisional view that they ought not to be recoverable but that,

> "if it were felt that there should be some compensation payable by way of solatium or in compensation for the sort of non-pecuniary loss here under consideration, then the amount of such compensation should be fixed by legislative tariff." (para. 203)

The English Law Commission Report No. 56 (1973)

The Law Commission once more examined the law on the subject in 1973 in its Report on Personal Injury Litigation - Assessment of Damages. It stated that the description of the action for loss of consortium in Working Paper No. 19 as anachronistic had "met with no disapproval on consultation". The Commission had "no doubt" that the action should be abolished and it also recommended that the action for loss of services be abolished.

The Law Commission reiterated its provisional proposal in Working Paper No. 41 that a victim should be entitled, in his own action, to recover damages in respect of the expenses incurred by others, subject to an overriding requirement of reasonableness. It repeated its view that there should be no statutory right of recovery against a victim who did not pass on the damages to those morally

entitled to them. The Commission also recommended that, where the victim had before his injury gratuitously rendered personal services to his dependants, he should be able to recover their reasonable past and future value from the wrongdoer.

The Commission did not recommend that the other members of the victim's family should have any right of action in respect of the non-pecuniary loss which they suffered. The only change in the law in this area that the Commission favoured was that the spouse or parents of a person killed by a wrongdoer should be made a personal award of £1,000 for the "bereavement".

To a large extent the solution favoured by the Commission - that the victim should be able to recover for expenses incurred by others - has been achieved by the development of the case-law on the subject.[23]

(b) Scotland

Whilst a spouse is entitled to reparation (i.e. damages) from a person who has wrongfully caused the death of his or her spouse,[24] the position regarding non-fatal injuries "is a question of some difficulty".[25] The cases have been thought difficult to reconcile and it is by no means certain whether, and if so to what extent and on what basis, an action for reparation would be competent (i.e. would lie).

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[23] Cunningham v. Harrison /1973/ Q.B. 942 (C.A.); Donnelly v. Joyce /1974/ Q.B. 454 (C.A.), referred to briefly in the Commission Report and analysed by Carr, "Measuring the Loss in Damages for Personal Injuries" (1974) 37 M. L.R. 341 and Jolowicz's Comment: "Gratuitous Services and Damages - A Full Circle" (1974) 33 Camb. L.J. 40.

[24] See E. Clive and J. Wilson, The Law of Husband and Wife in Scotland, 266-272 (1974).

[25] Id. 272.

CHAPTER 3 THE LAW IN OTHER EUROPEAN LEGAL SYSTEMS

(a) France

It appears that the members of a victim's family may have a right of action for damages, not only where the victim dies but also where he or she is severely injured.

Nature of Injury

Whereas a number of decisions for over forty years were to the effect that recovery should be limited to cases of death alone, it is clear that this is no longer the position. Damages may be awarded where the injuries sustained by the victim are so severe as to cause a serious disruption in family relationships.[26] This is a question of fact in each case.

Range of Claimants

It appears that not only the spouse of the victim but also his or her ascendants and children may be entitled to damages in appropriate cases.

Children born out of wedlock may recover damages in respect of their parents' injury or death, even where they have not been acknowledged by the parent in question. Moreover,

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[26] See H. & L. Mazeaud et A. Tunc, Traité Théorique et Pratique de la Responsabilité Civile Delictuelle et Contractuelle, 421 ff. (6 ed. 1965) and the decision of the Chambre Civile of the Cour de Cassation of 22 October, 1945, D. 1947. J. 59 (Société nationale des Chemins de fer francais c. Geneix et epoux Chamard).

persons who are in loco parentis to the child may be treated as "parents" for the purposes of claiming damages. Even engaged persons have recovered in some cases.

(b) Federal Republic of Germany

In effect, German law allows for actions for loss of consortium and for loss of the services of a child. The liability may arise out of contract or out of delict. The wife or child of A may sue B for injuries sustained in an accident caused by B. And A may also sue B for the loss of the consortium of his wife or the loss of the services of his child, which loss of consortium or loss of services has resulted to A from B's negligence. (For information and references on German law, the Law Reform Commission wishes to thank Professor W. Müller-Freienfels, University of Freiburg im Breisgau.)[27]

(c) Denmark

There appears to be no right of action in Danish law for loss of consortium.

(d) Finland

It appears that there is no right to claim damages for loss of consortium. Only the injured spouse has a right of action in respect of his or her injuries.

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[27] For delict, see Civil Code, Articles 823 et seq. Also (1) Ernst Cohn's Manual of German Law, vol. I, paras 312-325 (2nd ed. 1968) and (2) International Encyclopedia of Comparative Law, vol. XI (Torts) - Chapter 8 by Hans Stoll.

(e) Greece

It appears that a person may be able to recover damages resulting from financial expenditures or other financial losses resulting from the defendant's negligent infliction of injury on the plaintiff's spouse.

(f) Italy

It does not appear that there is a remedy for the negligent infliction of damage on the marital consortium in Italy.

(g) Turkey

There does not appear to be any right of action in Turkish law equivalent to the action for loss of consortium.

(h) Sweden

It appears that there is no separate right of action for loss of consortium in Sweden, but that the victim may be compensated for damage to the marital relationship in his or her action.

(i) Netherlands

It appears that the spouse of a victim of negligence may recover damages for medical expenses and hospital visits but that he or she may not recover any damages for non-pecuniary losses.

(a) The United States

Action for Loss of Consortium

Consortium has been defined in the United States as

> "the conjugal fellowship of husband and wife and the right of each to the company, cooperation and aid of the other in every conjugal relation."[28]

From earliest times in the United States the husband has had a common law right to claim damages for loss of his wife's services and consortium. Thus, he may be compensated where, as a result of his wife's illness, he is obliged to pay for domestic assistance, but not, apparently, where the domestic tasks that the wife used to perform are undertaken gratuitously by other members of the family. Medical expenses may also be recovered. Deprivation of the fellowship and affectionate relations of the wife also gives rise to damages.

Before 1950, it was generally accepted that a wife had no right of action for negligent interference with the consortium of her husband.

The position was transformed in that year by the decision of the Court of Appeals for the District of Columbia Circuit in Hitaffer v. Argonne Co. Inc.[29] There, the

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[28] Pratt v. Daly (1940) 104 P. 2d 147 at 150. For a general discussion of the subject, see W. Prosser, Handbook of the Law of Torts, 873 ff. (4th ed. 1971).

[29] (1950) 183 F. 2d. 811 per Clark J. supra p. 8.

plaintiff's husband had been severely injured by virtue of the defendant's negligence, one result of his injuries being inability to have sexual relations. The plaintiff sued for loss of consortium and her claim was successful.

Judge Clark disposed of a number of arguments against recognising the plaintiff's claim. The first argument was that the action depended essentially on loss of services and that the plaintiff had no right to her husband's services. This argument was rejected on the basis that

> "/t/he difficulty with adhering to these authorities is that they sound in the false premise that in these actions the loss of services is the predominant factor."

Such a standpoint was, in the court's view,

> "nothing more than an arbitrary separation of the various elements of consortium devised to circumvent the logic of allowing the wife such an action."

The second argument against recognising the plaintiff's claim was based on the fear of double recovery. The judge acknowledged that this matter did raise some difficulties (which he subsequently dealt with) but pointed out that the risk of double recovery related only to the services element in an award.

The third argument against recognising the plaintiff's claim was that her injuries were too indirect or remote to be compensated. Judge Clark pointed out that this did not represent an accurate statement of the general principles of negligence law and that, if it had any validity, it would also apply to the husband's claim.

The judge said he could not appreciate how a distinction could be made (as was done in a number of jurisdictions) between intentional and negligent invasions of the matrimonial consortium whereby a wife would be afforded a remedy in the former, but not in the latter, case.

Judge Clark, at p. 819, expressed the policy basis for his recognition of the plaintiff's right of action as follows:

> "/W/e can conceive of no reasons for denying the wife this right for the reason that in this enlightened day and age they simply do not exist. On the contrary it appears to us that logic, reason and right are in favor of the position we are now taking. The medieval concepts of the marriage relation to which other jurisdictions have reverted in order to reach the results which have been handed to us as evidence of the law have long since ceased to have any meaning. It can hardly be said that a wife has less of an interest in the marriage relation than does the husband or in these modern times that a husband renders services of such a different character to the family and household that they must be measured by a standard of such uncertainty that the law cannot estimate any loss thereof. The husband owes the same degree of love, affection. felicity, etc., to the wife as she to him. He also owes the material service of support, but above and beyond that he renders other services as his mate's helper in her duties, as advisor and counselor, etc. Under such circumstances it would be a judicial fiat for us to say that a wife may not have an action for loss of consortium due to negligence."

Judge Clark then dealt with the question of the risk of double recovery. In his view, it posed "no problems", since "/s/imple mathematics will suffice to set the proper quantum". The judge stated:

> "For in as much as it is our opinion that the husband in most cases does recover for any impairment of his duty to support his wife, and, since a compensable element of damages must be subject to measure, it is a simple matter to determine the damages to the wife's consortium in exactly the same way as those of the

> husband are measured in a similar action and subtract therefrom the value of any impairment of his duty of support."

In cases where the husband realised no such recovery in his action, as, for example, under Workman's Compensation legislation where the schedule of compensations made no distinction between married and unmarried claimants, the wife should, in his view,

> "also be able to include in her claim for damages the worth of any loss of this recognised element of her consortium."

Whilst Hitaffer was greeted with universal favour by academic commentators, it was at first slow to gain acceptance in the courts elsewhere in the U.S. By 1958, only four other jurisdictions, Arkansas, Georgia, Iowa and Nebraska had followed the lead in Hitaffer.

Today the position is radically different. Thirty-eight States have, either by judicial decision or legislation, now recognised the right of a wife to sue for negligent interference with her right to consortium.

The plaintiff's action for loss of consortium will be barred or the damages reduced where his or her spouse was guilty of contributory negligence.[30] This approach has been condemned by a number of writers.

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[30] Formerly contributory negligence constituted an absolute defence in almost all jurisdictions in the United States, but recently, fearing "no fault" compensation legislation, insurance companies have withdrawn their opposition to the "reduction of damages" rule so that "/t/here is at present a stampede toward comparative negligence": Schwartz, "Comparative Negligence: Oiling the System" (1975) 11 Trial 58.

Action for Loss of Services of a Child

The law in the United States on this subject is largely similar to that in this country. One important difference is that damages may be recovered even where the child was too young to render any services. The contributory negligence of the child will bar the parent's action or reduce damages.

(b) Canada

(i) Common Law Provinces

It is clear that a man may recover damages for total loss of the consortium of his wife caused by the defendant's negligence, but the question whether he may recover for partial interference has been resolved differently in the various provinces. In Manitoba, Alberta, and Ontario the courts have held that a complete loss of consortium must be established. In British Columbia, Saskatchewan and Nova Scotia, however, partial impairment is sufficient. The Supreme Court of Canada decision in Montreal Tramways Co. v. McGuire[31] would also appear to favour recovery for partial impairment. The right of a wife to claim for the loss - total or partial - has been rejected.

The Ontario Law Reform Commission Study and Report

In 1968, the Ontario Law Reform Commission examined the law relating to negligent interference with consortium in its Family Law Study. After a summary of the law in Canada,

[31] [1953] 2 S.C.R. 404.

England, Australia, New Zealand and the United States, the Study made a number of recommendations for reform. It recommended that the existing common law action should be replaced by a statutory right available to either spouse to claim damages

> "where the marital consortium has been at least substantially invaded by the defendant's tortious conduct such damages to be confined to pecuniary or economic loss caused by the defendant's tortious conduct. It should not include compensation for such items as affection or companionship, and no punitive damages should be allowed."[32]

The Study also recommended that the Court should have a discretion to direct that any damages awarded should be applied in whole or in part for the benefit of the children of the marriage or for the maintenance of the plaintiff spouse. On the uncertain question relating to recovery for partial interference with consortium, the Study stated that it

> "would seem reasonable to allow a remedy in all cases in which the consortium has been substantially impaired and the law should not insist upon total destruction of the consortium as a condition precedent to liability."

Lastly, on the important question of the effect of contributory negligence the Study considered that it

> "would seem that greater justice is achieved by regarding the action as derivative and by subjecting the husband to a reduction of damages in circumstances where the wife was contributorily negligent",

and it was so recommended.

The following year the Ontario Law Reform Commission dealt finally with the subject in its Report on Family Law. It confirmed the view favoured in the Study that the common

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[32] Study prepared for the Ontario Law Reform Commission: Family Law Project. Volume VI, Torts (1968) 203.

law action should be abolished. In its place it recommended[33] a statutory right of action available not merely to the spouse of the person negligently injured by the defendant but also to all members of the victim's family. This right of action would have the following characteristics:

(a) the members of the family who should be entitled to claim should be the same as those set out in the Fatal Accidents Act,

(b) the damages recoverable should be confined to pecuniary loss,

(c) the principle of contributory negligence should apply to the action,

(d) the claims of all members of the family (including that of the injured member) should be brought in one action on a basis similar to that under the Fatal Accidents Act.

Statutory Reform in Ontario

The recommendations of the Law Reform Commission were given substantial effect by the Family Law Reform Act 1978. The damage for which the members of the family may be compensated is worthy of particular attention. Section 60(2) of the Act provides that the damages may include:

> "(a) actual out-of-pocket expenses reasonably incurred for the benefit of the injured person;

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[33] Ontario Law Reform Commission, Report on Family Law, Part I, Torts (1969).

(b) a reasonable allowance for travel expenses actually incurred in visiting the injured person during his treatment or recovery;

(c) where, as a result of the injury, the claimant provides nursing, housekeeping or other services for the injured person, a reasonable allowance for loss of income or the value of the services; and

(d) an amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the injured person if the injury had not occurred."

(ii) Quebec

The right in Quebec law of a husband to sue for injury to the matrimonial consortium was first clearly recognised in Lister v. McAnulty,[34] where the Supreme Court of Canada held that the action should be recognised on the basis that

"/i/t is inconceivable that the rights of a husband in Quebec are more restricted than those in common law jurisdictions".[35]

Mr Justice Hudson, at p. 329, referred to the mutual obligations of husband and wife as set out in the Civil Code[36] and continued:

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[34] /1944/ S.C.R. 317. Husbands had recovered previously on less clear grounds.

[35] Id. at 330 (per Hudson J.).

[36] The relevant articles were as follows:

"173. Husband and wife mutually owe each other fidelity, succor and assistance.

174. A husband owes protection to his wife; a wife obedience to her husband.

175. A wife is obliged to live with her husband, and to follow him wherever he thinks fit to reside. The husband is obliged to receive her and to supply her with all the necessities of life, according to his means and conditions."

> "Any wrongful interference by a third person with the enjoyment of the rights and privileges of either husband or wife would in my opinion be a proper subject for relief under Article 1053 /of the Civil Code[37]. Recognition by law of such a right by the husband and a remedy for its breach is common throughout most of the civilized world."

The action appears from the case law to be available to the wife also.

Recovery may be ordered even where there is only impairment rather than total destruction of the matrimonial consortium. The contributory negligence of the plaintiff spouse will reduce the amount awarded to the plaintiff. A right of action based on loss of consortium also exists where the plaintiff's spouse is killed rather than merely injured.

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[37] Article 1053 provides as follows:

> "Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another: whether by positive act, imprudence, neglect or want of skill."

CHAPTER 5 THE LAW IN AUSTRALIA, NEW ZEALAND AND SOUTH AFRICA

(a) Australia

Action for Loss of Consortium

The law relating to loss of consortium in Australia differs in some important respects from that in this country. The leading decision is Toohey v. Hollier[38]. The facts, briefly, were that the plaintiff's wife was seriously injured in a traffic accident caused by the defendant's negligence. She was unable to carry out her domestic duties and the plaintiff was obliged to employ a housekeeper. The plaintiff was awarded a sum of money by the trial judge in respect of his financial loss together with the sum of £1,000 as "general damages". The defendant appealed against this latter award. The High Court of Australia dismissed the appeal. It differed from the approach which found some support in Best v. Fox,[39] the judgment of the Court[40] stating as follows:

> "In the present case the male plaintiff has suffered and will continue to suffer a very substantial prejudice or disadvantage of a material or practical kind because of the greatly reduced capacity of his wife to perform the domestic duties, manage the household affairs and

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38 (1955) 92 C.L.R. 618 (High Ct of Australia), analysed by Parsons, "Loss of Consortium" (1955) 18 M.L.R. 514.

39 [1952] A.C. 716, referred to supra pp. 2, 5 and 6.

40 Dixon C.J., McTiernan and Kitto JJ. The High Court of Australia is the final court of appeal in Australia.

> give him her support and assistance. Why should this not form a proper head of consequential damage to him? The answer given by the appellant was that it is all a part of consortium and consortium is one and indiscerptible. Unless you lose it all you have no remedy. We venture to think that such an answer proceeds from a supposition which finds no justification either in the history of the cause of action or in the common law principles by which it is governed, a supposition that the husband's remedy in damages is only for the violation of a right which the law gives him to the consortium of his wife and further that there is no actionable breach of the duty to respect the right except by the commission of an act completely depriving the husband of her consortium. The common law took no such abstract and theoretical position."

In permitting recovery for impairment of consortium as well as for its total destruction, the court referred to authorities to this effect in the United States. In a somewhat laconic passage, it added:

> "The application of this doctrine must, of course, be confined to material or temporal loss capable of estimation in money."

This passage has given rise to much academic discussion since it might, perhaps, be interpreted as limiting damages to financial rather than "moral" loss. However, it appears that the court was sounding merely a warning note against fanciful claims.

Some light was thrown on this question by the New South Wales decision of Birch v. Taubmans Ltd[41]. There the plaintiff's wife had been injured in a traffic accident caused by the negligence of the defendant. Her injuries were of such a nature as to make her unable to have sexual

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41 (1956) 57 S.R. (N.S.W.) 93, noted briefly in (1957) 31 A.L.J. 63.

relations. The plaintiff was held entitled to recover in respect of impairment of consortium. The court stated at p. 99:

> "We are unable to agree that nothing more than the actual pecuniary loss suffered is recoverable, and we think that in any event the decision in Toohey v. Hollier[42] would require us so to hold.... /O/nce it is accepted that consortium is not one and indiscerptible, and that damages may be recovered for any impairment thereof, the essential matter for consideration appears to us to be the extent to which the right to recover is limited. The terms of the limitation placed upon the husband's right to recover by the decision in Toohey v. Hollier is that the damage must be confined to the material or temporal loss capable of estimation in money'.... We think that the meaning of this limitation is plain. Injury suffered by the husband in the nature of diminished happiness or lessened spiritual enjoyment of his home life or his wife's society is not recoverable. Indeed, elements of this kind, including also such matters as mental distress suffered by the husband, are not in a true sense impairments of consortium at all. But if a consequence is that, in his domestic establishment, there are rendered to the husband fewer or inferior comforts, conveniences or assistance, of a temporal as distinct from a spiritual kind, then he may recover in respect thereof without it being necessary for him to incur expenditure in replacing or improving what is done for him."

Applying this test the court held that the inability of the plaintiff's wife to have sexual relations was a material or temporal injury, noting that

> "/t/he first reason given in the Marriage Service for the ordination of marriage is the procreation of children."

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[42] Supra p. 29.

The contributory negligence of the plaintiff's wife will not affect the defendant's liability to the plaintiff. It was so held by the final court of appeal in Australia in Curran v. Young[43].

The law in Australia regarding the right of a wife to sue for negligent impairment or destruction of the matrimonial consortium is difficult to state with certainty. There are conflicting decisions on the matter.

Action for Loss of Services of a Child

Australian law relating to the right of a parent to recover damages for the negligent interference with his child's services appears to be substantially the same as that in this country.

(b) New Zealand

Action for Loss of Consortium

Before 1974, the law in New Zealand relating to recovery for interference with matrimonial consortium appears to have been the same as in England.

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[43] (1965) 112 C.L.R. 99 (High Ct of Australia). A proviso was, however, suggested by Barwick C.J. (at p. 101) when he stated:

"The wife's failure to take care for herself which disentitles her to succeed is, in my opinion, an irrelevant circumstance in an action by the husband. The matter, of course, would be different if the husband were suing for the consequences of the defendant's negligence in circumstances where the conduct of the wife, when she was doing something which she was either expressly or impliedly authorized to do on his behalf, was a contributing cause to that damage. In such a case his responsibility for her acts may result in his being disentitled to succeed."

An unsuccessful attempt was made[44] by a wife in 1973 to overcome her non-entitlement to sue for loss of consortium by framing an action on principles of negligence.

Since 1 April 1974, when the Accident Compensation Act 1972, which introduced a comprehensive insurance system, came into force, no action for loss of consortium may be taken nor is it possible to frame the action in terms of negligence when it is based on personal injury suffered by the plaintiff's spouse.

Action for Loss of Services of a Child

The law in New Zealand relating to a parent's right of action for loss of the services of his child caused by the negligence of the defendant appears to have been the same as in England. However, since 1 April 1974 no action may be taken for loss of the services of a child.[45]

(c) South Africa

Action for Loss of Consortium

It is clear that a husband whose wife has been wrongfully injured may recover damages from the wrongdoer for the hospital and medical expenses that he has incurred, but that he may not recover for non-pecuniary damage to the consortium of his wife.

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[44] Marx v. A.G. [1974] 1 N.Z.L.R. 164.

[45] Section 5(2) of the Accident Compensation Act 1972.

The right to recover is based on an extension of the actio legis Aquiliae. In 1911, a South African court first recognised the right of a husband to claim damages in respect of pecuniary loss sustained by him by reason of the death of his wife,[46] and in 1921[47] a similar right on the part of the husband was recognised in relation to injuries sustained by his wife. Mr Justice Villiers stated in the 1921 case:

> "As in the case of the death of a wife, our law is, however, silent whether a husband can recover from a person who has through culpa injured his wife, though not fatally. But no reason can be suggested why a husband should not be allowed to recover when the injuries are not fatal. For, in principle, no distinction can be drawn between the two cases." (p. 56)

The extent of entitlement to recover is quite limited. Non-pecuniary injury to consortium is not compensatable. The pecuniary damages are limited to the domestic context. Thus, it would appear that only that part of the wife's earnings that is used to defray household expenses may be taken into account by the court in determining the husband's loss.

The contributory negligence of the wife will not reduce the amount of damages awarded to the husband, but the defendant will have a right to contribution from her.[48]

While there is no precedent in favour of recognising the right of action of the wife, there appears to be no objection in principle in South African law to the recognition of such a right.

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46 Union Government v. Warneke, 1911, A.D. 657.

47 Abbott v. Bergman, 1922, A.D. 53.

48 Apportionment of Damages Act 1956, sections 2(1A) and (6)(a). As to this Act, see R.G. McKerron, The Apportionment of Damages Act 1956 (Capetown 1956).

CHAPTER 6 POLICY ARGUMENTS REGARDING REFORM OF THE LAW

(a) Action for Loss of Consortium

The principal arguments in favour of abolishing or retaining the action for loss of consortium and the services of a spouse are considered below.[49] Then, on the assumption that the action in some form should continue to exist, attention is given to those aspects in which change seems desirable.

Arguments in Favour of Abolition of the Action

The first argument in favour of abolition of the action invokes its alleged historical basis in the assumption that a man has a proprietary interest in his wife, her "services" and her comapny. The reply to this argument, which is also applicable to criminal conversation, seduction and enticement actions, is that the historical origins of a right of action do not greatly matter if the action serves a sound and desirable social policy judged by the standards of today. At best, the argument supports a legislative restatement of the action in modern terms. (See the Commission Working Papers No. 5 - 1978, p. 48 and No. 6 - 1979, p. 60, in regard, respectively, to criminal conversation and the enticement and harbouring of a spouse and to seduction and enticement and harbouring of a child.)

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[49] In this regard, the arguments assume that in this country the action is available to the wife as well as to the husband.

The second argument in favour of abolition of the action is that it is anomalous in permitting recovery of damages by persons not directly affected by the defendant's wrongful conduct.[50] In reply, it may be said that the law has in recent years extended considerably the range of plaintiffs entitled to recover. For example, damages may now be awarded under section 49(1) (as amended) of the Civil Liability Act 1961 for mental distress resulting to each of the dependants of a fatally injured person. Moreover, the courts have tended to look with increasing favour on claims based on non-financial loss.

Whilst cases may be envisaged where the existence of the spouse of a victim of negligence (or other wrongful act) might be quite unforeseeable by the defendant, it may be argued that such cases should be provided for in legislation on the subject and that they do not require that the action in general be abolished.

Arguments in Favour of Retention of the Action

The first argument in favour of retaining the action is that where a person wrongfully causes injury to his victim's spouse he ought to compensate that spouse for the loss

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[50] In Spaight v. Dundon /1961/ I.R. 201 at 215 (Sup. Ct) Kingsmill Moore J. stated:

> "It appears to me that in general policy the law is sound in refusing to extend liability for a tort beyond the injuries to the person against whom the tort is directly committed. Otherwise I can see no limit to the number of the persons who could claim that they had been indirectly affected to their detriment or to the nature of the claims that could be made." (See supra pp. 2-5.)

sustained. Entitlement to compensation should not depend on any service basis. It may now justifiably be based on the solidarity of the family and the concept of the family action.

The second argument in favour of retaining the action is that, apart from the general principle that wrongfully occasioned loss should be compensated, the particular action provides a support for the family as an institution.

Conclusion

On balance the Law Reform Commission considers that the arguments in favour of retention of the action outweigh those in favour of its abolition. This does not mean, however, that the action should be retained as it is at present constituted. A number of changes in its constituents - some of them substantial - appear desirable. These are considered below.

The first change that appears desirable is to remove the "service" basis of the action and to provide that the action may arise when either spouse is the victim of the wrongful act of another. The notion of a wife being in her husband's service has clearly long been obsolete. The social policy served by the action is not the protection of some supposed proprietary interest in a spouse but rather that of protecting family solidarity and the continuity of family relationships - a basic philosophy adopted by the Commission in respect of the proposed new Family

Actions for adultery, for enticement of a spouse and for seduction, enticement and harbouring of a child proposed in the Commission Working Papers No. 5 - 1978 and No. 6 - 1979.

The second change that appears desirable is to extend the right of action to all members of the family of the victim. Once the "service" fiction is removed and the true policy of the action brought out it is clear that injury is suffered not only by the victim's spouse but by other members of the family also. A suitable model for such an extended right of action is to be found in Part IV of the Civil Liability Act 1961, which deals with the civil action for fatal injuries. The question arises as to who should fall within the category of claimants. Those entitled to claim under Part IV of the 1961 Act are the spouse, parents, grandparents, stepparents, son, daughter, grandchildren, stepchildren, brother, sister, half-brother and half-sister of the deceased person. Adopted children are treated as the legitimate offspring of their adoptive parents, illegitimate children as the legitimate offspring of their mother and reputed father, while persons in loco parentis to children are treated as their parents.

This range of claimants appears to be too wide in the present context. It is considered that it is too onerous to impose on a defendant who has behaved negligently towards his victim an obligation to compensate the victim's grandfather or grandmother, for example. Nevertheless such relatives would have a moral claim, where, for instance, they are living with, and in loco parentis to, the victim. The relationship should be one of proximity of actual association with the victim rather than one arising from consanguinity or from affinity. The Commission considers that the range of claimants should be

the same as that recommended in the case of the proposed Family Actions for adultery, for enticement of a spouse and for the seduction, enticement and harbouring of a child. In other words, the action (which should be a single family action) should be available for the benefit of all the members of the family unit residing together. The members of the family unit should be defined as comprising the parents and the children (including legally adopted children and children to whom either parent is in loco parentis). Only one action on behalf of all the members of the family would be permitted; and the court would be empowered to award such damages to each of the members of the family unit residing together as the court considered fit.

The third change that appears desirable would be for the legislation to specify the categories of loss in respect of which damages should be payable. At present, as has been indicated (supra pp. 2-4), the position is uncertain. The Law Reform Commission considers that the following losses should be recoverable:

(a) All reasonable expenses and other financial losses incurred by the members of the family of the victim

These would include expenses such as those involved in visiting hospital, employing domestic help and so on, as well as loss of income resulting from such activities.

(b) Mental distress resulting to the members of the family

This heading is based on Part IV of the Civil Liability Act 1961, which allows damages for mental distress in a fatal injuries case up to a maximum of £1,000. The Commission has examined the question as

to whether a limit should also be included in the proposed new Family Action. In favour of a limitation it may be argued that, if no limitation is included, the extension of liability might be unpredictably large, with consequent increases in insurance costs. As against this, an extension of liability without limitation may be defended on the basis that the social policy of the proposed new action is a sound one and that it should not therefore be "watered down". Accordingly, the Commission recommends that no monetary limitation be included in the proposed legislation and that the amount should be determined by the jury (rather than by the judge) where there is a jury. This represents a change in the law as contained in Part IV (section 49(1)) of the Civil Liability Act 1961.

(c) Damage to the continuity, stability and quality of the relationships between members of the family

This heading is designed to cover partial as well as total loss of consortium.

The fourth change that appears desirable is to reverse the present rule whereby the contributory negligence of the victim is not taken into account by the court in proceedings for loss of consortium or loss of services. (See sections 35(2) and 21 of the Civil Liability Act 1961.) Professor Fleming has observed that

> "/I/n terms of fairness and social policy.... it does not make a great deal of sense that a wrongdoer should be required to foot the whole of the medical bill if, but only if, his contributorily negligent victim

> turns out to be a married woman whose husband can providentially espouse the cause of their joint domestic budget."[51]

The Commission accordingly recommends that the present rule be replaced by a rule that damages are to be reduced by such amount as the court thinks just and equitable having regard to the degrees of fault of the victim and the defendant. On the basis of the concept of a "family action" it seems not unreasonable to identify the other members of the family with the one who is the negligent victim.

The fifth change that appears desirable is that the period of limitation should be reduced from the present six years. The Commission recommends that the period should be three years, which is the period for a negligence action for fatal injuries. (See section 48(6) of the Civil Liability Act 1961.)

(b) Action for Loss of Services of a Child

The Argument in Favour of Abolition of the Action

It may be contended that, whilst the defendant should be liable in full to any child whom he injures, he should not also be required to compensate the members of the child's

[51] J. Fleming, The Law of Torts, 645-646 (5th ed. 1977). See, however, Glanville Williams, Joint Torts and Contributory Negligence, 440-444 (1951) and subsection 25(3) of his proposed Concurrent Fault Act (p. 520). See also MacIntyre, "The Rationale of Imputed Negligence" (1944) Univ. of Toronto L.J. 368 at 381 and the law in South Africa referred to supra pp. 33, 34 and fn. 48.

family, since their claim might be over-inclusive or under-inclusive. It might be over-inclusive in that undeserving claimants - parents who have maltreated their child, for example - would be able to claim: it might be under-inclusive in that it might exclude deserving claimants - a cousin or an aunt, for example, who, whilst very close to the child, is not in loco parentis to the child.

As against this, it may be said that no solution will yield totally satisfactory results in every case and that, though there may be an argument for extending the number of claimants, there is no need to abolish the action.

The Argument in Favour of Retention of the Action

The argument in favour of retention of the action is that the existence of the action serves a sound social purpose in that it aids families who suffer financial or other loss as a result of the defendant's conduct. Of course, the law is capable of improvement in several respects.

As the main changes that appear desirable have already been spelt out supra (pp. 37-41) in relation to the action for loss of consortium, there is no need to specify them again in any detail. Very briefly, the Law Reform Commission recommends that a new action be created by statute so that the members of the family unit would have a right of action for damage done to them as a result of an injury done to a child by the wrongful act of the defendant. The losses should be those set out for the proposed new Family Action to replace the action for loss of consortium - pp. 39 and 40 supra. The defence of contributory negligence would be available - as is also suggested in respect of the new consortium action. (In the present context, it is worth

noting that recovery would not be denied on account of the fact that the child was of tender years.) Also, only one action should be capable of being brought and the period of limitation should be three years - supra pp. 40 and 41.

Note

This Paper does not include a general scheme of a Bill because, as has been indicated in the Commission Working Paper No. 5 - 1978 at page 71, it is considered that the drafting of the necessary legislation will be a relatively straightforward task once the principles upon which it is to be founded are settled following comments on Working Paper No. 5 - 1978, on Working Paper No. 6 - 1979 and on the present Paper.

CHAPTER 7 SUMMARY OF RECOMMENDATIONS

1. The actions for loss of consortium and for loss of the services of a child should be replaced by single family actions for the benefit of all the members of the family unit residing together. The members of the family unit should be defined as comprising the parents and the children (including legally adopted children and children to whom either parent is in loco parentis). (Pages 37, 39 and 42)

2. The damages, which should be without monetary limitation (i.e. at large) should cover

(a) all reasonable expenses and other financial losses incurred by the members of the family of the victim;

(b) mental distress resulting to the members of the family;

(c) damage to the continuity, stability and quality of the relationships between members of the family. (Pages 39, 40 and 42)

3. The defence of the contributory negligence of the victim should be available to the defendant in proceedings brought against him by members of the family of the victim. (Pages 41, 42 and 43)

4. Only one action should be capable of being brought; and the court should be empowered to award such damages to each of the members of the family unit residing together as the court considers fit. (Pages 39 and 43)

5. The period of limitation should be the same as that for an action for fatal injuries, namely, three years. (Pages 41 and 43)