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Claims for Loss of Services and Society

Jill Cottrell argues that s 20B of the Law Amendment and Reform (Consolidation) Ordinance is being misinterpreted to deny ‘service’ claims under the Fatal Accidents Ordinance.

The dependency claim of a husband under the Fatal Accidents Ordinance (Cap 22) (FAO) can sometimes be framed in terms of loss of domestic services, which may be replaced by hiring help or even by the husband giving up his own employment. There may also be awarded additional damages to recognise a personal attention element which cannot be compensated for by hiring help (the English cases usually cited are Mehmet v Perry [1997] 2 All ER 529 and Regan v Williamson [1976] 2 All ER 241).

However, in Leung Sing Kiu v Wong Shik Keung [1989] 1 HKC 206, Master Jerome Chan (as he then was) held that a husband could not succeed under the FAO on such a ‘services’ claim. This has been followed recently by two other masters (see Chan Ki v Travel Trade Communication Network and Marketing Services Ltd [1998] 2 HKC 57 and Ngai Chit Chuen v Lui Chi Hung [1997] HKLY 440). The basis for these decisions has been s 20B of the Law Amendment and Reform (Consolidation) Ordinance (Cap 23) (LARCO), which says:

"... no person shall be liable in tort –

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

It may be that the practical effect is not very great as there will often be children and the award can be made in relation to them. But occasionally English and Hong Kong courts have separately assessed such claims for husband and children.

... it is undesirable that the law should be so puzzling to those who do not have long memories and a knowledge of the more arcane pieces of common law history ...

Has every court treated s 20B as having done away with this liability? The fact is, with all due respect, that s 20B was not intended to affect, and its English equivalent (s 2 Administration of Justice Act 1982) has not been interpreted as having affected, the fatal accidents legislation.

What the draftsman intended was that ‘the common law action of per quod servitium amisit, under which a man may sue for loss of the services and consortium of his wife [and for the loss of services of his child or a menial servant] caused by the tortious act of the defendant is hereby abolished’. Under this action the woman was essentially viewed as her husband’s property. Society referred to the sexual consortium ... and other aspects of matrimonial life. By the mid-twentieth century the common law action was thought to be seriously anachronistic and the consortium element eventually became a token sum. Section 2 of the 1982 Act abolished the action and the similar actions – at least for the services – which lay for injury to a man’s children or servants.

It did not enter the draftsman’s head that anyone would relate this to the Fatal Accidents Act, which does not mention ‘services’. Section 20B was not intended to affect the purely statutory remedy under the FAO (the language was originally that of the English Law Commission’s Draftsman, see Report of Personal Injury Litigation – Assessment of Damages (Report No 56, 1973) Appendix 5 at 122). The draftsman would also not have made the connection because the action for loss of services and society at common law was not available to a man whose wife had died. The original marginal note to the Hong Kong section made the situation crystal clear: ‘Abolition of the common law action for loss of society and services’. By the time the amendment reached the Revised Edition of the Laws, the words ‘common law’ had disappeared (accurate marginal notes do have their uses).

At about the same time, however, the legislature in England realised that the purely financial approach of the Fatal Accident Act perhaps failed to respond to the needs of families, especially in those situations in which there was no financial dependency. England therefore adopted the ‘bereavement’ provision, which now appears in the FAA. A fixed sum can now be claimed by certain close family members for the loss of a person who died.

When Hong Kong came to consider the issue of damages for personal injury and death, the Law Reform Commission (LRC) made a valiant effort to think independently – or at least not narrowly to follow English
precedent. They suggested the adoption of a bereavement provision. They were agreed that the husband's action for loss of consortium was anomalous. However, rather than simply abolish it they proposed the creation of a remedy for family members for the loss of society of a person killed or injured. The sort of situation that they envisaged was where the injured person was in a coma or some similar situation, though they felt it unwise to spell out the possibilities.

For loss of services the LRC considered two possible models: one under which the family members brought an action, and one under which the injured person brought the action for the inability to continue to render services. They recommended the adoption of the latter. In fact one could take the view that they need not have made any such recommendation because the Court of Appeal in England had already recognised such a right at common law (see Daly v General Steam Navigation Co [1981] 1 WLR 120). However the LRC said that since the Hong Kong courts were not obliged to follow this decision it would be good to incorporate it in statute. As a result in 1986 Hong Kong law was amended to:

1. do away with the *actio quod servitium amisit*;
2. create a ‘bereavement’ remedy in the FAO;
3. create a new, extended remedy for loss of society; and
4. create a new remedy for loss of ability to render services.

Section 20C provides that there is a remedy with a fixed maximum for certain relatives of an injured person for loss of society and a remedy for the injured person to sue for his or her own inability to provide services as he or she could before the accident. It may be that some members of the Hong Kong judiciary have been misled in their interpretation of the impact of § 20B on the FAO by the existence of § 20C.

Perhaps the power that exists since *Pepper v Hart* [1993] AC 593 to consider the legislative history would sort out such uncertainties in future, provided that anyone thought to look (as apparently did not happen in *Chan Kii*). Perhaps counsel will remember this possibility once it is enacted into Hong Kong law (the new § 19A of the Interpretation and General Clauses
Ordinance (Cap 1), when passed, will permit reference to sources such as Law Reform Commission Reports if legislation is ‘ambiguous or obscure’.

On the other hand, it is undesirable that the law should be so puzzling to those who do not have long memories and a knowledge of the more arcane pieces of common law history – even more unsatisfactory that the result might be injustice. Perhaps the solution would be to amend the law.

Technically it would be possible simply to repeal s 20B since once a statutory provision repealing the common law is itself repealed this does not revive the common law. However, this is eminently unsatisfactory. It ought to be possible for any reasonably intelligent lawyer to be able to work out from a combination of the law reports and the statute book what the law is in Hong Kong, without being required to know also about once repealed statutes. So perhaps s 20B could be replaced by a provision in s 20C saying something to the effect of ‘for the avoidance of doubt the common law action for loss of ... is abolished’.

Master Chan was, with respect, on stronger ground when he pointed to the odd drafting of s 20C of LARCO and s 4 of the FAO. Section 20C creates a remedy for loss of society of a token nature (currently $150,000) which can be claimed by certain identified relatives. Only one sum is payable – the spouse of the deceased claims first and, if there is no spouse, the children and so on. It is not clear why the list of those who can successfully claim for loss of society is different from those who can claim for bereavement under the FAO. Indeed the oddity is that the FAO gives a separated spouse precedence over concubines and ‘common law wives’. Why? One should remember that this is for bereavement and not for financial loss.

Even odder is the other discrepancy Master Chan pointed out. After referring to the husband or wife or children of the injured person as entitled to sue for loss of society, the s 20C list continues by referring to the concubine and so on of the deceased. Presumably a plain, and unthinking, copy from the bereavement provision was introduced into the FAO at the same time. The effect is to render ineffective changes intended to be made to the Bill as it passed through the Legislative Council. It is remarkable that this has not been amended in the years since Master Chan first made this comment.

One final thought. Is it compatible with human rights provisions to discriminate against the father of an illegitimate child as both Ordinances do? For example LARCO s 20C(1)(e) states ‘where there is no person by or for whom a claim can be made under paragraph (a), (b), (c) or (d), the parents of the deceased or (if the deceased was illegitimate) his mother’.

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失去服務或情誼的索償

Jill Cottrell 認為，法院在否定根據《致命意外條例》提出的「服務」索償時，其實曲解了《法律修訂及改革（綜合）條例》第 20B 條

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名丈夫根據《致命意外條例》（第 22 章）提出的受損索償，有時可根據家書的失去而索償。於妻子喪生，家書凌然處理，丈夫須倫理家務助理人員甚或放棄自己的工作。此外，律師其他人員協助用法問題時提供個人照耀的元素，而就此法庭也可順應個別的損失賠償（以下稱英美案例通常被引述作為典範：Mehmert v Perry [1997] 2 All ER 529 及 Regan v Williamson [1976] 2 All ER 241）。


「...（a）若僅以丈夫被剝奪了妻子的服務或情誼為由，則無人須對該丈夫負侵權的法律責任 ...」

條文的實際影響可能會不太大，因為案件的「受害人」往往亦包括子女，而法院可就該些兒童的損失發放賠償。但在事實情況下，不論英美或香港的法庭都會把丈夫的此類索償及受害人的此類索償分開處理及評估。

各級法庭是否已依第 20B 條取消了此等責任？在尊重以往法院判決的情況下，筆者認為第 20B 條並非旨在對致命意外條例產生影響；事實上，等同第 20B 條的另一條的英國法律條文（即 1982 年司法執行法令第 2 條）從未被解釋為對致命意外條例造成影響。

有關法例草擬者的原意，其實是「藉此廢止『因他人的原因，使其失去服務』這項普通法訴訟」，若被告（在未正式對案）的被告（以失去子女或家人的服務）來說，其父親便可提出該項訴訟。」就该项訴訟而言，女性基本上乃未被成其丈夫的財產。「情誼」是指性格方面的相承，亦或婚前婚姻生活的其他方面。到了 20 世紀中期，普通法和個人訴訟已變得相對落伍，而相對這元素最終亦只獲得象徵式的賠償。上述 1982 年法令第 2 條第 2 條，替該項訴訟以及受害者的愛情或僱傭人可之間的其他類似訴訟劃上了句號（至少就失去服務的索償而言）。
Personal Injury Practice

One possible situation is that, in the event of another person being injured as a result of your negligence, you may be held liable for the injuries sustained. This situation could arise if you fail to exercise due care and attention in performing your duties, and as a result, someone else is injured. In such cases, you may be required to compensate the injured party for their losses.

In order to establish liability, it is necessary to prove that you breached a duty of care owed to the injured party. This duty of care arises out of your relationship with the injured party. For example, if you are a doctor, you owe a duty of care to your patients to provide them with appropriate medical treatment. If you fail to provide this care, and as a result, a patient sustains injuries, you may be held liable for those injuries.

In cases where liability is established, the injured party may be entitled to compensation for their losses. This compensation may include damages for physical injury, loss of earnings, and other losses suffered as a result of the injuries.

It is important to seek legal advice in cases of personal injury to ensure that your rights are protected and that you are properly compensated for any losses suffered. Legal advice can help you understand your rights and the steps you need to take to secure compensation for your losses.

Legal aid is available in Hong Kong for people who are unable to afford legal representation. You can contact the Legal Aid Department of the Department of Justice for more information on legal aid services.

In conclusion, personal injury cases can be complex and require a thorough understanding of the law. Seeking legal advice is crucial in ensuring your rights are protected and that you are appropriately compensated for any losses suffered.

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