The Law Reform Commission

Report No 32

COMMUNITY LAW REFORM FOR THE AUSTRALIAN CAPITAL TERRITORY: SECOND REPORT

- **Loss of Consortium**
- **Compensation for Loss of Capacity to do Housework**

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The Law Reform Commission is established by section 5 of the Law Reform Commission Act 1973 for the purpose of promoting the review, modernisation and simplification of the law. The first Members were appointed in 1975. The offices of the Commission are at 99 Elizabeth Street, Sydney, NSW, Australia (Tel 02 231 1733) and Royal Insurance Building, 25 London Circuit, Canberra, ACT, Australia (Tel 062 47 2166).

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Terms of Reference

COMMUNITY LAW REFORM PROGRAM FOR THE AUSTRALIAN CAPITAL TERRITORY

I, GARETH EVANS, Attorney-General of Australia, HAVING REGARD TO

(a) the functions of the Law Reform Commission (the Commission) under the *Law Reform Commission Act 1973* (the Act);

(b) the provision made in section 6 of the Act for the Commission to suggest to the Attorney-General matters to be referred to the Commission; and

(c) the desirability of involving the community of the Australian Capital Territory in the reform of the laws of that Territory,

HEREBY REFER to the Commission the following program, to be known as the Australian Capital Territory Community Law Reform Program:

1. The Commission is to call for suggestions from members of the public as to laws of the Territory that should be reviewed and for proposals for their reform;
2. The Commission is to consider such suggestions and report on them to the Attorney-General;
3. Where it appears to the Commission that a suggestion relates to a matter on which it is desirable for the Attorney-General to issue to the Commission a specific reference under the Act the Commission is to include in its report a recommendation to that effect;
4. Where it appears to the Commission that a suggestion discloses the desirability of an amendment or amendments to a law of the Territory and a conclusion to that effect is possible without an extensive investigation, the Commission is to report to the Attorney-General to that effect indicating the nature of the amendment or amendments it considers desirable.

DATED this 21st day of February, 1984.

Gareth Evans

Attorney-General

Participants

The Commission

The Division of the Commission constituted under the Law Reform Commission Act 1973 to deal with this Reference comprised the following members of the Commission:

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Summary

1. This is the second report in the Community Law Reform Program for the Australian Capital Territory. One suggestion which has been made under the Program is that the action for loss of consortium should be abolished.

2. The action for loss of consortium allows a husband (and only a husband) to recover damages for the loss of his wife's companionship and services if she is negligently injured by someone else. This report examines the operation of this form of action and concludes that it should be abolished.

3. This will leave an important gap in the law: the action for loss of consortium is at present one of the few, inadequate, ways in which the loss of capacity to do housework can be compensated. To cover this gap, the law should be amended to provide that, if a person is incapacitated from performing unpaid housework because of the negligence of another, the injured person should be properly compensated for that loss of capacity. Unpaid housework should be valued on the basis of gross median weekly earnings unless the parties can prove that a different rate should apply.

1. Introduction

The community law reform program

1. This is the second report by the Commission under the Community Law Reform Program for the Australian Capital Territory. The background to this program was detailed in the first report.[1] One suggestion received by the Commission, and noted in the first report[2], was that the loss of consortium action should be abolished. That suggestion is the subject of this report.

Assistance to the commission

2. The Commission's initial proposals on this project were published in 1984 in a consultative paper.[3] This paper was widely circulated within the Australian Capital Territory and a number of useful submissions were obtained from, amongst others, the Department of Territories, the National Roads and Motorists Association, one of the largest insurers in the Territory and the Insurance Council of Australia Limited. General support was evident for the Commission's proposal to abolish the right of action for loss of consortium. In addition, the Commissioner in charge of the project had led a seminar at the Australian National University Law School in March 1985, where a useful and constructive debate on the Commission's proposals took place.

1. Australian Law Reform Commission, *Community Law Reform for the Australian Capital Territory, First Report* (ALRC 28) AGPS, Canberra, 1985, ch 1.
2. id, para 19.
3. Australian Law Reform Commission, Consultative Paper: *Loss of Consortium* (ACTLR3) 1984.

2. Loss of Consortium

Assessment of the action

A curious cause of action

3. The loss of consortium action (known as *per quod consortium amisit*) is an action brought by a husband for compensation against a person who has negligently injured his wife with the consequence that the husband is wholly or partly deprived of his wife's 'consortium'. 'Consortium' means the benefits provided by a wife to a husband and includes the household work performed by the wife and the companionship and support she provides. Its meaning is not precisely clear but will be described more fully below. The action is, in modern times, a curiosity in two respects:

- it is only available to husbands, not to wives[1], except in South Australia[2];
- the underlying historical rationale of the action was that a husband had a proprietary right in his wife and that a damaged wife was analogous to damaged property.[3]

These two points make examination of the law, with a view to reform, imperative.

A related action: loss of employee's services

4. There is a closely related action (*per quod servitium amisit*)[4] under which an employer can claim for losses incurred as a result of injuries negligently inflicted on his or her employee.[5] The action for loss of consortium and for loss of an employee's services are often dealt with together by law reform agencies.[6] This is because the actions are so closely allied and, indeed, the consortium action may be an off-shoot of the employer's action (in that a wife has been treated by the law as a type of unpaid servant).[7] Despite their common origins, and although both share the handicap of being out-of-step with modern views about compensation, the arguments for and against abolition of each are somewhat different. Abolition of the loss of consortium action raises the question whether family members of an injured person ought to be able to claim for the losses they have suffered as a consequence of the disablement, or whether losses should only be claimed by the accident victim personally. Abolition of the employer's action raises, amongst others, the questions whether the employer (or indeed any other person or agency who renders assistance to the injured party) should be able to recover from the tortfeasor the costs of providing that assistance. The employer's (and other person's) right to compensation become complicated by issues such as contributory negligence of the employee,

1. See *Best v Samuel Fox & Co Ltd* [1952] AC 716; *Wright v Cedzich* (1930) 43 CLR 493.
2. Wrongs Act 1936 (SA) s 33. A similar proposal was made in Tasmania but has not been implemented: Tasmanian Law Reform Commission, Report No 13, *Discrimination on the Grounds of Sex*, 1977, para 7.
3. P Brett, 'Consortium and Servitium – A History and Some Proposals' (1955) 29 ALJ 321, 322; *Blackstone's Commentaries*, 15th edn, Oxford Clarendon Press, 1809, vol 3, 143; *Best v Samuel Fox & Co Ltd* [1952] AC 716, 731 (Lord Goddard).
4. For an account of this action see H Luntz, *Assessment of Damages for Personal Injury and Death*, 2nd ed, Butterworths, Sydney, 1983, para 10.3.21; see also Brett, 389, 428.
5. The action is not limited to losses incurred in respect of *domestic* servants: *Commissioner for Railways (NSW) v Scott* (1958–59) 102 CLR 392; cf the position in the United Kingdom: *Inland Revenue Commissioners v Hambrook* [1956] 2 QB 641.
6. eg UK Law Reform Committee, Report No 11, *Loss of Services* (Cmnd 2017) 1963 (UK Report); Law Commission (UK), Report No 56, *Report on Personal Injury Litigation – Assessment of Damages*, 1973 para 115–22; Royal Commission on Civil Liability and Compensation for Personal Injury, *Report*, 1978, (Pearson Report) vol 1, para 445–7.
7. See eg *Lynch v Knight* (1861) 9 HLC 577, 598–9; 11 ER 854, 863 (Lord Wensleydale).

whether if, for example, sick pay has been provided to the accident victim, the employer's compensation should be assessed net of tax, to what extent social security benefits received by the employee should be taken into account, joinder of actions and other problems.[8] The employer's action does not, but the loss of consortium action does, involve compensation for loss of 'society', that is, loss of companionship, sexual relations and other less tangible benefits arising out of a relationship. The latter is unique in this respect. This report does not deal with the employer's action.

Heads of recovery

5. *Heads of recovery.* Consortium loss by a husband has been broadly defined as 'the material consequences of the loss or impairment of his wife's society, companionship and service in the home and the expense of her care and treatment incurred as the result of the injury'.[9] This can be broken down into two elements:

- loss of services, encompassing domestic work, child rearing and other household services and, possibly, services provided by the wife in the husband's or a family business[10];
- loss of comfort and society, which include support, companionship and sexual relations, but only in so far as their deprivation brings about a 'material and temporal', as distinct from a 'spiritual', loss.

Occasionally, medical expenses, incurred by the husband on behalf of his wife, are included in a loss of consortium action. But usually such expenses are included in the wife's own claim and are almost always not paid until the compensation claim is finalised. They are then paid directly by the defendant's insurance company to the doctor or hospital. Husbands have also claimed other 'caring' and related expenses, including earnings lost due to attending to her accident-created needs.[11] The loss of consortium action thus compensates husbands for a mixture of tangible, economic losses and intangible losses. The intangible losses are conveniently called 'loss of society'.

6. *Loss of society.* It is the second element that has given rise to the most difficulty in the courts. No attempt is made to assess the quality of a particular relationship in these cases, presumably because such an inquiry is practically impossible. It has been said that distress, emotional shock and diminished happiness suffered by the husband in witnessing his wife's continued disablement do not entitle him to compensation.[12] Yet in one case[13] a husband was able to claim compensation because he had to endure the society of a woman who was in a perpetual state of depression as a result of the accident. In discussing deprivation of sexual relations the courts have admitted that separating the 'material and temporal' element from the 'spiritual' element is difficult.[14] One may well ask whether these categories are exhaustive, if any certain meaning can be ascribed to them in the first place. It has been held that the loss of the opportunity to have children is a material loss capable of being compensated[15] but the court did not address itself to the fact that people generally engage in sexual intercourse for purposes other than procreation. This seems to have been recognised in other cases[16], though judges generally approach the task of quantifying the loss of the material or temporal component of sexual intercourse with some distaste.[17] In these cases, the courts find themselves unwittingly entering into the unfamiliar territories of psychology, sociology, sexology and economics

8. See UK Report, para 5–16.
9. *Toohey v Hollier* (1955) 92 CLR 618, 627.
10. *Smee v Tibbetts* (1953) 53 SR (NSW) 391.
11. *Parkhill v Qualmer* (1887) 3 WN (NSW) 131.
12. *Birch v Taubmans Ltd* (1957) 57 SR (NSW) 93, 99; *Toohey v Hollier* (1955) 92 CLR 618, 624.
13. *Markellos v Wakefield* (1974) 7 SASR 436.
14. 'Temporal' loss has been said to mean the kind of damage which was recognised in the temporal, as opposed to the ecclesiastical, courts: Brett, 431. This explanation does not make the meaning of the words any clearer.
15. *Birch v Taubmans Ltd* (1957) 57 SR (NSW) 93.
16. *Shutt v Extract Wool & Merino Co Ltd* (1969) 113 Sol Jo 672.
17. See eg *Bagias v Smith* (1979) FLC 90-658.

without proper advice in these fields.[18] An inquiry into the material and temporal, as opposed to the spiritual, aspects of loss of society may be appropriate in a philosophical discussion, but it is puzzling in the context of claims for accident compensation.

7. *Economic losses.* The medical and loss-of-service components of consortium actions have given rise to less difficulties in the courts because they can be identified and are measurable, albeit with some difficulty in the case of some household services. The cost of employing domestic help clearly is recoverable and is easily measured. Other services, such as pre-school education of children and other parental tasks, are compensable but less easy to measure.

Reforming the action

Reform options

8. There are 2 options for reform: to equalise the action, as in South Australia[19], so that it is available to wives as well as husbands; or to abolish the action altogether, as in New South Wales.[20]

Equalising the action

9. *Removal of discrimination.* The obvious advantage of equalising the action is that it would remove its most objectionable feature – its discriminatory treatment of wives. The Commission is obliged to ensure, so far as practicable, that laws are consistent with the International Covenant on Civil and Political Rights.[21] Article 26 provides that 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law .....' The practical effect of equalising the action would be to provide compensation to wives who have suffered loss of consortium when their husbands are injured. The elements of consortium would be the same as at present and it would be the court's task in a particular case to assess what 'services' and 'society' the wife has been deprived of and then place a money value on those losses.

10. *Remaining elements of discrimination.* Equalising the action would eliminate formal discrimination against wives. But it has been argued that an equalised loss of consortium action would not in fact operate equally because the amount of damages awarded to husbands for the loss of wives' services would tend to be greater than damages awarded to wives in equivalent actions.[22] This is because, as a rule, the economic consequences of losing a wife's services in the home are greater than losing a husband's domestic services. This argument by itself does not necessarily indicate that the action should not be equalised. Equalising would remove formal discrimination and allow claims by both husbands and wives to be assessed on the same basis. However, a further argument against equalising the action, based on discrimination, is that the action would only be available to married people. A possible solution to this would be to allow such claims on a non-discriminatory basis, that is, they could be available to anyone who is adversely affected by injuries negligently inflicted on a person.

11. *A universal loss of consortium action?* In an ideal compensation scheme, people who are adversely affected by accidents, whether to themselves or to those with whom they are associated, should be able to claim for their losses. However, both from a legal point of view and from an economic perspective, the line must be drawn somewhere or the legal and economic burden of compensating people would be too great for the community to bear. Even if consortium-type losses were only claimable by immediate family members (analogous to the class of statutory claimants in fatal accident cases) the extra burden on the compensation system would be considerable, with consequent rises in in-

18. For a discussion of some of these issues see AC Riseley, 'Sex, Housework and the Law' (1981) 7 *Adelaide LR* 421; KA Clarke & AI Ogus, 'What is a Wife Worth?' (1978) 5 *British Journal of Law and Society* 1.
19. Wrongs Act 1936 (SA) s 33.
20. Law Reform (Marital Consortium) Act 1984 (NSW).
21. Law Reform Commission Act 1973 (Cth) s 7(b).
22. Riseley; M Thornton, 'Loss of Consortium: Inequality Before the Law' (1984) 10 *Sydney LR* 259.

surance premiums. In the United Kingdom it has been recommended that in fatal accident cases (but not in injury cases) the family members should be compensated not only for the economic consequences of the loss of the deceased (as at present) but also for the loss of society they have suffered.[23] This recommendation has not been implemented, presumably because it was thought that the cost would be too high. Instead a fixed sum for bereavement suffered by a spouse or parent – a different concept from loss of society – is now allowed in the United Kingdom.[24]

12. *Secondary claims.* The loss of consortium action is a secondary claim, that is, the court has to decide what losses A has suffered as a result of injuries negligently inflicted on B by C. Negligence cases are usually primary actions, that is, they are concerned with assessing B's losses. Secondary claims are not unique to loss of consortium cases. When a person is negligently killed, members of the family are entitled to claim compensation for resulting economic losses[25]: this is a well known example of a secondary action. In these cases the court has to decide what one person (the deceased) was worth in money terms to the family. In the Australian Capital Territory fatal accident claims are limited to the economic losses suffered by the family and do not extend to intangible losses such as bereavement or loss of society.

13. *Objections to secondary claims.* Assessing the worth of one human being to another is unavoidable in fatal accident cases. However, such an assessment may be distasteful when the victim is still alive, particularly when the court's task is to assess not only the economic consequences to the claimant of the victim's injuries but also to measure in money what the victim's companionship and society were worth. Other arguments have been put forward against secondary claims.[26] They add to the costs and the complexity of litigation arising out of an accident. They are necessarily arbitrary in allowing some people (in the immediate case, husbands) to claim, but not others, such as children, de facto partners, close house companions or indeed wives, who may be just as disadvantaged by the accident victim's plight. Secondary claims, depending as they do on a particular relationship, may result in over-compensation if the relationship ceases shortly after damages are awarded.[27] Indeed, the relationship may cease as a direct result of the accident. In such a case there is over-compensation, because damages for loss of consortium are assessed on the basis that the marriage will continue and that the husband will continue to suffer the various deprivations for which compensation is awarded.[28]

14. *An anachronism.* A final objection to retaining loss of consortium is that it is an anachronism and is generally regarded as a quaint hangover from the past.[29] Its historical basis was that wives were to be treated as the equivalent of property or, alternatively, as servants.[30] Rather than perpetuate such an action by attempting to breathe new life into it, it is preferable to consign it to history.

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23. Pearson Report, vol 1, para 424.
24. Administration of Justice Act 1982 (UK) s 1A. There are similar provisions in South Australia (Wrongs Act 1936 (SA) s 23a, 23b) and Northern Territory (Compensation (Fatal Injuries) Act 1974 (NT) s 10(3)(b)).
25. Compensation (Fatal Injuries) Ordinance 1968 (ACT).
26. MR Chesterman, Research Paper, *Accident Compensation – Proposals to Modify the Common Law,* NSW Law Reform Commission, Sydney, 1983, para 3.2.1 – 3.2.4.
27. This is a problem which is not exclusive to secondary claims and can arise in primary claims too. It is a product of the lump sum system of awarding common law damages.
28. The court may have to speculate whether the marriage is going to continue and for how long: *Kealley v Jones* [1979] 1 NSWLR 723. It is clear that, if the marriage has in fact broken up by the time of the trial, the court must only assess for loss of consortium during the period of the marriage: *Parker v Dzundza* [1979] Qd R 55. If the injuries arising from the accident have caused the marriage to break up, the injured party may be able to claim for the breakdown of the marriage as part of his or her general damages: *Hird v Gibson* [1974] Qd R 14. However, the non-injured partner cannot claim for the break-down of the marriage in the secondary, loss of consortium action: *Parker v Dzundza.*
29. In *Best v Samuel Fox & Co Ltd,* in which the House of Lords held that the loss of consortium action does not extend to wives, Lord Goddard commented that the action in favour of husbands was an anomaly: [1952] AC716, 733.
30. Brett 322; *Blackstone's Commentaries,* vol 3, 143; *Lynch v Knight* (1861) 9 HLC 577, 598–9; 11 ER 854, 863 (Lord Wensleydale).

15. *Recommendation.* The loss of consortium action is discriminatory and an anachronism. Its discriminatory character could be eliminated by making it available to wives as well as husbands, but this would either involve discriminating against non-married people or, if the action were made available to a wider group than husbands and wives, impose too great a burden on limited compensation funds. The action should be abolished.

Consequences of abolition

Economic losses

16. There would be two consequences of abolishing loss of consortium claims:

- husbands would be deprived of compensation for loss of society to which they have previously been entitled;
- husbands would be deprived of compensation for the economic consequences suffered by the family as a result of the wife's disablement. This deprivation has an impact on the family as a whole.

The first consequence is unfortunate but one which a rational compensation scheme must accommodate for the reasons already discussed. There is no reason why husbands should be in a unique and privileged position in being able to claim for loss of society. The second consequence is far more serious and remedial action would have to be an integral part of any reform of the law to abolish the loss of consortium action.

Medical, etc, expenses

17. One issue that may arise if the loss of consortium action is abolished relates to medical expenses. At present, the husband who pays his injured wife's medical expenses can claim for these in a loss of consortium action.[31] In practice, in almost all cases, medical expenses are not actually paid before a negligence action is settled or determined by a court. After settlement or court order in favour of the plaintiff, the defendant's insurance company pays the medical bills directly. Therefore the problem of recouping medical expenses paid by the husband generally does not arise. Even if it did, it may be possible for the husband to claim them without bringing a loss of consortium action.[32] Alternatively, the wife could claim them even though she herself has not had to pay them.[33] Accordingly it is not necessary to make specific provision for recovery of medical expenses in the absence of a loss of consortium action. Another small problem which may arise from abolition of the loss of consortium action is that it has been held in the past that a husband can claim for loss of earnings consequent on attending to his wife's accident-created needs.[34] The proposals in chapter 3 will not cover this type of loss. Such a loss would be regarded as too remote in any normal negligence claim and it is probable that the only reason why such an item was successfully claimed is because of the existence of the anomalous loss of consortium action. Such claims are very rare and no remedial action needs to be taken to preserve this type of compensation.

31. It is not clear if a husband's entitlement to be reimbursed for medical expenses incurred for his wife's treatment is based on the loss of consortium action or on an independent claim based on the duty to maintain: see Luntz, para 10.1.04.
32. id.
33. *Griffiths v Kerkemeyer* (1977) 139 CLR 161.
34. *Smee v Tibbetts* (1953) 53 SR (NSW) 391.

3. Damages for loss of housework capacity

Primary and secondary claims: the present law

Secondary claims

18. The law of negligence in relation to secondary claims in the Australian Capital Territory is illogical. Apart from the action by an employer for losses arising out of injuries negligently inflicted on an employee[1], there are two types of secondary claims available. The first is the loss of consortium claim, discussed in chapter 1, in which a husband may claim for the economic and non-economic (loss of society) consequences resulting from injuries negligently inflicted on his wife. The second is the action available in fatal accident cases in which the family may be compensated for the economic consequences of the death of a family member.[2] Compensation in this type of claim is restricted to economic loss and does not include damages for bereavement or loss of society. Thus, under the present law, a husband can claim for loss of society if a wife is injured, but not if she is killed, and can claim for the economic consequences of her injuries or death. Other family members cannot claim for loss of society, nor can they claim for the economic consequences of injury to one of their members, but they can claim for these losses if the member is negligently killed. There is no reason in principle why these distinctions should exist.

Primary claims

19. Abolition of the loss of consortium action will remove one of these illogicalities. But, as pointed out in chapter 1, it will leave a gap. The economic consequences of the loss of a wife's services will be compensated if she is negligently killed, but not if she is injured. The logical solution to this is to allow a primary action to be brought by her for the losses arising from her injuries. Such an action is available under the present law, but because services in the home are not paid for, the amount of damages awarded is small. At present, if a wife is injured as the result of negligence, she can claim for lost wages if she was working, medical expenses and for those items of general damages which the law allows such as pain and suffering, loss of amenity and loss of expectation of life. If she was not working for wages or salary at the time of the accident, she can claim for the lost opportunity to re-join the workforce if her injuries have prevented that happening. However, as explained below, the law has been parsimonious when it comes to assessing her loss of working capacity in the home.

Compensation for loss of capacity to do housework

Housework defined

20. The types of work which come within the compass of household work should not be artificially confined. The proposed legislation attached to this report simply uses the expression 'work in connection with a household'[3]: this covers any work which is performed around the home, ranging from the routine care of children, cleaning, cooking and house management to less common jobs such as maintenance, clothes making, do-it-yourself work and other jobs which people choose to do themselves rather than pay

1. See para 4.
2. Compensation (Fatal Injuries) Ordinance 1968 (ACT).
3. Appendix A, proposed s 31(1).

others to do. The type of work must be related to home maintenance and management, so that work associated with running a business would not be included. If a person is unable to do this latter type of work because of a negligently inflicted injury, the law of negligence already caters for such claims.

Loss of capacity to do unpaid work

21. When the courts are faced with a claim for compensation for the loss of capacity to perform work which is not remunerated, they have generally concluded that such a loss is not an economic one. This problem affects not only housework but other types of unpaid work:

- A recent case in New South Wales illustrates the problem. A Marist brother was negligently injured. His principal job in the Marist community was teaching, but he was not paid a salary. It was held that there should be no compensation for loss of working capacity because the brother's injuries were not productive of financial loss. To the extent that the plaintiff had suffered a loss of satisfaction in no longer being able to render gratuitous services, compensation was awarded as part of general damages.[4]

Loss of capacity to do unpaid housework

22. Similarly, unpaid housework has not been recognised as being of financial worth.[5] A wife's claim for this type of compensation has been either disallowed to prevent double recovery (the loss is instead claimed by the husband[6]) or it has been treated as worth very little because no wages are paid for housework.[7] Some recognition has been given in primary claims to the intangible element of pride and satisfaction in housework which is compensated as loss of amenity[8] but almost no recognition to its economic component, with one or two exceptions. One exceptional instance of recognition of the economic component is the following passage in a High Court judgment:

> The expression 'loss of earning capacity' does not precisely describe this element of loss in its modern application. What is measured is the impairment or destruction of the capacity to engage in work that is economically valuable, whether it would be paid for in money or not. It is a loss of working capacity sometimes referred to as loss of economic capacity. There is a discernible factor of economic loss in loss of ability to do non-earning work of economic value ... A woman who loses her capacity to make the usual contributions of a wife and mother in a household suffers great economic deprivation. Actions for loss of services correctly treat this as economic injury, but as a loss to the husband on the archaic view of the husband as master or owner of his wife. The economic loss is one of the wife or mother. It is her capacity to work, either in the household or outside, which is affected ...[9]

The wider issue – the question of the appropriate way of compensating loss of the capacity to do unpaid work – needs to be considered. But it is beyond the scope of this report, which deals with the problem of unpaid housework because of its connection with the loss of consortium action.

Economic worth of unpaid housework

23. Whilst the courts have given inadequate recognition to the economic worth of unpaid housework (at least when compensation is sought by the person who has suffered that type of loss), economists have recognised housework as being a significant sector of the total economy.[10] Parliaments, through legislation, have also recognised this type of

4. *Donnelly v Pandoulis* (unreported) Supreme Court of NSW (19 February 1986).
5. R Graycar, 'Compensation for Loss of Capacity to Work in the House' (1985) 10 *Sydney LR* 528; J Keeler, 'Three Comments on Damages for Personal Injury', (1983–84) 9 *Adelaide LR* 385, 392–412.
6. eg *Simmonds v Hillsdon* [1965] NSWR 837; *Maiward v Doyle* [1983] WAR 210.
7. *Burnicle v Cutelli* [1982] 2 NSWLR 26, 27 (Reynolds JA).
8. id.
9. *Sharman v Evans* (1977) 138 CLR 563, 598 (Murphy J).
10. See generally M Edwards, *The Income Unit in the Australian Tax and Social Security Systems*, Institute of Family Studies, Melbourne, 1984.

work. For example, the Family Court is given the task of assessing the homemaking role of the unpaid spouse when it has to decide on the apportionment of family assets between spouses on the breakdown of marriage.[11] The Family Court's task is somewhat different from that of a court which actually has to place a value on houseworking capacity. Nevertheless, the Family Court does give proper recognition to homemaking activities as a contribution to the family's wealth. Other legislative recognition of the economic worth of this type of work is to be found in statutory compensation schemes, such as the Victorian Motor Accidents Act 1973.[12] In the United Kingdom, it has been recommended that claims for lost capacity to perform unpaid housework should be properly compensated.[13]

Some problems

24. *Loss of amenity or financial loss?* Mention has already been made that some courts have recognised that a homemaker's loss of capacity to work in the home is a loss to the claimant, but a non-economic one. It is seen as a loss of amenity, equivalent to losing the ability to taste, smell or enjoy a hobby.[14] Yet in fatal accident cases, where the family can claim for the economic consequences of the loss of a family member, the courts have accepted that, if the homemaker is killed, proper compensation should be paid. In one case at least, some attempt was made to put a value on the unique services which a mother provides to her children.[15] Similarly, in loss of consortium claims, the economic worth of unpaid housework is recognised. There is no reason of principle why, in primary claims, the courts should continue to deny that this type of work has any value.[16] While such a distinction remains, a person who earns wages for housework (for example, by working as a maid or housekeeper) will be compensated at a higher rate than a person whose housework is only in his or her own home. But the work performed is, in principle, the same. If the work is the same and has economic benefits, the basis of compensation for loss of capacity to do that work should not, in principle, be different depending on whether it happens to be paid for or not.

25. *Lost capacities to do paid and unpaid work.* Mention has already been made of the fact that an injured person who is performing unpaid work in the home can, under the present law, claim for lost *earning* capacity. The courts will allow compensation for this deprivation but take into account the fact that the capacity was not being used to earn.[17] The victim can in effect claim for the loss of the opportunity to go out into the workforce at some later time. But the result is that compensation for this component of loss is heavily discounted.[18] The present law makes no distinction between someone who works in the home and a person who simply chooses not to work. The same discounting applies to both: it is said that they are not using their earning capacity and should therefore receive less compensation for the loss of that capacity. How will the proposed expansion of a primary claimant's entitlement to compensation be reconciled with the court's approach to lost earning capacity? Courts should allow a component of compensation for lost opportunity to rejoin the paid workforce, as at present, *and* proper compensation for the loss of capacity to perform housework.

26. *Loss to victims or families?* When a person suffers a loss of earnings due to another's negligence it is easy to see the victim's loss as his or her own. Wages are lost which otherwise would have been enjoyed by the plaintiff. As soon as the element of wages is removed, difficulties arise because the courts generally see a loss of capacity to

11. Family Law Act 1975 (Cth) s 79(4)(c).
12. Motor Accidents Act 1973 (Vic) s 30(g).
13. Law Commission (UK), Report No 56, *Report on Personal Injury Litigation – Assessment of Damages*, 1973 para 157; Royal Commission on Civil Liability and Compensation for Personal Injury, *Report* HMSO, London, 1978 (Pearson Report) vol 1, para 358.
14. Graycar, 548–9.
15. *Regan v Williamson* [1976] 1 WLR 305.
16. Damages awarded to injured single wage-earning women are very much more than those awarded to injured married unpaid women: Keeler, 401–2.
17. *Mann v Ellbourn* (1974) 8 SASR 298.
18. See Keeler, 401.

do unpaid work as a loss, not to the victim, but to those who benefited from the 'voluntary' work. The *victim's* only losses, it is argued, are the loss of satisfaction (that is, a non-pecuniary loss) in rendering such services to others and the cost of finding someone to perform the services which the victim previously rendered to him or herself. There is no denying that the beneficiaries of housework are the family or household members. It is, in effect, the whole family or household which will suffer the economic consequences of the destruction of this capacity to work. Is it then appropriate to provide compensation to the primary claimant for these losses which are measurable by reference to what the whole family has lost? Or is it more appropriate, as discussed earlier, to extend the fatal accidents legislation to allow dependants to claim for the economic consequences of not only the death but also the disablement of a family member? The latter would be logical in a perfect compensation scheme but would be too radical a change to well-established causes of action and would be too expensive to finance.[19] As the law is at present, if the breadwinner is disabled and his or her family suffers as a result, an action for compensation is brought by the injured breadwinner, not by the family in a secondary claim. So, too, where the person performing unpaid housework is injured, the action should be a primary one.

27. *Uncertainty of present law.* Some attempts have been made to develop the principle established in the case of *Griffiths v Kerkemeyer*[20] to cover the type of loss being here discussed, but without much success. The principle established in that case was that a victim's accident-created needs were to be compensated by a payment to the victim whether they were paid for or not. So, if a family member rendered free nursing services to the victim, the victim could nevertheless claim for the market cost of those services. The short step of extending this principle to gratuitous services rendered *by* (rather than *to*) the accident victim has been both accepted, notably in *Hodges v Frost*[21], and rejected in other cases.[22] The law on this point is uncertain.

Recommendation

28. The law should regard loss of capacity to perform unpaid housework as a primary economic loss to the person injured. Accordingly, in association with the abolition of the loss of consortium action, legislation should be enacted enabling negligently injured people to claim compensation for the loss of capacity to perform unpaid housework.

Assessment

The models

29. There are 5 possible models for assessing the value of unpaid housework.[23] For the sake of completeness these will all be discussed, although it will be seen that for practical purposes only one or two would be appropriate for use in a court of law. The reason for a comprehensive treatment of models for assessment is that in the legal world the question of the value of lost capacity to perform household work has been largely ignored.

Replacement cost and itemised cost models

30. *Replacement cost.* The courts are familiar in secondary claims, such as loss of consortium and fatal accident cases, with assessing damages for impairment or loss of the capacity to perform housework. The simplest way of implementing the proposal discussed above would be to spell out in the legislation that damages may be awarded for loss of capacity to perform unpaid work in the household and that damages should be assessed

19. See para 11.
20. (1977) 139 CLR 161.
21. (1984) 53 ALR 373; and see *Cummings v Canberra Theatre Trust* (unreported) Full Court of the Federal Court (18 June 1980); *Daly v General Steam Navigation Co Ltd* [1980] 3 All ER 696; *Maiward v Doyle* [1983] WAR 210 (Wickham J); *Waters v Mussig* [1986] 1 QdR 224.
22. *Burnicle v Cutelli* [1982] 2 NSWLR 26; *Maiward v Doyle* [1983] WAR 210.
23. For replacement cost, itemised market cost and opportunity cost models, see Appendix B.

as if the claim were for the equivalent loss in a fatal accident case with appropriate modifications for partial incapacity. This is what has been recommended in the United Kingdom[24]: the assessment of the loss should be left to the court 'on the basis of what is reasonable'.[25] The valuing of lost capacity to perform housework would be based on obtaining evidence of what it would cost to hire a person or persons from appropriate agencies. This model would be the simplest to implement and would have the merit of being familiar to the courts. On the other hand, this model requires an *ad hoc* decision in each case, with each assessment having to be tailored to the particular work patterns and capacities of the victim.

31. *Itemised market cost.* This model attempts to measure, in a more sophisticated way than the replacement cost model, the functions of a person who does housework. Each function lost or impaired is identified and costed at a market rate. The model has the merit of being precise. It would promote greater equity between similar claims. In particular, it would more accurately reflect the true loss when the injured person, prior to the injury, only performed some of the household tasks. So, too, it would be more accurate when he or she is only partially incapacitated. On the other hand, it would be cumbersome to use in court. It would require evidence of each different task performed by the injured party and then evidence of the market rate for each job – $x per hour for cooking, $y per hour for cleaning, $z per hour for laundry, and so on.

32. *Comparison.* In considering these two approaches attention should be drawn to the similarities and differences in their methods of calculating the value of unpaid household work. Both methods use the market cost (the commercial cost) of labour. The major difference between them is that the market cost method assumes that housework consists of separate functions whereas the replacement cost method assumes that it is a single function. The market cost method uses several commercial rates in assessing the several functions of a homemaker. By contrast, the replacement cost method usually results in the application of the current commercial rate for a housekeeper. Although the market cost method provides greater certainty of measurement from case to case[26], judges and advocates are at least familiar with the replacement cost method when they have been required to measure lost domestic services to third parties in dependency actions. It has been used in England in primary actions by victims.[27] In any event, there is in practice probably little difference in the amount awarded resulting from using the market cost and replacement cost methods. In one Canadian case, the trial judge, evaluated a husband's claim for lost domestic services of his fatally injured wife, using a version of the market cost method. On appeal, the Ontario Court of Appeal overruled the admissibility of evidence as to the economic value of the services rendered by the average Canadian housewife and disagreed with the trial judge's method. The appeal court simply used a replacement cost method (the cost of hiring a housekeeper). The amounts awarded did not differ greatly.[28] On balance, the replacement cost method is to be preferred because of its relative simplicity which will save the cost of long court hearings. Although the market cost method is more precise, compensation in negligence actions is not a precise process, as the economists would perhaps like to see it, but a relatively rough and ready measure of the various losses suffered by the injured plaintiff. The market cost method would introduce an element of spurious accuracy – rather like using a jigsaw when a chain saw would do.

Other models

33. *Opportunity cost.* If a person works at home for no wages, the value of that work can be measured by reference to what that person could have earned in the paid work-

24. Pearson Report, vol 1, para 352–8.
25. id, para 358.
26. See K Cooper-Stephenson & I Saunders, *Personal Injury Damages in Canada*, Carswell, Toronto, 1981, 224.
27. *Daly v General Steam Navigation Co Ltd* [1980] 3 All ER 696.
28. *Franco v Woolfe* (1974) 52 DLR (3d) 355.

force. If that person is then injured so that he or she can no longer work in the house, then a measure of damages for this lost capacity is the loss of the notional wages which could have been earned prior to the accident, assuming that the injuries incapacitate the victim for both housework and paid work. This model, however, measures something other than what has been lost. Its effect would be to compensate highly qualified victims more generously than less qualified people for the same loss of capacity: the capacity to do housework. Further, it takes no account of the particular needs created by the lost capacity. The losses resulting from the loss of capacity to do housework will vary according to the particular injures and to the household arrangements. The High Court case of *Griffiths v Kerkemeyer*[29] provides the judicial lead for measuring impaired domestic capacity by reference to needs created by the injury. Viewed from this perspective, lost capacity to do housework cannot be measured by an opportunity cost approach. Finally, this model overlaps with the already existing compensation for lost earning capacity.[30] There is no question that the injured homemaker should be compensated for lost earning capacity, discounted in the normal way if it was not in fact being used for earning. There should then be a separate item representing lost capacity to engage in household work. If the opportunity cost model were adopted, it would treat homemakers as a group as entitled to full compensation for lost earning capacity and would ignore the loss of capacity to perform unpaid work. This is not satisfactory because it could be seen as discriminatory. It may be asked: why should other groups who are not using their earning capacity to the full not be able to obtain full compensation for loss of that capacity? Rather than using the opportunity cost approach it is preferable to attempt to measure what has actually been lost.

34. *Proportion of breadwinner's earnings.* This model assumes that the work performed in the home is essential for the breadwinner's capacity to earn and that a component of most earnings should be attributed to the unpaid partner. It is analogous to the approach taken by courts under the Family Law Act when a decision has to be made about division of family property upon the breakdown of marriage.[31] It is approriate for dividing assets, but it is arbitrary for the purpose of valuing assets. Like the opportunity cost model, it does not actually measure the capacity that has been lost. Instead it imputes a value which depends upon the extraneous fact of what the paid partner happens to be earning. A doctor's spouse may do less work in the home than a labourer's. Yet, on this model, the doctor's spouse's work would be more highly valued. Because this model is arbitrary, it should not be used.

35. *Flat rate.* The final model prescribes (by legislation) an hourly rate for assessing the value of the lost capacity to perform household work. The advantage of this method of assessment is simplicity. It would not be necessary to adduce evidence of charges by appropriate agencies. All that would be required in a particular case would be evidence of the average number of hours worked per week by the injured plaintiff on unpaid housework. This approach has already been adopted in recent New South Wales legislation (dealing with gratuitous services provided to the plaintiff). There, a rate determined by average weekly earnings is used.[32] (This method incidentally provides a measure of opportunity cost if it is assumed that the homemaker could have earned the average weekly rate in the paid workforce.) But average weekly earnings may be too generous. The average worker does not earn the average wage, but something less. Median weekly earnings more closely reflect the appropriate rate for a replacement housekeeper. For example, in September 1985 the median gross weekly earnings were $321, which is comparable to the figure of $321.23 for homecare ascertained by the Commission.[33] The disadvantage of fixing a rate in the proposed legislation is that it does not allow flexibility. For example, in the case where the injured person was capable of doing very skilled work,

29. (1977) 139 CLR 161.
30. See para 20, 25.
31. See Australian Law Reform Commission, Discussion Paper No 22, *Matrimonial Property Law*, Canberra, 1985 para 1.
32. Motor Vehicles (Third Party Insurance) Act 1942 (NSW) s 35C.
33. Source: Home Care Service of NSW.

such as furniture making or covering, a fixed rate could result in under-compensation. If this method is adopted, there should be a provision allowing a higher rate to be substituted in appropriate cases.

Gross or net wages?

36. Should a person who has lost the capacity to perform unpaid housework be compensated on the basis of gross or net earnings? Although damages for personal injuries which compensate for lost paid working capacity are calculated on the assumption that the plaintiff has been deprived of net (after tax) wages[34], the compensation which is awarded for lost capacity to perform unpaid housework is intended to be used for paying a substitute housekeeper. Accordingly, the amount should be calculated without deducting what would have been paid in tax.[35]

Recommendation

37. In the legislation which which provides for compensation for the loss of capacity to perform unpaid household tasks, assessment of an hourly rate should be based on the gross median weekly earnings. In addition, there should be an overriding provision whereby the plaintiff can argue that the fixed rate should not apply in the special circumstances of the case.

Other matters

Limiting costs of reform

38. *Increased claims.* A practical problem must be addressed: what effect will the reforms proposed in this report have on the insurance system? The Commission is acutely aware of the high cost of compulsory third-party premiums in the ACT.[36] The proposals contained in this Report cover not just motor accidents but other accidents as well.[37] Nevertheless, the bulk of claims from people disabled from performing household work will probably arise out of motor accidents. This is because most serious accidents, particularly amongst non-employees, are motor accidents which, in turn, generate relatively high awards of damages. Negligence claims in such cases have a high success rate. It has not been possible to find statistics on past loss of consortium cases which would give some guidance to the number of claims which the proposed reform would generate. Although the claims on the insurance system will be diminished by abolition of the loss of consortium action, there will be a corresponding, or perhaps greater, number of claims by injured household workers.

39. *Who benefits?* The people who will benefit from the proposed reform will be those who, at present, do least well from the compulsory third party system. Everybody pays the same premium irrespective of risk or ability to pay. Yet a non-earner is, under the present law, not likely to be awarded as high damages as someone in the paid workforce. Similarly, women pay the same premiums as men even though there is evidence that men make much higher claims on the insurance funds than do women.[38] Consequently there is

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34. *Cullen v Trappell* (1980) 29 ALR 1.
35. cf *Warringah Shire Council v Jamieson* (unreported) Court of Appeal, NSW (19 December 1980) where it was held that, in relation to services voluntarily provided to the plaintiff, the gross rate should apply.
36. Motor Traffic Ordinance 1936 (ACT) s 51. The present rate (July 1986) for a private motor vehicle is $243 per year.
37. Accidents in the work place are covered by compulsory insurance: Workmen's Compensation Ordinance 1951 (ACT) s 18. Other accidents may or may not be covered by insurance.
38. eg, in Victoria, the AAMI insurance group requires lower premiums and lower excess rates from women than from men under 24 when writing comprehensive insurance policies. The group believes from their statistics that women subsidise men in the motor vehicle comprehensive insurance system. Further, statistics gathered by the New South Wales Law Reform Commission show that, in the under 30 age group, the number of male accident victims exceed very significantly the number of female accident victims: NSW Law Reform Commission, *A Transport Accident Scheme for New South Wales* vol 2, App A, Table A27, 273.

an argument of equity that non-earning women (assuming that this group will be the principal beneficiaries of the proposed reform) should be paid higher compensation than they presently are able to claim. Admittedly, this argument is more appropriate to loss insurance than liability insurance, but the general point is valid.

40. *Limiting compensation.* The proposed reform will generate damages claims which have hitherto been absent. In such claims a number of factors will have the effect of keeping compensation at a reasonable level.

- Some of the plaintiff's work, particularly fulfilling parental duties, are less in demand as time progresses.
- In large families the injured person's contribution may be a fraction of the total work.
- The possibility that the plaintiff would have gone out to work at some future time may lessen the period for which compensation for loss of homemaking capacity is sought.
- Whereas in the loss of consortium action contributory negligence did not operate to lower the husband's entitlement to damages[39], contributory negligence will be available in a primary action by the injured plaintiff for lost capacity to perform housework.
- Husbands' claims for loss of society will be eliminated once and for all by abolition of the loss of consortium action.

Loss of both paid and unpaid working capacity

41. Empirical research has shown that in a nuclear family, even when a woman has a full-time job, she nevertheless bears the brunt of the housekeeping work so that she in effect has two jobs.[40] There are households where the housework is equally shared between all members other than young children, but this is not the norm. Further, it would seem that all wage earners perform at least some household tasks. How should the proposed legislation accommodate these varying patterns of allocation of domestic tasks? Should an injured plaintiff be able to claim for loss of both paid and unpaid work capacities? In principle these claims should not be limited. If a person has lost two separate capacities to work, then there should be appropriate compensation for each loss. The only argument for not awarding proper compensation to such a person is that the insurance system could not afford to cover such claims or, alternatively, that premiums would have to be raised to an unacceptably high level. Unfortunately it is not possible, because information is not available, to make even a rough estimate of the impact of the present proposal on the insurance system. It may be that the abolition of loss of consortium action and the introduction of a claim for lost capacity to perform household work, in combination with the availability of the defence of contributory negligence, which was not available in loss of consortium claims, will, on balance, have a negligible effect on total insurance outlays. We simply do not know. In the past, fears have been expressed about the inability of the insurance system to cope with expanding negligence liability. These fears have been unfounded. The argument that premiums will inevitably rise has to be balanced against the inequity which presently applies in claims by unpaid workers.

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39. *Curran v Young* (1965) 112 CLR 99.
40. JP Harper & L Richards, *Mothers and Working Mothers* Penguin, Ringwood, 1979; HI Hartmann, 'The Family as the Locus of Gender, Class, and Political Struggle: the Example of Housework', (1981) 6 *Signs: Journal of Women in Culture and Society*, 366; A Game & R Pringle, 'Production and Consumption: Public Versus Private' in DH Broom (ed) *Unfinished Business: Social Justice for Women in Australia*, George Allen & Unwin, Sydney, 1984, 77; E Malos (ed) *The Politics of Housework*, Allison & Busby, London, 1980; L Peattie and M Rein, *Women's Claims: a Study in Political Economy*, Oxford University Press, Oxford, 1983, ch 3.

Single houseworkers

42. Again, a single person should be able to claim for the economic consequences of being deprived of the capacity to look after him or herself. This should apply whether or not the person is also working for wages or salary. Such claims are routinely made and allowed in negligence cases.[41]

'Rallying round'

43. Since the decision in *Griffiths v Kerkemeyer*[42], there have been some decisions in New South Wales which have attempted to limit compensation for gratuitous services rendered to the accident victim by members of the family on the argument that, when a tragedy strikes, family members must be expected to 'rally round'.[43] These cases have been followed in Western Australia[44] and Queensland.[45] The argument is sometimes put that if the plaintiff benefited from various household services before the accident, then to the extent that these services continue after the accident no compensable loss is identified.[46] Such an argument has no bearing on the deprivation which is suffered by someone who can no longer render services to others. The 'rallying round' decisions have been criticised.[47] In relation to loss of services rendered by the accident victim – which is the issue under consideration here – the 'rallying round' argument deprives that person of compensation on the basis of an assertion which is both unquantifiable and speculative. The 'rallying round' principle, in this context, ignores the fundamental principle that an injured person is deprived of a working capacity which is something of economic value. The value of that working capacity can be assessed by reference to the cost of replacement labour. The loss of capacity persists irrespective of whether the family rallies round or whether the injured person applies the compensation towards hiring substitute labour. To diminish compensation on the basis that the family members will 'rally round' ignores the fact that permanently injured people may experience many different living arrangements over time. One cannot predict how long rallying round will last. It follows that the amount of compensation for loss of this working capacity should not be affected by the decisions of the injured person and his or her family as to how the household tasks will be performed in the future. The 'rallying round' principle in its application to services rendered to the victim has, in any case, been nullified in relation to motor accidents by recent legislation in New South Wales.[48] This provision recognises that services rendered to the accident victim should be paid for on a proper economic basis using average weekly earnings as the benchmark. A similar recognition of its economic value should be accorded to housework previously performed by the accident victim.

Survival of actions

44. If legislation provides for compensation for loss of capacity to work in the household it will be necessary to make a consequential amendment to the survival of actions legislation[49] to prevent double recovery in the event of the plaintiff dying from his or her negligently-inflicted injuries. If the person dies, the relatives will be able to recover the cost of replacing the deceased's economic contributions to the household. The deceased's estate should not be able to claim the same loss. This parallels the policy which has

41. eg *Sharman v Evans* (1977) 138 CLR 563.
42. (1977) 139 CLR 161.
43. *Johnson v Kelemic* (1979) FLC 90-657; *Bloomfield v Brambrick* (unreported) Court of Appeal, NSW (17 August 1979); *Kovac v Kovac* [1982] 1 NSWLR 656.
44. *Maiward v Doyle* [1983] WAR 210.
45. *Carrick v Commonwealth of Australia* [1983] 2 Qd R 365.
46. H Luntz, *Assessment of Damages for Personal Injury and Death*, 2nd ed, Butterworths, Sydney, 1983, para 4.6.08.
47. A summary of these criticisms appears in Graycar, 564-5: itself critical of the cases limiting compensation in reliance on the 'rallying round' argument.
48. Motor Vehicles (Third Party Insurance) Amendment Act 1984 (NSW).
49. Law Reform (Miscellaneous Provisions) Ordinance 1955 (ACT) Pt II.

prompted the removal of compensation for lost future earnings in the survival of actions legislation in most jurisdictions in Australia.

Appendix A
Draft Legislation

- Draft Law Reform (Miscellaneous Provisions) Ordinance (ACT) 1986
- Explanatory Notes to Draft Law Reform (Miscellaneous Provisions) Ordinance (ACT) 1986

AUSTRALIAN CAPITAL TERRITORY

Law Reform (Miscellaneous Provisions) Amendment Ordinance 1986

An Ordinance to amend the *Law Reform (Miscellaneous Provisions) Ordinance 1955*

Short title

1. This Ordinance may be cited as the *Law Reform (Miscellaneous Provisions) Amendment Ordinance 1986.*[1]

Principal Ordinance

2. The *Law Reform (Miscellaneous Provisions) Ordinance 1955*[2] is in this Ordinance referred to as the Principal Ordinance.

Damages in actions that survive under this Part

3. Section 5 of the Principal Ordinance is amended –

(a) by omitting from sub-paragraph (c)(iii) "and"; and

(b) by adding at the end of paragraph (c) the following:

"; and (iv) do not include damages that may be claimed under section 31".

4. After Part VIII of the Principal Ordinance the following Part is added:

"PART IX – DAMAGES FOR LOSS OF CONSORTIUM AND LOSS OF CAPACITY TO DO HOUSEHOLD WORK

Application

"29. This Part does not apply to a cause of action that accrued before the commencement of this Part.

Loss of consortium action abolished

"30. (1) Where the wife of a person (in this section called the husband) has been injured through the fault of some other person (in this section called the defendant), the liability of the defendant to the husband in respect of the injury to the wife does not extend to include liability for loss of consortium.

"(2) The reference in sub-section (1) to 'fault' includes a reference to breach of statutory duty and any other act or omission that gives rise to a liability in tort and also includes a reference to fault for which the person concerned is vicariously liable.

Damages for lost capacity to do household work

"31. (1) The liability of a person in respect of injury to the person suffered by another person (in this section called the plaintiff) extends to include liability for damages for the loss of capacity to do work in connection with a household.

"(2) It is immaterial that –

(a) the plaintiff was not being paid for doing work of that kind; or
(b) the work that was being done by the plaintiff is being, or has at any time after the injury occurred been, done by a person other than the plaintiff (whether for payment or not).

"(3) The amount of the damages shall be ascertained on the basis of an hourly amount equal to one-fourtieth of the amount last published by the Australian Statistician as the median gross weekly earnings of adult employees in full-time employment in Australia.

"(4) Sub-section (3) does not prevent the court from ascertaining the amount of the damages on some other appropriate basis if the plaintiff satisfies the court that it is proper to do so".

NOTES

1. Notified in the *Commonwealth of Australia Gazette* on

2. No. 3, 1955 as amended by No. 14, 1965; No. 10, 1968; No. 65, 1977; No. 95, 1982.

Explanatory notes to
Draft Law Reform
(Miscellaneous Provisions)
Amendment Ordinance 1985(ACT)

OUTLINE

General

1. This Ordinance amends the Law Reform (Miscellaneous Provisions) Ordinance 1955 to implement recommendations of the Australian Law Reform Commission made in its second report in the ACT Community Law Reform Program, on loss of consortium (ALRC 32).

2. The Ordinance abolishes the right of action for loss of consortium and provides that damages may be claimed in negligence suits for lost capacity to do household work at a rate equivalent to median weekly earnings of adult employees in full-time employment in Australia. Provision is also made for variations of that rate in appropriate cases.

NOTES ON CLAUSES

Clause 1 – Short title

Clause 2 – Principal Ordinance

These clauses set out the short title of this Ordinance and provide that the Law Reform (Miscellaneous Provisions) Ordinance 1955 is the Principal Ordinance.

Clause 3 – Damages in actions that survive under this Part

Section 5(c)(iii) of the Principal Ordinance prevents double recovery for lost future wages in fatal accident cases under both the Compensation (Fatal Injuries) Ordinance 1968 (ACT) and Part II of the Principal Ordinance. This clause, similarly, excludes damages under proposed section 31 (damages for lost capacity to do household work) from being claimed in a 'survival of actions' claim because such damages can already be claimed by the dependant family under the Compensation (Fatal Injuries) Ordinance 1968 (ACT). (Report, para 44)

Clause 4 – New Part

This clause inserts a new Part IX at the end of the Principal Ordinance.

Proposed section 29 – Application

This clause provides that proposed s 30 and 31 do not apply to causes of action that accrue before the commencement of this Part. Those causes of action will be dealt with under the existing law.

Proposed section 30 – Loss of consortium action abolished

The loss of consortium action allows the husband of a woman negligently injured to claim damages for 'loss of consortium' or society. A similar right of action does not exist for wives. The proposed s 30 abolishes this right of action for the husband. (Report, para 15)

Proposed section 31 – Damages for lost capacity to do household work

Sub-cl(1) provides that persons who are negligently injured include in the negligence claim a claim for damages for loss of capacity to do household work. (Report, para 28; for a definition of 'housework' see Report, para 20)

Proposed sub-s 31(2) makes it clear that it is immaterial that the household work was unpaid at the time of the injury and that help with the household work is otherwise available to the plaintiff after the accident (whether for payment or not). (Report, para 22–3, 43, considering the case of *Griffiths v Kirkmeyer* (1977) 139 CLR 161)

Proposed sub-s 31(3) provides that the amount of the damages is to be ascertained on the basis of the median weekly earnings of adult employees in full-time employment in Australia. These figures are available yearly from the Australian Government Statistician (Publication No 6310.0). (Report, para 36)

Proposed sub-s 31(4) allows the court to substitute a higher rate in assessing damages under this section if the plaintiff satisfies the court that it is proper to do so. Some considerations which would be taken into account include:

- the length of time since the last publication of median weekly earnings;
- whether the plaintiff undertakes particular tasks requiring a high degree of skill, such as clothes making.

Appendix B
Assessment Models

Opportunity cost approach

1. This method estimates the earnings foregone in the open market in pursuing unpaid work in the home. The value of housework is deemed to be the amount a person could have earned if he or she had spent the same time in paid employment. In the case of a housewife with children, the wages she could have earned less the cost of keeping her job (eg childcare) is the opportunity value of her housework.

Replacement cost and market cost models

2. *Introduction.* The 'market cost' and 'replacement cost' approaches described below are both forms of valuing housework by reference to replacement services. The major difference is that the market cost method itemises all the necessary services by separate functions and matches each function with the commercial rates for equivalent occupational functions in the open market, whereas the replacement cost method uses one overall commercial rate.

3. *Replacement costs.* This method requires the making of a cost estimate of hiring a person to replace the lost services. It assumes that housework is a single function. In contrast, the market cost approach acknowledges that housework is multi-functional, each function being separately identified. It is not necessary to cost separate activities as in the market cost method. However, in determining replacement cost, such factors as family size, the age of its members and the size of the home must be taken into account. A variation of this method involves the services performed by a homemaker being replaced by more than one person.[1] In addition to a housekeeper then, it would be possible to cost the services of a governess and other domestic personnel. However many persons are involved, the replacement cost value in appropriate circumstances would have to include the cost of holidays and worker's compensation insurance for the hired substitute(s).[2] Ascertaining gross wages payable to a replacement housekeeper is a simple matter. The Commission was told by Home Care Service of NSW that a full-time housekeeper would cost $321.52 per week (in September 1985). Another rate ascertained by the Commission at the same time for a full-time live-in housekeeper was $216 per week plus accommodation and meals from Dial-An-Angel.

4. *Market cost.* The method involves identification, by job description, of all the tasks done in the house. In a particular case, all or any of the following activities might be relevant – cook, dishwasher, launderer, cleaner, waiter or waitress, chauffeur, administrator, baby-sitter, private nurse, tutor, gardener. The number of hours spent on each job is computed and multiplied by the market wage rate for each job. Where market wage rates differ, an average can be taken. (Where rates differ by gender, a decision must be taken as to whether to use female or male rates). The aggregate figure for all functions represents the total value of the housework. For example:

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1. FJ Pottick 'Tort Damages for the Injured Homemakers: Opportunity Cost or Replacement Cost?' (1978) 50 *Univ of Colorado LR* 59.
2. M Edwards, *The Income Unit in the Australia Tax and Social Security Systems*, Institute of Family Studies, Melbourne, 1984, 97 n 1.

Functions	*$/hr*	*hr/wk*	*$/wk*
Food preparation	3.97	18.13	71.97
Cleaning	2.86	8.58	24.53
Clothing care	2.94	6.12	17.99
Repairs & maintenance	3.98	2.30	9.15
Marketing & household management	5.08	6.96	35.35
Physical child care	3.07	4.36	13.38
Tutorial child care	6.57	1.57	10.31
Other child care	4.74	0.98	4.64
TOTAL		49.00	187.32
Annual value	$187.32 x 52 wks	=	$9740.64
Average hourly value	$\frac{\$187.32}{49}$	=	$3.82/hr

This example of the market cost approach is extracted from a study by the Advisory Council on the Status of Women, Canada in 1978.[3] The study used the average wage paid in equivalent occupations in the open market in order to cost each homemaker function. 1971 figures were used for hourly wage rates updated to 1977 by using the Canadian CPI. The domestic arrangement on which the above calculation is based is that of a mother of a family of 2 children the younger aged between 7 and 12 years. The authors observe that 'If the male rate of pay had been used in the example [above] the weekly value of household tasks would have been $270.01 and the annual value $14040.52 in 1977 [Canada]'.[4] Depending on how it is used, this costing can involve double counting of time. For example, where 2 jobs are done at once, both are costed separately. Double counting can be overcome using the market cost method. Clark[5] used this method but took only two domestic functions namely, caring for children and caring for adult members from institutions performing the same functions – the care and maintenance of children and adults. Clarke's final figure was lower than it otherwise would have been not only because it excluded double counting but because 'by relying on care provided by institutions than by a housewife at home, the cost is likely to reflect scale economies.'[6]

3. K Cooper-Stephenson & I Saunders, *Personal Injury Damages in Canada*, Carswell, Toronto, 1981.
4. id, 224.
5. Cited Edwards, 97, n 1.
6. Ibid.

Table of Cases

Table of Legislation

Bibliography

AUSTRALIAN LAW REFORM COMMISSION, Report No 28, *Community Law Reform for the Australian Capital Territory, First Report* AGPS, Canberra, 1985.

_____ Consultative Paper No 3: *Loss of Consortium,* Canberra, 1984.

_____ Discussion Paper No 22, *Matrimonial Property Law,* Canberra, 1985.

BLACKSTONE'S COMMENTARIES, 15th edn, Oxford Clarendon Press, vol 3.

BRETT P, 'Consortium and Servitium – A History and Some Proposals' (1955) 29 *Australian Law Journal* 321.

CHESTERMAN MR, Research Paper, *Accident Compensation – Proposals to Modify the Common Law,* NSW Law Reform Commission, Sydney, 1983.

CLARKE KA & OGUS AI, 'What is a Wife Worth?' (1978) 5 *British Journal of Law and Society* 1.

COOPER-STEPHENSON K & SAUNDERS I, *Personal Injury Damages in Canada,* Carswell, Toronto, 1981.

EDWARDS M, *The Income Unit in the Australian Tax and Social Security Systems.* Institute of Family Studies, Melbourne, 1984.

GAME A & PRINGLE R, 'Production and Consumption: Public Versus Private' in DH Broom (ed), *Unfinished Business: Social Justice for Women in Australia,* George Allen & Unwin, Sydney, 1984.

GRAYCAR R, 'Compensation for Loss of Capacity to Work in the House' (1985) 10 *Sydney Law Review* 528.

HARPER JP & RICHARDS L, *Mothers and Working Mothers* Penguin, Ringwood, 1979.

HARTMANN HI, 'The Family as the Locus of Gender, Class, and Political Struggle: the Example of Housework', (1981) 6 *Signs: Journal of Women in Culture and Society,* 366.

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, Article 26.

KEELER J, 'Three Comments on Damages for Personal Injury', (1983–84) 9 *Adelaide Law Review* 385.

LAW COMMISSION (UK), Report No 56, *Report on Personal Injury Litigation – Assessment of Damages* HMSO, London, 1973.

LUNTZ H, *Assessment of Damages for Personal Injury and Death,* 2nd ed, Butterworths, Sydney, 1983.

MALOS E (ed) *The Politics of Housework,* Allison & Busby, London, 1980.

NSW LAW REFORM COMMISSION, *A Transport Accident Scheme for New South Wales* vol 2.

PEATTIE L & REIN M, *Women's Claims: a Study in Political Economy,* Oxford University Press, Oxford, 1983.

RISELEY AC, 'Sex, Housework and the Law' (1981) 7 *Adelaide Law Review* 421.

TASMANIAN LAW REFORM COMMISSION, Report No 13, *Discrimination on the Grounds of Sex,* Government Printer, Hobart, 1977.

THORNTON M, 'Loss of Consortium: Inequality Before the Law' (1984) 10 *Sydney Law Review* 259.

ROYAL COMMISSION ON CIVIL LIABILITY AND COMPENSATION FOR PERSONAL INJURY, *Report* HMSO, London, 1978 (Pearson Report).

UK LAW REFORM COMMITTEE, (UK) Report No 11, *Loss of Services, etc* 1963.

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