RELATIVES' RIGHTS AND BEST v. SAMUEL FOX

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This article has two aims: first, to look generally at an area of the law of personal injuries described for the sake of brevity as 'relatives' rights'—the rights of persons who are not themselves victims of accidents but who, by reason of their relationship (usually a family relationship) to someone who is killed or injured in an accident, are damaged in some way as a result of that accident; and second, to look specifically at one particular aspect of this area—the rule laid down by the House of Lords in 1952 in the case of *Best* v. *Samuel Fox*[1] that, although a husband is recognised to have an action for the losses he suffers consequent on an injury to his wife (an action for loss of 'consortium'), which is independent from his wife's action, a similar right is denied to the wife when it is the husband that is injured.

The existence of the husband's action is an exception to the general rule which prevails in this area—a rule of no recovery. The law seeks to compensate the accident victim, but not anybody else who, because of their relationship to him, suffers loss of some kind consequent upon the accident. This is the general rule, but it is not totally inflexible—besides the exception already mentioned, there are other exceptions, some real and some apparent. Just as a husband may sue for loss of consortium, so in some circumstances parents may sue in respect of the loss of services of children;[2] and more general rights of recovery are granted to a number of relatives under the *Fatal Accidents Acts*. Those who render services or otherwise incur loss in an attempt to benefit the accident victim may have an avenue of recovery via the victim's own action, and relatives and others who actually witness the accident may have a right to recover if they suffer shock as a result.

The rights of relatives who suffer some sort of loss as the result of an accident to another are therefore not inconsiderable. But there is no general principle running through this area of the law. There is simply a rather untidy collection of rules and doctrines, evolved in piecemeal

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1 [1952] A.C. 716.

2 As may employers in respect of the loss of services of their employees, although the relationship here is basically commercial, rather than family, and commercial relationships are outside the province of this article—see n. 7 infra.

fashion by courts concerned only with the particular problem in hand, and without any real attention being devoted to the question of relatives' rights as a coherent whole. Doctrine built up in this way is of course typical of the common law, and need not have unsatisfactory results—but in this area some anomalies do exist, and it is submitted that the rule in *Best* v. *Samuel Fox*[3] is one such. Both the English Law Commission, in its 1973 Report on the assessment of damages in personal injury cases,[4] and the Pearson Commission in its much wider-ranging Report on Civil Liability and Compensation for Personal Injury, issued in 1978,[5] pointed out anomalies in this area and recommended reforms, which will be mentioned in due course.

The method of proceeding will therefore be as follows. In the first part of the article, we will examine the general question of relatives' rights in personal injury cases—first the general rule and then the 'exceptions' to it, concluding with a comparative survey which reveals the striking diversity of attitudes to this problem. Then, in the second part of the article, having outlined the context in which the discussion is to take place, we devote specific attention to *Best* v. *Samuel Fox*.[6]

RELATIVES' RIGHTS GENERALLY

As already indicated, we are concerned with the rights of persons who are affected in some way by an accident resulting in the death of, or injury to, a person whom we will usually refer to as the primary accident victim. These persons will normally be members of the victim's family, hence the use of the description 'relatives' rights', but there can of course be cases where there is no family relationship—or at least no legitimate one—and yet exactly the same losses are suffered. The description should at least serve to exclude other cases with which we are not concerned—cases where one person suffers loss as the result of an accident to another because there is a *commercial* relationship between them.[7]

An accident may affect persons other than the primary accident victim in various ways. First, such persons may suffer financially. The most

[3] [1952] A.C. 716.

[4] Law Com. No. 56, *Report on Personal Injury Litigation—Assessment of Damages* (1973).

[5] Royal Commission on Civil Liability and Compensation for Personal Injury, *Report*, (1978) Cmnd. 7054.

[6] [1952] A.C. 716.

[7] e.g. Société Anonyme v. Bennett [1911] 1 K.B. 243, Cattle v. Stockton Waterworks (1875) L.R. 10 Q.B. 453, Weller v. Foot and Mouth Disease Research Institute [1966] 1 Q.B. 569, French Knit Sales v. Gould [1972] 2 N.S.W.L.R. 132. See Fleming, *Law of Torts*, 5th ed. (1977), at 170-172.

obvious case of financial loss is where the relative is supported by the accident victim—as in the case of the wife and children of a husband who was, until killed or injured in an accident, the family breadwinner. There are also, however, various other possible cases of financial loss. The relative may have to pay for medical treatment to the victim; or may have to give up his or her job to perform the nursing services which, as a result of the accident, the victim now requires; or may be out of pocket due to the need to travel to visit the victim in hospital; or may have to employ someone to perform services, usually of a domestic nature, which the victim can no longer render. In addition there are losses which although material are not overtly financial—it is clear that the companionship, guidance and so on which a family member obtains from a spouse or parent is a material loss. Nor do these cases of material loss exhaust the possible consequences of the accident for the relative: it is highly likely that relatives will suffer mental distress as a result of the accident—grief, shock and the like. In some cases this mental distress may result in physical illness—'nervous shock', to use the traditional, but rather inexact, term favoured by the courts, or, as rather more precisely described by Lord Denning M.R. in *Hinz* v. *Berry*,[8] a 'recognisable psychiatric illness'.

The General Rule: No Recovery

To what extent, if at all, can a relative recover from the tortfeasor for injuries such as these? The general attitude of the law has been to deny any recovery for injuries to relational interests. It has been well expressed by Fleming:

> Generally the law has considered itself fully extended by affording compensation only to persons immediately injured, such as the accident victim himself, without going to the length of compensating also third persons who, in consequence, incur expenses or lose their livelihood, support or expected benefits from their association with him . . . . The burden of compensating anyone besides the actual casualty is feared to be unduly oppressive because most accidents are bound to entail repercussions, great or small, upon all with whom he had family, business, or other valuable relations.[9]

The law, then, compensates the accident victim, and the accident victim alone. The relative is not completely ignored, because the damages payable to the victim will be assessed with relatives in mind. The accident victim whose ability to earn his living in the future is impaired or

8 [1970] 2 Q.B. 40.
9 Fleming, supra n. 7, at 170-171.

destroyed will recover a sum in respect of his lost future earning capacity, and this is obviously to be used to support his family in lieu of his former earnings.[10] Likewise, where the accident victim has become obliged to reimburse third parties for services provided or expenses incurred on his behalf, these sums are usually included in the victim's damages award.[11] But the general policy which the law is putting into effect is that relatives have no rights separate from that of the victim—relatives can be compensated only through the victim, and only in so far as it is appropriate so to compensate them.

A means by which this policy can be put into effect is the well-known rule of the law of negligence that the duty of care must be owed to a foreseeable plaintiff. Not only must there be a recognised 'duty-situation'[12] or 'notional duty';[13] it must also be established that on the facts damage (of a foreseeable kind[14]) was foreseeable to this particular plaintiff. This rule emerged about fifty years ago[15] as a result of two leading cases, one American and the other English.

In the American case, *Palsgraf* v. *Long Island R. Co.*[16]—a celebrated decision of Cardozo J.—the defendants' servant, in attempting to bundle two passengers into a train at the last minute, caused one of them to drop a parcel which he was carrying, which exploded and caused a weighing-machine at the other end of the station to topple over and injure the plaintiff. It was held that although the defendants may have been in breach of a duty of care owed to the passengers, they were not under any liability to the plaintiff. The duty owed to the passengers was of no avail, since a plaintiff could not build upon a duty owed to someone else—it was necessary for the plaintiff to show a duty owed to herself personally, and here the existence of a duty was ruled out because the plaintiff was outside the range of foreseeable harm. Though Prosser[17] has convincingly demonstrated that the defendants could have been made liable to the plaintiff by the application of other principles,

10 In Lim v. Camden & Islington Area Health Authority [1980] A.C. 174 it was argued (unsuccessfully) that damages for lost future earning capacity should not be awarded to persons with no dependents.

11 see infra.

12 see Clerk & Lindsell, *Torts* 14th ed. (1975), at para. 861.

13 see Winfield & Jolowicz, *Tort* 10th ed. (1975), at 46.

14 Overseas Tankship v. Morts Dock & Engineering Co. (The Wagon Mound (No. 1)) [1961] A.C. 388. See Clerk & Lindsell, supra n. 12, at paras 874-875.

15 For the position as previously understood, which was that plaintiffs could recover damages even if they were unforeseeable, see Smith v. L. S. W. Ry. (1870) L.R. 6 C.P. 14, and Prosser, *Law of Torts* 4th ed. (1971), at 150-158.

16 (1928) 162 N.E. 99 (N.Y.).

17 Prosser, 'Palsgraf Revisited' (1953) 52 *Mich. L.R.* 1, also in Prosser, *Selected Topics on the Law of Torts* (1954) at 191.

and that the facts of this particular case may therefore not be totally appropriate for the application of Cardozo J.'s principle, the principle itself has been unhesitatingly accepted ever since.

The equivalent English case (in fact, of course, a Scottish appeal to the House of Lords) is *Bourhill* v. *Young*[18]—the case of the pregnant fishwife who suffered nervous shock and produced a stillborn child as the result of hearing a collision between a motor-cyclist and a car which took place about 45 feet away from her, on the other side of a tram. The House of Lords unanimously held that the defendant (the motor-cyclist) owed no duty of care to the plaintiff. He owed a duty only to such persons as he could reasonably foresee might be injured by his failure to exercise that care, and on the facts the plaintiff was not within the area of potential danger and so no duty was owed to her.

The plaintiff, then, must be foreseeable, either as an identified individual or as one of a number of persons who might foreseeably have been injured by the defendant's act[19]—the duty of care must be 'owed to' him. The plaintiff cannot take advantage of a duty owed to someone else. Besides *Palsgraf* v. *Long Island R. Co.*[20] and *Bourhill* v. *Young*,[21] the rule has the support of many other leading decisions,[22] and is surely also endorsed by the well-known principle enunciated by Lord Atkin in *Donoghue* v. *Stevenson*,[23] which, as every lawyer knows, holds that liability in negligence arises in respect of acts or omissions which are foreseeably likely to injure a neighbour—Lord Atkin defines neighbours as persons who are so closely and directly affected by an act that the actor ought reasonably to have had them in contemplation as being so affected when directing his mind to the acts or omissions in question.

Neither *Palsgraf* v. *Long Island R. Co.*[24] nor *Bourhill* v. *Young*[25] involved the type of fact situation here being considered, and the principle which these cases set out is obviously capable of application in a wide variety of different circumstances.[26] However, it can obviously be applied to defeat the claim of the relative. If the defendant by his negli-

18 [1943] A.C. 92.
19 see Farrugia v. G. W. Ry. [1947] 2 All E.R. 565.
20 (1928) 162 N.E. 99 (N.Y.).
21 [1943] A.C. 92.
22 e.g. Bunyan v. Jordan (1937) 57 C.L.R. 1, Chester v. Waverley Corp. (1939) 62 C.L.R. 1, and see also cases cited in n. 26 infra.
23 [1932] A.C. 562, at 580.
24 (1928) 162 N.E. 99 (N.Y.).
25 [1943] A.C. 92.
26 Liability was denied on the ground that the plaintiff was unforeseeable in Bourhill v. Young [1943] A.C. 92, King v. Phillips [1953] 1 Q.B. 429, Chester v. Waverley Corp. (1939) 62 C.L.R. 1 (nervous shock cases); Videan v. B.T.C. [1963] 2 Q.B. 650 (liability to trespasser); Mazinski v. Bakka (1978) 20 S.A.S.R. 350 (liability to trespasser);

gent driving kills or injures another driver or a pedestrian, the accident victim is plainly a person to whom a duty is owed, because he is one of a number of persons foreseeably likely to be affected by the defendant's negligence. But the defendant as a reasonable man cannot be expected to foresee the consequential injuries that may befall other persons as a result of the injury to the primary accident victim. No doubt a reasonable man in the defendant's position might be expected to realise, in a general way, that the victim of his negligence might have a spouse, children or other relatives who might be affected in one way or another; but this is not to say that he can *foresee* injuries of particular kinds to particular individuals. Accordingly, no duty is owed to the relatives, because no harm of any kind to them can be contemplated to occur as a result of the defendant's negligence; nor can they base their claim on the duty owed to the primary accident victim.[27]

The cases

From time to time, over the years, there have been cases in which relatives affected in some way by the death of or an injury to another in an accident caused by the defendant's negligence have tried to persuade the courts to recognise that the defendant owes them a duty of care, in addition to the duty which he owes to the primary accident victim. In recent years such actions have undoubtedly been encouraged by the extension of the range of duty into areas such as economic loss and negligent statements,[28] and also by the increased importance of the notion of foreseeability consequent upon the decision in *The Wagon Mound (No. 1).*[29] But the courts have consistently rejected these attempts, and have denied recovery to the relatives. They have stated that the person who is entitled to compensation is the accident victim, and

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see also Woods v. Duncan [1946] A.C. 401, per Lord Porter at 437-438 (liability of contractors). In other cases it has been held on the facts that the plaintiff was foreseeable, and that the duty was accordingly owed to him, e.g. Buckland v. Guildford Gas, Light & Coke Co. [1949] 1 K.B. 410 (liability of non- occupier to trespasser); Merrington v. Ironbridge Metal Works [1952] 2 All E.R. 1101 (liability to rescuer); Carmarthenshire County Council v. Lewis [1955] A.C. 549 (liability of school authority to pupil); Mill v. Public Trustee [1945] N.Z.L.R. 347 (liability of employer to employee); Pollard v. Macarchuk (1959) 16 D.L.R.2d 225 (nervous shock); Urbanski v. Patel (1978) 84 D.L.R. 3d 650 (liability of doctor to organ donor).

27 Palsgraf v. Long Island R. Co. (1928) 162 N.E. 99, per Cardozo J. at 100: 'What the plaintiff must show is 'a wrong' to herself; i.e. a violation of her own right, and not merely a wrong to someone else'; Bourhill v. Young [1943] A.C, 92, per Lord Wright at 108: 'If however the appellant has a cause of action it is because of a wrong to herself. She cannot build on a wrong to someone else.'

28 Particularly as a result of the decision in Hedley Byrne v. Heller [1964] A.C. 465.

29 Overseas Tankship v. Morts Dock & Engineering Co. [1961] A.C. 388.

the accident victim alone; and they have called in aid the principle that duties of care are owed only to foreseeable plaintiffs.

One leading case in which it was alleged that the tortfeasor owed a duty not only to the accident victim but also to his relatives was *Kirkham* v. *Boughey*.[30] In this case, a wife was injured in a road accident due to the defendant's negligence. Her husband decided not to return to his employment in Africa, from which at the time of the accident he was on a short period of leave, because of his anxiety about his wife and the problem of caring for their two small children. (He also had been slightly injured in the accident, but he had recovered from his injuries and they did not in any way affect his decision not to return.) He eventually obtained some employment in England, though this did not pay as much as he would have earnt in Africa. He claimed damages in respect of his loss of earnings for the period during which it was reasonable for him to remain in England on the grounds of his wife's health.

The question of the rights of relatives was clearly before the court. Counsel for the plaintiff argued, in the words of Diplock J., that 'the circle which encloses those to whom the driver owes a duty to take care is not a mere geographical circle, but extends to the family circle of those who find themselves within the geographical circle.'[31] Diplock J. however rejected this contention and held that the husband could not recover. He affirmed the desirability of compensating only the accident victim and not his relatives, and referred to statements to this effect made by Lord Goddard and Lord Morton of Henryton in *Best* v. *Samuel Fox*,[32] saying that the plaintiff's proposition was in direct conflict with these dicta and possibly with the ratio decidendi of that case; and he stated that the driver owed no duty to the relatives of the injured person, however commendable the sacrifice made by the relative on the accident victim's behalf.[33]

Diplock J. mentioned that the position of a husband of an injured wife might be different from the position of all other relatives, because of the existence of the action for loss of consortium—'the husband can, therefore, recover damages against the driver even though the husband was a hundred miles away from the highway when the accident took place.'[34] But the claim in this case was expressly said *not* to be based on loss of consortium; and instead counsel placed much reliance on

30 [1958] 2 Q.B. 338.
31 Id. at 341.
32 [1952] A.C. 716, at 731, 734.
33 [1958] 2 Q.B. 338, at 342.
34 Id.

Behrens v. *Bertram Mills Circus.*[35] In this case, the immediate accident victim was the wife, a three-foot-high circus performer trampled upon by a circus elephant, and her two-foot-six-inch husband, also a circus performer, recovered damages for the fact that while his wife was injured he had refrained from going on tour with the circus because she would be unable to perform with him and give him society and domestic help. Devlin J. justified his decision (at least in part) by reference to the general principles governing tort damages, under which a plaintiff is to be put in the position he would have been in if no tort had been committed.[36] Diplock J. in *Kirkham* v. *Boughey*[37] said that if the judgment in *Behrens* v. *Bertram Mills Circus*[38] was to be read as extending the rights of the husband of an injured wife, then it was in conflict with the principles of *Best* v. *Samuel Fox*[39] which he had already stated, and was therefore insupportable. However, he thought that the decision could perhaps be justified within the framework of the action for loss of consortium, the husband's action in staying at home being a proper step to take in mitigation of damages—a view of the case which was confirmed by Devlin J. himself in *McNeill* v. *Johnstone.*[40] So, in *Kirkham* v. *Boughey*,[41] where the husband's action was ostensibly *not* based on loss of consortium, it failed.

Fairly recently, important cases dealing with the right of the accident victim to recover damages for services rendered to him by third parties have ruled out any possibility of the provider of the services mounting a direct action against the tortfeasor. Before these cases, there had been a series of cases dealing with the recovery of damages for nursing or other services performed for the accident victim by one of his relatives. In the vast majority of them the action was brought by the accident victim, but the loss was seen as a loss suffered by the provider of the services for which the accident victim was under an obligation to compensate him or her.[42]

In *Donnelly* v. *Joyce*[43] in 1973, an action brought on behalf of a child injured in an accident to recover for the services of his mother who gave up her job to nurse him, the defendants argued that the loss was one suf-

35 [1957] 2 Q.B. 1.
36 Id. at 29.
37 [1958] 2 Q.B. 338.
38 [1957] 2 Q.B. 1.
39 [1952] A.C. 716.
40 [1958] 1 W.L.R. 888; and see also Hunter v. Scott [1963] Qd.R. 77.
41 [1958] 2 Q.B. 338.
42 For references to these cases, and to the other issues canvassed in them, see infra. at

43 [1974] Q.B. 454.

fered by the provider of the services rather than the accident victim and conceded that the provider would have a direct right of action against them (safe in the knowledge that the mother had not been joined as plaintiff and could not now be joined because of the expiry of the period of limitation). Megaw L.J., delivering the judgment of the Court of Appeal, held that the loss suffered was the victim's loss—his injuries had created a need for nursing services—and that the provider of such services had, apart from the actions for loss of consortium and services,[44] no direct right of action.[45] In the companion case of *Cunningham* v. *Harrison*,[46] decided by a different division of the Court of Appeal on the day before *Donnelly* v. *Joyce*,[47] Lord Denning M.R. held that the wife of an injured husband who had nursed him likewise had no direct action against the defendant.[48] Three years afterwards, in *Griffiths* v. *Kerkemeyer*,[49] the Australian High Court adopted the principles stated in *Donnelly* v. *Joyce*,[50] and Stephen J. made it clear that a direct action by the provider of the services would seldom, if ever, be recognised.[51]

More or less contemporaneously with these cases, two more decisions, one from New Zealand and one from Australia, have repulsed direct assaults on the principle that no duty of care is owed to relatives. In the first of these cases, *Marx* v. *A.G.*[52] in New Zealand, the husband was severely injured in an accident at work and suffered brain damage. This caused a change in his personality and affected the domestic relations between him and his wife—he manifested a hypersexual attitude towards her and repeatedly assaulted her physically and sexually. The wife alleged that her husband's employer owed her a duty of care—that she was a person who it was reasonably foreseeable might be ill-treated by the husband as a consequence of the injury. It was recognised that this would be opening up a new category of duty of care; there were no

44 As to which, see infra.
45 [1974] Q.B. 454, at 462.
46 [1973] Q.B. 942.
47 [1974] Q.B. 454.
48 [1973] Q.B. 942, at 952.
49 (1977) 15 A.L.R. 387.
50 [1974] Q.B. 454.
51 (1977) 15 A.L.R. 387, at 395, 399-401. Stephen J. did not entirely rule out the possibility of a direct action: he quoted Fullagar J. in Blundell v. Musgrave (1956) 96 C.L.R. 73 and Comr. of Rys. (N.S.W.) v. Scott (1959) 102 C.L.R. 392 as contemplating a direct action where the provider was under a *legal* obligation to provide or pay for services to the injured person, and also suggested that an action by the provider for his economic loss might be distilled from Caltex Oil (Australia) v. Decca Survey Australia (1976) 11 A.L.R. 227—but in the ordinary case of nursing services rendered by relatives he thought a direct action incongruous and that the principle in Donnelly v. Joyce [1974] Q.B. 454 was the one most likely to provide a satisfactory remedy. The other judges did not discuss this question.
52 [1974] 1 N.Z.L.R. 164.

authorities in point, but it was suggested that the claim had to be allowed as a question of principle. The court rejected the wife's claim. In a comprehensive discussion of the problem they laid particular stress on the need for the plaintiff to found her claim on a breach of a duty owed to herself,[53] and on the desirability of compensating only the accident victim.[54] *Kirkham* v. *Boughey*[55] was affirmed. One case relied on by the plaintiff was *Malcolm* v. *Broadhurst,*[56] where the facts were somewhat similar in that the injuries suffered by the husband in an accident and his consequent personality change were alleged to have caused the wife to suffer nervous depression. However, the key to this case is that the wife was also injured in the same accident, though only slightly, and therefore a duty of care was owed to her. The wife recovered damages in respect of her depression because, given the existence of the duty of care, the damage was not too remote—she had a pre-existing susceptibility to nervous disorder, and, in the words of the court, there was no difference between an eggshell skull and an eggshell personality. The court in *Marx* v. *A.G.*[57] were not over-impressed with this decision; and in any case it seems that it can only be justified on the basis that the wife had also been injured and was therefore owed a duty—there is nothing in the case to suggest that she would have recovered otherwise.[58]

A similar duty was alleged to exist in the Victorian case of *Pratt* v. *Pratt and Goldsmith.*[59] A wife was injured by her husband's negligent driving and the child she was carrying was born disabled. Actions were brought against the husband by the wife, the child, and also the wife's mother, who had arrived to care for her injured daughter. The mother's claim was for services provided to her daughter, which she said she had a moral duty to render; for shock caused by viewing her daughter's pitiable state; and for financial loss in the shape of travelling expenses and lost earnings—altogether, it reads rather like something dreamed up for a Torts examination paper. The mother's argument was founded on the proposition that after *The Wagon Mound (No. 1)*[60] foreseeability alone governed both liability and compensation, and questions of time and

53 Id. per McCarthy P. at 168, per Beattie J. at 173.

54 Id. per McCarthy P. at 169-170, per Beattie J. at 175, 177.

55 [1958] 2 Q.B. 338.

56 [1970] 3 All E.R. 508.

57 [1974] 1 N.Z.L.R. 164.

58 In Kirkham v. Boughey [1958] 2 Q.B. 338 supra, the husband had also been injured in the accident, but the court made it clear that this did not in any way cause him to abandon his work in Africa—this presumably foreclosed any possibility of mounting an argument similar to that in Malcolm v. Broadhurst [1970] 3 All E.R. 508. Exactly the same is true of McNeill v. Johnstone [1958] 1 W.L.R. 888.

59 [1975] V.R. 378.

60 Overseas Tankship v. Morts Dock & Engineering Co. [1961] A.C. 388.

space had no more than incidental relevance in determining whether the harm that flowed from the negligence was foreseeable or not. The defendant took out a summons to determine whether the mother's claim disclosed any cause of action, and the Full Court of the Supreme Court of Victoria held that it did not. Application of recognised principles as to liability for nervous shock and economic loss ruled out the second and third claims, and, as to the first claim, all three judges ruled out the possibility of a direct action.[61] It was pointed out, once again, that the plaintiff had to establish a duty owed to herself, and that apart from exceptional cases such as loss of consortium persons other than the accident victim himself had no right to sue. *Bourhill* v. *Young,*[62] Lord Goddard's dictum in *Best* v. *Samuel Fox,*[63] and *Kirkham* v. *Boughey*[64] were all endorsed. Starke J. suggested, as respects the services rendered, that the appropriate method or proceeding was for a claim to be made on the mother's behalf in the daughter's action, on the principles of *Donnelly* v. *Joyce*;[65] the other two judges declined to commit themselves on the question whether that case should be followed since the matter was not in issue—but, as we have seen, the High Court in *Griffiths* v. *Kerkemeyer*[66] has now endorsed the view of Starke J.

The major cases in which attempts have been made to construct a direct action for the relative are fairly recent, but we should also notice one earlier case which is of considerable interest—though it differs in that the initial harm was not caused accidentally. The case is *Johnson* v. *Commonwealth of Australia.*[67] The defendant's representatives entered the house where the plaintiff lived with her husband, assaulted him in her presence, and then forcibly removed him to prison, where they kept him for some considerable time. It was admitted that this was done wrongfully, wilfully and maliciously. As a result of all this the plaintiff suffered mental distress and became physically ill. She recovered damages under the principle of *Wilkinson* v. *Downton,*[68] in that the defendant had done an act calculated to cause, and actually causing, her physical harm;[69] and she also recovered for loss of consortium

61 [1975] V.R. 378, per Adam and Crockett J.J. at 386, per Starke J. at 390.
62 [1943] A.C. 92.
63 [1952] A.C. 716 at 730-731.
64 [1958] 2 Q.B. 388.
65 [1974] Q.B. 454.
66 (1977) 15 A.L.R. 387.
67 (1927) 27 S.R. (N.S.W.) 133.
68 [1897] 2 Q.B. 57.
69 By an act directed at a third party, cf. Stevenson v. Basham [1922] N.Z.L.R. 225, Purdy v. Wosnesensky [1937] 2 W.W.R. 116.

(intentionally caused).[70] Since this was the first Australian case to recognise either of these causes of action, the court was obviously perfectly prepared to countenance new causes of action regardless of the fact that they were new. However, the third claim made by the wife, for loss of support as a result of the wrongful imprisonment, was rejected. The court said that any loss suffered by the husband arising out of the imprisonment was a matter for a claim by the husband, and the wife had no rights in this regard.[71]

In the United States, the story is exactly the same. As we have already seen, the *Palsgraf* case[72] makes it clear that the plaintiff must show a duty to care owed to himself and cannot build upon a duty owed to another.[73] If relatives are to be allowed to sue, it must be by invoking one of the admitted exceptions to this principle, such as loss of consortium. This is neatly illustrated by *Bailey* v. *Wilson,*[74] in which a wife recovered for the losses she suffered consequent on injury to her husband in an action for loss of consortium, but the court made it clear that this was the only avenue of recovery available to her—apart from actions for loss of consortium, a defendant owed no duty to the relatives of the primary accident victim.

The cases, then, reveal a consistent refusal to recognise the right of anyone other than the accident victim to mount a direct action against the tortfeasor in respect of any loss that they may have suffered. There are, however, some exceptions to this principle. None have been deliberately created as exceptions—all are the result of the development of other types of liability[75] Some of these exceptions are only apparent exceptions; some are real. Let us now, therefore, consider the exceptional circumstances in which relatives of accident victims may be able, by one means or another, to obtain some sort of compensation for their losses.

Cases where Recovery has been Permitted

(i) services rendered: recovery by victim on relative's behalf

It is often the case that an accident victim will be helped out in various ways by relatives or friends. They may assume nursing duties, making it unnecessary to engage the professional nursing help that

70 But on this point the decision was later overruled by the High Court in Wright v. Cedzich (1930) 43 C.L.R. 493 (as to which, see infra, text and nn. 295-298).
71 (1927) 27 S.R. (N.S.W.) 133, at 137.
72 Palsgraf v. Long Island R. Co. (1928) 162 N.E. 99 (N.Y.).
73 See also 57 *American Jurisprudence 2d,* 'Negligence', para. 43.
74 (1959) 111 S.E.2d 106 (Ga).
75 With the possible exception of the Fatal Accidents Act.

would otherwise be required: and if the relative gives up a job to take up nursing duties this will involve him or her in financial loss. The services may be given with no thought of reward, or there may be some understanding between the parties, perhaps even a legally binding agreement, as to remuneration. The same applies, of course, to any other sort of service provided. Then again, relatives may incur expense on the victim's behalf, as where they have to travel to visit the victim in hospital.

In such cases, the law has generally compensated the relative by allowing the victim to claim in respect of the services or expenditure in his own action for damages. Since the action is being brought by the victim and not the relative, in one sense this rule does not constitute a true exception to the general rule of no recovery by relatives; but since the cases proceeded on the basis that the loss was one suffered by the relative, and that the victim was claiming it on the relative's behalf, it is fair enough to regard it as a way, albeit indirect, in which a relative could recover for losses consequent upon the injury to the accident victim. Various issues were canvassed in the cases over the years. The most important was the question whether the relative, in order to recover, had to prove that the victim was under a legal obligation to pay. In England, a number of first instance cases put forward varying views. In *Gage* v. *King*[76] Diplock J. ruled that there must be a legal obligation, and this was echoed in *Haggar* v. *De Placido,*[77] a case in which the parties went to the lengths of having a formal contract drawn up to establish the legal obligation and so secure reimbursement. By contrast, in *Wattson* v. *Port of London Authority*[78] Megaw J. held that a moral obligation was sufficient, and in *Schneider* v. *Eisovitch*[79] Paull J. rejected even the need for a moral obligation, holding that an undertaking by the victim to repay was all that was necessary. Strangely, all these cases ignored the earlier Court of Appeal decision in *Roach* v. *Yates*[80] in which the victim had recovered in respect of nursing services rendered to him by his wife and sister-in-law on the basis that he was morally obliged to compensate them. The same issue was aired in other common-law jurisdictions: in Canada, the decisions varied considerably,[81] as also they did in Australia—in the leading High Court decision of *Blundell* v. *Musgrave*[82] the

76 [1961] 1 Q.B. 188.
77 [1972] 1 W.L.R. 716.
78 [1969] 1 Lloyd's Rep. 95.
79 [1960] 2 Q.B. 430.
80 [1938] 1 K.B. 256.
81 See Greenaway v. Canadian Pacific R. Co. [1925] 1 D.L.R. 992, Stewart v. Lepages Inc. [1955] O.R. 957, Hamilton v. Hayes (1962) 36 D.L.R.2d 657 (legal obligation necessary); contrast Sunston v. Russell (1921) 21 O.W.N. 160 (legal obligation not necessary).
82 (1956) 96 C.L.R. 73.

majority of judges held that a legal obligation was necessary, but this decision was set in the context of a fact situation very different from the one under consideration (the question before the court was whether the defendant should reimburse the plaintiff for free medical treatment provided by the Navy), and in cases dealing specifically with the question of compensation for services rendered by relatives the decisions varied.[83] There were other issues also. In the cases on nursing services, what was the basis on which compensation was given? In some cases, the court awarded as compensation the amount of the wages earnt by the relative in the job which he or she gave up to carry out the nursing services,[84] but it became clear that this sum was awarded because it represented the value of the services rendered and that courts would not compensate for lost wages as such[85]—in any case, this would be an inappropriate basis of compensation in cases where the relative did not have to give up any employment.[86] Such a basis of compensation was also less appropriate if there was any question of recovery for the cost of future nursing services rather than services already rendered.[87] The appropriate level of compensation, therefore, was the reasonable value of the services rendered or to be rendered, bearing in mind always that the value of such services would not be as high as the value of services rendered by a professional nurse.[88]

The common feature of all the cases so far referred to is that the loss is regarded as one suffered by the third party and not by the victim. However, a somewhat different approach was taken in the Australian case of *Wilson* v. *McLeay,*[89] in which the plaintiff, a 22-year-old girl injured in an accident while on holiday in Queensland, recovered damages in respect of the travelling expenses incurred by her parents who came from New South Wales to visit her. The damages were awarded on the basis that the expenditure helped to alleviate her condition, and was incurred with that purpose in mind; and it would seem that the judge was

[83] See McGregor v. Rowley [1928] S.A.S.R. 67, Groves v. Lingston [1965] W.A.R. 186 (legal obligation necessary); contrast Nicholls v. Jack [1963] Qd.R. 1, Renner v. Orchard [1967] Q.W.N. 3, Gaydon v. Public Transport Commission [1976] 2 N.S.W.L.R. 44 (legal obligation not necessary).

[84] e.g. Roach v. Yates [1938] 1 K.B. 256, Wattson v. Port of London Authority [1969] 1 Lloyd's Rep. 95, George v. Pinnock [1973] 1 W.L.R. 118, cf. Donnelly v. Joyce [1974] Q.B. 454.

[85] Thus in Janney v. Gentry (1966) 110 *S.J.* 408 it was held that there was no principle by which lost wages as such could be recovered.

[86] e.g. Cunningham v. Harrison [1973] Q.B. 942.

[87] As in Roach v. Yates [1938] 1 K.B. 256, and Cunningham v. Harrison [1973] Q.B. 942.

[88] See Davies v. Tenby Corp. [1974] 2 Lloyd's Rep. 469.

[89] (1961) 106 C.L.R. 523.

approaching the case on the basis that the loss was one suffered by the accident victim herself.

This is the attitude to the problem which is now expressly adopted by the two leading cases already referred to—*Donnelly* v. *Joyce*[90] in England, and *Griffiths* v. *Kerkemeyer*[91] which adopted the reasoning of *Donnelly* v. *Joyce*[92] for Australia.[93] *Donnelly* v, *Joyce*[94] has also been adopted by Canadian cases,[95] and the United States approach is again similar.[96] Megaw L.J., delivering the judgment of the Court of Appeal in *Donnelly* v. *Joyce,*[97] made it clear that in such cases the loss suffered is the accident victim's loss. Whatever the case involves—the provision of nursing services, the expense of hospital visits, or some other sort of expenditure on behalf of the victim—the loss is not the expenditure itself but the creation of the need for that expenditure; and the appropriate amount of compensation is the proper and reasonable cost of supplying that need.[98] This approach disposes of most of the problems thrown up by the previous cases.[99] The relationship between the accident victim and the third party who has borne the cost is irrelevant—there is no need to establish either a legal or a moral obligation, or an undertaking to reimburse. Likewise, the basis for assessment of the compensation payable becomes clear—in the case of nursing services, what is appropriate is the proper and reasonable cost of supplying the services

90 [1974] Q.B. 454, followed in Davies v. Tenby Corp. [1974] 2 Lloyd's Rep. 469, Hay v. Hughes [1975] Q.B. 790, Taylor v. Bristol Omnibus Co. [1975] 1 W.L.R. 1054; cf. Cunningham v. Harrison [1973] Q.B. 942.

91 (1977) 15 A.L.R. 387.

92 [1974] Q.B. 454.

93 Subject, according to Gibbs J., to one qualification: in order to accommodate Blundell v. Musgrave (1956) 96 C.L.R. 73, the need must be productive of financial loss. Donnelly v. Joyce [1974] Q.B. 454 has also been adopted in most state Supreme Courts: see Beck v. Farrelly (1975) 13 S.A.S.R. 17, Johnson v. Kelemic (1977) F.L.C. 90-657, Weeks v. Meskudia [1979] 1 S.R. (W.A.) 65, cf. Pratt v. Pratt and Goldsmith [1975] V.R. 378 per Starke J.

94 [1974] Q.B. 454.

95 Thornton v. Board of School Trustees (1976) 73 D.L.R. 3d 35; Hasson v. Hamel (1977) 78 D.L.R. 3d 573. Urbanski v. Patel (1978) 84 D.L.R. 3d 650.

96 22 *American Jurisprudence 2d*, 'Damages' para. 102.

97 [1974] Q.B. 454.

98 Id. at 462. This approach was approved by the Pearson Commission, supra n. 5, paras. 344-346. The Law Commission had previously agreed that a moral obligation to reimburse was sufficient, without suggesting that the loss was suffered by the accident victim—but this report was written before the decision in Donnelly v. Joyce [1974] Q.B. 454, which only came in time to be referred to in a footnote: supra n. 4, at paras 112-114, especially n. 91.

99 Though it may still be questioned whether this is the most desirable approach: see Weir, *Compensation for Personal Injuries and Death: Recent Proposals for Reform* (Cambridge-Tilberg Law Lectures 1978) 18-19, and infra, text and n. 251.

provided. In *Donnelly* v. *Joyce*[100] itself, the cost of the services was held to be the mother's lost wages, but the cost of the nursing services and lost wages will presumably not always be equivalent.

The result of these cases is that, although the accident victim may be suing in respect of services rendered or expenditure incurred by relatives, he is suing in his own action to recover for a loss which is his own loss, and not that of his relatives. Only very indirectly, then can this line of cases now be said to represent an exception to the general rule of no recovery by relatives.

(ii) recovery by bystanders for nervous shock

The early cases allowing recovery in negligence for nervous shock did so on the basis that the plaintiff was within the zone of physical danger created by the defendant's negligence, and suffered shock through fear of injury to himself.[101] In time, however, it became accepted that claims for nervous shock were not limited to such cases, and that recovery could also be had by mere bystanders—persons who were not within the zone of physical danger, and who suffered shock consequent upon an injury to someone else.[102]

At the present day, therefore, it is possible for a bystander to recover shock sustained as a result of witnessing an accident to someone else. Although there is no requirement that the bystander and the victim be related—indeed, there are several important cases in which a bystander recovered for shock resulting from viewing an accident to a total

100 [1974] Q.B. 454.

101 Dulieu v. White [1901] 2 K.B. 669 (see esp. the judgment of Kennedy L.J.), Stevenson v. Basham [1922] N.Z.L.R. 225 (esp. at 229), Horne v. New Glasgow [1954] D.L.R. 832 (esp. at 844).

102 The first case to allow recovery to a bystander was Hambrook v. Stokes Bros. [1925] 1 K.B. 141, in which a mother recovered for shock caused by fear of injury to her children—though Havard, 'Reasonable Foresight of Nervous Shock' (1956) 19 *M.L.R.* 478 argues that it could have been established that the mother's shock resulted from fear of injury to herself. The case presents other difficulties: the defendants admitted they were in breach of duty, and it is not clear whether this could have been established in the absence of this admission; and one wonders whether the plaintiff could have shown that the duty was owed *to her*, as required by the doctrine (which had not then been established) of Palsgraf v. Long Island R. Co. (1928) 162 N.E. 99 (N.Y.) and Bourhill v. Young [1943] A.C. 92—see supra, text and nn. 14-27, and infra, text and nn. 111-112. In spite of these difficulties, subsequent cases establish that bystanders can recover, e.g. Dooley v. Cammell Laird & Co. [1951] 1 Lloyd's Rep. 271, Boardman v. Sanderson [1964] 1 W.L.R. 1317, Storm v. Geeves [1965] Tas.S.R. 252, Abramzik v. Brenner (1967) 65 D.L.R.2d 651. In the United States, the theory that the plaintiff must be within the zone of danger prevailed for rather longer, but is now being progressively abandoned as a result of the influential decision in Dillon v. Legg (1968) 69 Cal. Rptr 72.

stranger[103]—the bystander is more likely to suffer shock when the victim is a close relative, and most of the bystander cases involve some sort of family relationship.[104] Thus, there is a sense in which the bystander nervous shock cases can be viewed as an avenue of recovery available to relatives of accident victims who suffer a particular kind of damage as a consequence of the original accident.

Of course, no recovery can be had unless certain conditions are met. The bystander must have suffered nervous shock, which is more than mere mental distress[105]—nervous shock signifies not this temporary emotion but the longlasting physical injury or illness that may result from it.[106] Secondly, the bystander must have witnessed either the accident itself,[107] whether by seeing or hearing,[108] or its immediate aftermath[109]—where the shock results from being told of the accident after it

103 Dooley v. Cammell Laird & Co. [1951] 1 Lloyd's Rep. 271, Chadwick v. B.R.B. [1967] 1 W.L.R. 912, Mount Isa Mines v. Pusey (1970) 125 C.L.R. 383. It may be argued that in the first and third cases the victim and the bystander were workmates, not total strangers, and that in the second and third cases the bystanders were rescuers.

104 e.g. Boardman v. Sanderson [1964] 1 W.L.R. 1317, Hinz v. Berry [1970] 2 Q.B. 40, Storm v. Geeves [1965] Tas.S.R. 252, Andrews v. Williams [1967] V.R. 831, Benson v. Lee [1972] V.R. 879, Abramzik v. Brenner (1967) 65 D.L.R.2d 651, Marshall v. Lionel Enterprises (1971) 25 D.L.R.3d 141. In the leading American case, Dillon v. Legg (1968) 69 Cal. Rptr 72, whether the parties are related is one factor to be considered in deciding whether a duty is owed to the bystander in the particular circumstances.

105 But note that in the United States it is accepted that, in two groups of cases, the negligent transmission of telegraph messages and the negligent handling of dead bodies, mental distress alone is sufficient (as to the first of these, cf. Owens v. Liverpool Corp. [1939] 1 K.B. 394, criticised by the House of Lords in Bourhill v. Young [1943] A.C. 92)—see Prosser, supra n. 15, at 328-330; fairly recently it has been suggested that it is time to recognise a general duty not to cause mental distress by negligence: Rodrigues v. State (1970) 472 P.2d 509 (Haw.), see also Wallace v. Coca-Cola Bottling Plant (1970) 269 A.2d 117 (Me.), Leong v. Takasaki (1974) 520 P.2d 758 (Haw.)—but there is a fairly substantial body of opposition: Ver Hagen v. Gibbons (1970) 177 N.W.2d 83 (Wis.), Summers v. Western Idaho Potato Processing Co. (1971) 479 P.2d 292 (Idaho), Aragon v. Speelman (1971) 491 P.2d 173 (N.M.), Gilper v. Kiamesha Concord (1972) 302 A.2d 740 (D.C.), Johnson v. State (1975) 372 N.Y.S.2d 638, 334 N.E.2d 590, Krouse v. Graham (1976) 129 Cal. Rptr 624.

106 Hinz v. Berry [1970] 2 Q.B. 40.

107 There need not necessarily be *an* accident, provided that what the bystander sees or hears leads him to believe on reasonable grounds that one happened or is about to happen, and the shock he suffers results from that belief. No accident occurred in Dooley v. Cammell Laird & Co. [1951] 1 Lloyd's Rep. 271, and only a very minor one in King v. Phillips [1953] 1 Q.B. 429. cf. the statutory provisions in certain Australian jurisdictions, infra text and nn. 119-125.

108 In Boardman v. Sanderson [1964] 1 W.L.R. 1317 it was by hearing (cf. Bourhill v. Young [1943] A.C. 92, in which there was no liability).

109 As in Chadwick v. B.R.B. [1967] 1 W.L.R. 912, Mount Isa Mines v. Pusey (1970) 125 C.L.R. 383, Archibald v. Braverman (1969) 79 Cal. Rptr. 723.

has occurred, it has been held that no recovery is possible.[110] Obviously, therefore, the remedy is not available on grounds of relationship alone: what matters is that the plaintiff is present at the scene of the accident, because, presumably, shock is more likely to result in such circumstances.

The most important limitations on recovery are those based on foreseeability. First there is the requirement, dealt with earlier in this article, that the plaintiff must be foreseeable. *Bourhill* v. *Young*[111] was itself a nervous shock case: it was held that the defendant could not reasonably foresee injury of any kind to the plaintiff, who was some way away and on the other side of a tram at the moment of impact; and this case was followed in *King* v. *Phillips*,[112] where, for a similar reason, a taxi-driver was held not liable to a mother who suffered shock through witnessing from a nearby window her son disappearing under the wheels of the taxi. It is insufficient, however, for injury of *some* kind to the plaintiff to be foreseeable—although the older cases seemingly regarded foreseeable injury of any kind as sufficient,[113] it is now clear that what has to be foreseen is injury to the plaintiff *by shock*. This requirement, supported by dicta in *Chester* v. *Waverley Corp.*,[114] *Bourhill* v. *Young*,[115] and *King* v. *Phillips*,[116] was authoritatively confirmed by *The*

110 Guay v. Sun Publishing Co. [1953] 4 D.L.R. 577. The case was based on the old authorities as to negligent statements, now superseded by Hedley Byrne v. Heller [1964] A.C. 465, but would probably be decided the same way today: this is confirmed by United States cases such as Archibald v. Braverman (1969) 79 Cal.Rptr 723, Burroughs v. Jordan (1970) 456 S.W.2d 652, Mobaldi v. Board of Regents of the University of California (1976) 127 Cal.Rptr 720. (cf. the doctrine of Rodrigues v. State (1970) 472 P.2d 509 (Haw.), supra n. 105, under which a bystander may recover for pure mental distress—there is still no liability for mental distress suffered when someone is told afterwards of what occurred, as distinct from witnessing it themselves: Kelley v. Kokua Sales & Supply Co. (1975) 532 P.2d 673 (Haw.)). From Guay v. Sun Publishing Co. should be distinguished cases like Schneider v. Eisovitch [1960] 2 Q.B. 430, where the defendant was already in breach of duty to the plaintiff, and the recovery for nervous shock was parasitic to the main award.

111 [1943] A.C. 92.

112 [1953] 1 Q.B. 429.

113 Dulieu v. White [1901] 2 K.B. 669, per Kennedy J. at 675; Hambrook v. Stokes Bros. [1925] 1 K.B. 141, per Sargant L. J. at 162; Bourhill v. Young [1943] A.C. 92, per Lord Thankerton at 98; King v. Phillips [1953] 1 Q.B. 429, per Hodson L. J. at 443. In the United States this theory prevailed for rather longer: see Waube v. Warrington (1935) 258 N.W. 497 (Wis.), Amaya v. Home Ice, Fuel & Supply Co. (1963) 379 P.2d 513, 29 Cal. Rptr. 33.

114 (1939) 62 C.L.R. 1, per Latham C. J. at 7 and 10, per Rich J. at 11, per Starke J. at 14.

115 [1943] A.C. 92, per Lord Wright at 111, per Lord Porter at 117-119; and possibly also per Lord Russell of Killowen at 102, per Lord Macmillan at 105, though in each case they also make statements which might be interpreted as supporting the impact theory.

116 [1953] 1 Q.B. 429, per Denning L.J. at 441; cf. Singleton L.J. at 435, adopting both theories.

Wagon Mound (No. 1)[117] and has has been upheld in all recent cases.[118]

It will be apparent, then, that the nervous shock cases, like the nursing service cases, are not truly an exception to the general principle of no recovery by relatives in respect of losses incurred as a consequence of an accident to someone else. Recovery is not limited to relatives; and it is not allowed *because of* the existence of the relationship, but because the relative was present at the scene of the accident. The relative's right is in no way derived from the victim's right, but is independent—the relative; like every other plaintiff in a negligence action, must prove the existence of a duty of care owed to himself.

In the light of these remarks, it is however interesting to notice the statutory reform of this area of the law carried out in some Australian jurisdictions in the 1940s and 1950s. The original provision, enacted in New South Wales,[119] was as follows:

> The liability of any person in respect of injury caused . . . by an act, neglect or default by which any other person is killed, injured or put in peril, shall extend to include liability for injury arising wholly or in part from mental or nervous shock sustained by (a) a parent or the husband or wife of the person so killed, injured, or put in peril; or (b) any other member of the family of the person so killed, injured or put in peril within the sight or hearing of such member of the family.[120]

As Fleming points out,[121] at the time this provision was originally enacted, the scope of recovery by bystanders was still rather limited—indeed, in Australia, it had been virtually precluded by the decision in *Chester* v. *Waverley Corp.*[122] Since then, however, the rights of bystanders have been fully recognised by the common law,[123] and so the statutory provisions have been to some extent overtaken by events. There are still, however, some important departures from the common

117 Overseas Tankship v. Morts Dock & Engineering Co. [1961] A.C. 388, per Viscount Simonds at 426.

118 Boardman v. Sanderson [1964] 1 W.L.R. 1317; Chadwick v. B.R.B. [1967] 1 W.L.R. 912; Storm v. Geeves [1965] Tas. S.R. 252; Mount Isa Mines v. Pusey (1970) 125 C.L.R. 383; Rowe v. McCartney [1975] 1 N.S.W.L.R. 72; Pollard v. Macarchuk (1959) 16 D.L.R. 225; Abramzik v. Brenner (1967) 65 D.L.R.2d 651. In the United States, Dillon v. Legg (1968) 69 Cal. Rptr 72 was the first case which authoritatively declared that the proper test was reasonable foresight of *shock*.

119 Law Reform (Miscellaneous Provisions) Act 1944 (N.S.W.) s.4(1).

120 There are now similar enactments in the A.C.T. and the N.T.: Law Reform (Miscellaneous Provisions) Ordinance 1955 (A.C.T.) s.24; Law Reform (Miscellaneous Provisions) Ordinance 1956 (N.T.) s.25.

121 supra n. 7, at 157.

122 (1939) 62 C.L.R. 1.

123 Storm v. Geeves [1965] Tas.S.R. 252; Mount Isa Mines v. Pusey (1970) 125 C.L.R. 383.

law position. The most important difference is that the need for an independent duty owed to the bystander disappears. All that the plaintiff need show is that someone to whom he is related has been killed, injured or put in peril as the result of a negligent breach of a duty[124] owed by the defendant to the accident victim.[125] At once, therefore, the recovery becomes derivative rather than independent. Further, recovery is based on family relationship—the plaintiff has to be a parent, spouse or family member of the initial accident victim; and in the case of a parent or spouse, even the requirement that the plaintiff be a bystander is dispensed with.

Therefore, although at common law the right of a bystander to recover damages for nervous shock is not really an exception to the general rule prohibiting recovery by relatives of accident victims, this Australian statutory extension of the common law is rather different, and does confer upon relatives *qua* relatives a remedy for losses consequent upon the accident.

(iii) wrongful death claims

At common law, wrongfully causing the death of another person did not give rise to any civil liability. No action lay on behalf of the victim's estate, because his right of action died with him;[126] nor did the causing of death give any right of action to the victim's relatives. *Baker* v. *Bolton*[127] may have been an unsatisfactory decision, but it was always accepted as confirming the existence of the latter rule. It arose out of a stage-coach accident, in which a wife was badly injured and died a month later. Her husband recovered damages for the loss of her consortium[128] for the month for which she survived, but no further damages consequent upon her death.

This position was altered in England by statute in 1846,[129] the growth of railways and the consequent increase in fatal accidents having made the position intolerable. The statute, the *Fatal Accidents Act*, was based on Scottish law, which gave a right of recovery to certain relatives in such circumstances, and it was piloted through Parliament by a Scotsman, John Campbell, who later became Chief Justice of the Queen's Bench and Lord Chancellor. It provided that, where death was caused

124 Which need not have been actionable: Scala v. Mammolitti (1965) 114 C.L.R. 153.

125 e.g. Smee v. Tibbetts (1953) 53 S.R. (N.S.W.) 391.

126 *Actio personalis moritur cum persona.*

127 (1808) 1 Camp. 493.

128 See infra 1.24.

129 But the common-law rule was not abolished: the statute only creates an exception, and the common-law rule still applies in cases falling outside the statute: Osborne v. Gillett (1873), L.R. 8 Ex. 88, Admiralty Comrs. v. S. S. Amerika [1917] A.C. 38.

by a wrongful act, neglect or default, which, if death had not ensued, would have involved the actor in liability to the victim, an action would lie against the actor[130] at the suit of various listed relatives.[131] Amending legislation has augmented the provisions over the years, but essentially the statutory right of action, as now outlined in the consolidating *Fatal Accidents Act* of 1976, differs little from the original legislation. The English example was speedily copied in other common law jurisdictions, and so now virtually every part of the common law world has its own *Fatal Accidents Act*, whether called by this or by some other name.[132]

The *Fatal Accidents Acts* are a clear exception to the general rule of no recovery by relatives in respect of losses suffered consequent upon the death of or an injury to another. The policy of compensating only the accident victim is simply not adhered to in this case. Nor is it necessary to comply with the rule that the plaintiff must be foreseeable: all that the relative has to do is to bring himself within the statutory provisions. If the tortfeasor would have been liable to the deceased accident victim had he survived, then the tortfeasor will be liable to the relatives.[133] The defendant, therefore, must owe a duty to the deceased; but there is no need to establish any duty owed to the relatives.

The existence of such a wide-ranging exception to the general principle of no recovery by relatives is probably due to the fact that the *Fatal Accidents Acts* made their appearance at a time when negligence as a distinct tort was at a very early stage of development.[134] The idea of a duty of care was still in the process of formulation,[135] and certainly there was at that time no requirement that plaintiffs had to rely on duties owed to them personally.[136] In the words of Atiyah,[137] the right of recovery under the *Fatal Accidents Acts* 'antedates the present concep-

130 Fatal Accidents Act 1846 (U.K.) s.1. See now Fatal Accidents Act 1976 (U.K.) s.1(1).

131 Fatal Accidents Act 1846 (U.K.) ss.2, 3. See now Fatal Accidents Act 1976 (U.K.) ss.1(2), 1(3).

132 In Australia, see Fatal Accidents Act 1959 (W.A.), Compensation to Relatives Act 1897 (N.S.W.), Wrongs Act 1958 (Vic.) Part III, Common Law Practice Act 1867 (Qld.), Wrongs Act 1936-1972 (S.A.) Part II, Fatal Accidents Act 1934 (Tas.), Compensation (Fatal Injuries) Ordinance 1968 (A.C.T.), Compensation (Fatal Injuries) Ordinance 1974 (N.T.).

133 See e.g. Fatal accidents Act 1976 (U.K.) s.1(1), Fatal Accidents Act 1959 (W.A.) s.4.

134 It is probable that the modern tort of negligence only finally emerged with the decision in Williams v. Holland (1833) 10 Bing. 112: see Prichard, 'Trespass, Case and the Rule in Williams v. Holland' [1964] *C.L.J* 234; Milsom, *Historical Foundations of the Common Law* (1969) 344-352; Baker, *Introduction to English Legal History*, 2nd ed. (1979) 336-345.

135 Perhaps this requirement was not completely established until Winterbottom v. Wright (1842) 10 M. & W. 109.

136 As is made clear by Smith v. L.S.W. Ry. (1870) L.R. 6 C.P. 14—see supra n. 15.

137 *Accidents, Compensation and the Law* 2nd ed. (1975) at 88.

tual framework of the law of negligence.' Moreover, it should be remembered that in 1846 there was no alternative for relatives in the form of an action by the victim's estate, the proceeds of which might come to them under his will or on intestacy, because tort claims did not survive the death of either the victim or the tortfeasor. When survival of actions was introduced in England by statute in 1934,[138] courts had to ensure that appropriate deductions from *Fatal Accidents Act* damages were made so as to prevent double recovery.[139] The *Fatal Accidents Acts*, as we will see, are primarily concerned with support derived by the relatives from the deceased's earnings, and so the key area of overlap would relate to the claim made by the estate for damages for lost earnings. Until recently, in line with the rule in *Oliver* v. *Ashman*[140] which held that damages for lost earnings were to be assessed on the basis of the post-accident life expectancy, the custom in cases where the plaintiff had died and actions were being brought under both statutes was to award damages for lost earnings up to the time of death under the 1934 Act, lost earnings subsequent to that point falling exclusively within the province of the *Fatal Accidents Acts*.[141] In Australia, however, which never adopted the rule in *Oliver* v. *Ashman*[142] and always awarded

138 Law Reform (Miscellaneous Provisions) Act 1934 (U.K.) s.1. In Australia, see Law Reform (Miscellaneous Provisions) Act 1941 (W.A.), Law Reform (Miscellaneous Provisions) Act 1944 (N.S.W.), Administration and Probate Act 1958 (Vic.) s.29, Common Law Practice Act 1867 (Qld.) s.15D, Survival of Actions Act 1940 (S.A.), Administration and Probate Act 1935 (Tas.) s.27, Law Reform (Miscellaneous Provisions) Ordinance 1955 (A.C.T.), Law Reform Miscellaneous Provisions) Ordinance 1956 (N.T.) Part II.

The reform was necessitated by the increase in road accidents in which the tortfeasor hinself died, leaving nobody who could be sued. As Weir says, comparing the Fatal Accidents Act with the Law Reform (Miscellaneous Provisions) Act: 'The train which provoked the Fatal Accidents Act with itself overtaken by the motor car. There was this difference, that whereas the train company survived collisions in perfect health, the careless motorist often ended up as dead as those he killed and deader than those he injured. This was a serious matter for highway victims and their dependants because the rule at common law was that when a tortfeasor died his liability terminated. Legislation went further and provided that dead people could sue as well as be sued. This gratifying piece of evenhandedness exposed judges to a new claim from plaintiffs . . . .': supra n. 99, at 12.

139 Thus, although the Law Reform (Miscellaneous Provisions) Act 1934 (U.K.) s.1(5) provided that the rights under that Act should be in addition to and not in derogation of any rights conferred upon the deceased's dependants by the Fatal Accidents Act, it is clear that if a claimant under the Fatal Accidents Act has received, or is likely to receive, damages under the Law Reform (Miscellaneous Provisions) Act, then the amount of his benefit must be deducted from the Fatal Accidents Act damages: Davies v. Powell Duffryn Associated Collieries [1942] A.C. 601, Murray v. Shuter [1976] Q.B. 972.

140 [1962] 2 Q.B. 210.

141 See e.g. Murray v. Shuter [1976] Q.B. 972.

142 [1962] 2 Q.B. 210.

damages based on the pre-accident life expectancy,[143] a deduction has to be made to prevent double recovery, and so a sum representing the amount the deceased would have spent on himself and his dependants (expenditure on dependants being what will be claimed in the *Fatal Accidents Act* action) is deducted from damages awarded under the survival legislation.[144] In England, the House of Lords in *Pickett* v. *British Rail Engineering*[145] has recently abolished the rule in *Oliver* v. *Ashman,*[146] and damages for lost earnings are now assessed on the basis of pre-accident life expectancy; the courts have also accepted the logical consequence and have held in *Kandalla* v. *British Airways Board*[147] that this claim for loss of earnings survives for the benefit of the estate, The problem of double recovery thus presented was solved by assuming that the deceased's estate would pass to the *Fatal Accidents Act* beneficiaries, thus extinguishing the *Fatal Accidents Act* claim[148]—an interesting departure from the Australian practice. If this is a true picture of what will now happen, one wonders how many successful claims will be made under the English *Fatal Accidents Act*; and these developments probably underline the fact that, in a situation where all claims that may be made by living plaintiffs survive for the benefit of the estate, the direct action by the relatives under the *Fatal Accidents Acts* may not be necessary.

However, the *Fatal Accidents Act* claim exists and is obviously too firmly established to be eliminated by such developments: only the legislature can decide whether both the survival action and the *Fatal Accidents Act* action are now necessary. In assessing the scope of the *Fatal Accidents Act* action, the most important issue, for the purposes of this article, is to investigate the types of losses for which a relative may be able to recover under it. The legislation itself provides very little in the way of guidance. s.3 of the English Act of 1976, re-enacting a provision of the original 1846 Act, says simply that such damages may be awarded as are proportioned to the injury resulting from the death, a provision

143 Skelton v. Collins (1966) 115 C.L.R. 94—a rule altered by statute in Qld. in 1972: Common Law Practice Act 1972 (Qld.) s.15D(2)(d)(ii).

144 Skelton v. Collins (1966) 115 C.L.R. 94, per Taylor J. at 114. See Fleming, supra n. 7, 661; Luntz, *Assessment of Damages* (1974) 149, 258-259.

145 [1980] A.C. 136.

146 [1962] 2 Q.B. 210.

147 [1980] 2 W.L.R. 730; see also Gammell v. Wilson [1980] 2 All E.R. 557.

148 It was to avoid this problem that the Law Commission in 1973 recommended that the claim for lost earnings in the lost years should not survive for the benefit of the estate: supra n. 4, para. 107. The Pearson Commission made a similar recommendation: supra n. 5, para. 437. Weir, supra n. 99, at 16, points out that the difference between a judicial and a legislative reversal of the rule in Oliver v. Ashman [1962] 2 Q.B. 210 is that, unlike the legislature, the courts are powerless to render the new claim intransmissible to the estate.

echoed by most of the *Fatal Accidents Acts* in other jurisdictions.[149] The Scottish law on which the *Fatal Accidents Act* was based did not limit the relatives' right to recovery to their economic losses—the financial support of which they had been deprived by the deceased's death—but also allowed compensation (*solatium*) for the grief and suffering which relatives would naturally experience.[150] However, the English courts immediately limited the ambit of recovery to pecuniary loss. Within a couple of years of the passing of the Act, it had been held at nisi prius in *Gillard* v. *Lancashire & Yorkshire Ry. Co.*[151] that relatives could recover only for their pecuniary losses; and this was confirmed by the House of Lords four years later in *Blake* v. *Midland Ry. Co.*[152] In this case counsel for the plaintiff argued that the Act was based on the Scots law, and that therefore it had surely been contemplated that relatives might recover for all damage suffered on the same basis as in Scotland; and Lord Campbell C.J., the Scottish-born judge who was responsible for getting the Act onto the statute book, was one of the judges—but, interestingly enough, he was not in court when judgment was given.

Ever since these cases it has been settled law that recovery under the *Fatal Accidents Acts* has been limited to pecuniary loss—indeed, in some jurisdictions this has been expressly written into the statute.[153] Accordingly, the courts have held that relatives must not only show that they are within the category of relatives laid down by the Acts, but must also prove that they had a reasonable expectation of pecuniary benefit.[154] The pecuniary benefit that is recoverable will normally be that which accrued from the deceased's earnings, in the usual case where the deceased is the family breadwinner; but the Acts also embrace other situations, for example the situation where the deceased is the wife and mother, and the husband and children have by her death lost the benefit of the multifarious services in the home which she provided. In *Regan* v. *Williamson*[155] an English court extended the scope of recovery in this area by holding that the services of a wife and mother for which the family might claim were not in fact limited to the obvious domestic chores such as cooking and cleaning—which could be replaced

149 e.g. Fatal Accidents Act 1959 (W.A.) s.6(2).

150 See Walker, *Law of Delict* (1966) at 471-472, 725-733. The action was limited to spouses, parents and children of the deceased: Eisten v. North British RR. Co., 1908 S.C. 444.

151 (1848) 12 L.T. 356.

152 (1852) 18 Q.B. 93.

153 e.g. New Zealand, New Brunswick, New York: Law Com., supra n. 4, para. 166 n. 160. .

154 The requirement was first stated by Pollock C.B. in Franklin v. S. E. Ry. (1858) 3 H. & N. 211, at 214.

155 [1976] 1 W.L.R. 305.

by the hire of a substitute—but also covered other aspects, such as her role in the upbringing of the children, which were harder to value and much harder to replace. The court went some way towards agreeing with a statement of McGregor[156] that the benefit of a mother's personal attention to a child's upbringing had, in the long run, a financial value. This case was followed in *Methet* v. *Perry,*[157] in which the court, in addition to awarding compensation for the loss of the domestic services formerly provided by the deceased wife and mother, also awarded compensation for loss of personal services and attention both to the children (on the analogy of *Regan* v. *Williamson*[158]) and to the husband—though in both cases the sums awarded were modest. The South Australian decision in *Fisher* v. *Smithson*[159] has adopted these two cases and perhaps even extended them a little. As in *Mehmet* v. *Perry,*[160] the court recognised that, in addition to compensation for the loss of the wife's domestic services, both the husband and the children had separate claims for the loss of the personal attention of the wife and mother. Zelling J.[161] would have gone even further, and pointed to Canadian decisions, in particular *St Lawrence & Ottawa Ry.* v. *Lett*[162] in which as long ago as 1885 it was held that the loss which children suffer in being deprived of a mother's care and moral training is a pecuniary loss for which damages are recoverable in a *Fatal Accidents Act* action; and *Vana* v. *Tosta,*[163] following this decision, confirmed that such damages should be substantial. Zelling J. said that he thought that the question of the damages recoverable by a child for the loss of a mother needed to be further thought out, and hoped that one day it would be reviewed by the highest courts—he felt that the loss of a mother, since it would almost inevitably affect the child's school-work, at least for a substantial period, could easily affect his future employment prospects and might therefore be very substantial.

The losses described above have been clearly identified as material pecuniary losses. Though non-pecuniary losses at present remain outside the scope of the legislation in most jurisdictions, there is a marked trend towards amendment to permit claims of this nature. The pioneering step was taken in South Australia, where in 1940 the *Wrongs Act*

156 *Damages* 13th ed. (1972) para.1232, referred to by Lord Edmund-Davies in Hay v. Hughes [1975] Q.B. 790 at 802-803.
157 [1977] 2 All E.R. 529.
158 [1976] 1 W.L.R. 305.
159 (1977) 17 S.A.S.R. 223; see also Jacobs v. Varley (1976) 9 A.L.R. 219, per Murphy J. at 234-235.
160 [1977] 2 All E.R. 529.
161 (1977) 17 S.A.S.R. 223 at 241-243.
162 (1885) 11 S.C.R. 422.
163 (1967) 66 D.L.R.2d 97.

1936[164] was amended to permit recovery (characterised as *solatium* rather than damages[165]) for injured feelings, though a statutory ceiling was placed on the amount recoverable.[166] A similar step was taken in Eire in 1961[167] and in the Northern Territory in 1974.[168] In the United States, a similar development is taking place—in a number of states the courts, reinterpreting statutory provisions similar to the English provision which do not limit the damages recoverable in any way, have held that damages for injured feelings are recoverable,[169] and some states, including some which formerly had an express statutory restriction on the nature of the damages recoverable, have now amended their statutes to write in a right to recover, usually limited as to the amount, for non-pecuniary loss.[170] These statutes, then, like the Scottish right to recover for *solatium*, give relatives a right of recovery purely and simply for their injured feelings.

The effect of these developments has been to produce suggestions for extending the law in England, although the suggested extension does not go quite as far as allowing recovery for pure mental distress. In their 1973 Report the Law Commission recommended that a limited class of relatives—surviving spouses, and parents of minor children—should be able to claim a maximum of £1,000 for 'bereavement'.[171] The choice of the label 'bereavement' was influenced by the separate recommendations of the Scottish Law Commission, which had recommended that the relatives' right to *solatium* should be replaced by an additional element of damages acknowledging the non-pecuniary loss suffered by a husband, wife, parent or child of the deceased[172]—non-pecuniary loss here meaning the loss of help as a member of the household and (except perhaps in the case of a parent of a deceased child) of counsel and guidance. By bereavement, then, the Law Commission mean not only grief and mental suffering but also the other deprivations particularly emphasised by the Scottish Law Commission's proposal.[173]

The Scottish proposal subsequently became law as s.1(4) of the *Damages (Scotland) Act* 1976, and when the Pearson Commission came

164 Wrongs Act 1936-1972 (S.A.) s.23A (added 1940).
165 Fisher v. Smithson (1977) 17 S.A.S.R. 223, per Bray C.J. at 232.
166 A sum not exceeding $3,000 for a child, or $4,200 for a spouse: Fleming, supra n. 7 at 658.
167 Civil Liability Act 1961 (Eire) s.49.
168 Compensation (Fatal Injuries) Ordinance 1974 (N.T.) s.10.
169 This development was initiated by Wycko v. Gnodtke (1960) 105 N.W.2d 118.
170 See McGregor, Damages for Personal Injuries and Death, *International Encyclopedia of Comparative Law* vol XI (*Torts*), chap. 9, at 111 nn. 1090-1091.
171 supra n. 4, at paras 160-180.
172 Scottish Law Com. Memorandum No. 17 (1972) para. 99.
173 supra n. 4, at para. 172.

to consider the matter they modified the Law Commission's proposal to bring it further into line with the new Scottish position.[174] Concurring with the view of the Scottish Law Commission above referred to, they felt that the award should be directed at 'loss of society', rather than sorrow or suffering—that is, they would exclude the latter two elements from the Law Commission's notion of 'bereavement'. Again in line with the Scottish statute, they would allow claims for loss of society to be brought not only in the cases suggested by the Law Commission but also in one other case—that of an unmarried minor child deprived of a parent. Legislation to implement this proposal may eventually materialise—though it may be that as a result of *Regan* v. *Williamson*[175] and the other recent cases the common law has already more or less reached this position.

In England (but not in Australia) there is one other case in which relatives may receive a small sum of money which, in effect, compensates them for the death of another: this has nothing to do with the *Fatal Accidents Act*, but results from the interpretation by the courts of the provisions of the *Law Reform (Miscellaneous Provisions) Act* 1934 dealing with the survival of causes of action. Damages for lost expectation of life were first recognised as a separate head of damages by *Flint* v. *Lovell*[176] in 1935, and then in *Rose* v. *Ford*[177] in 1937 it was held that a claim under this head might be made not only by a living plaintiff but also by an estate. The large number of claims which resulted, and the variation in the amounts awarded, caused the House of Lords in 1941 in *Benham* v. *Gambling*[178] to limit damages under this head to a small conventional sum, and this remains the practice at the present day.[179] The importance of this is that, even if damages are not claimable under any other head, a claim for loss of expectation of life can be made—and this is so even if the victim is killed in the accident more or less instantaneously.[180] Thus, where a young child is killed in an accident, though no other claims can be made, the estate can always recover under this head; and the money passes to the parents by operation of the intestacy rules. In effect, therefore, in such cases parents receive a small sum of

174 supra n. 5, at paras 438-444. It should be noted that this also corresponds with the position in the N.T., where a husband can recover for loss of his wife's companionship: Compensation (Fatal Injuries) Ordinance 1974 (N.T.) s.8(v).

175 [1976] 1 W.L.R. 305.

176 [1935] 1 K.B. 354.

177 [1937] A.C. 826.

178 [1941] A.C. 157.

179 An attempt to enlarge the conventional sum failed in Yorkshire Electricity Board v. Naylor [1968] A.C. 529.

180 Morgan v. Scoulding [1938] 1 K.B. 786.

money by way of compensation for their bereavement.[181] The Law Commission in their 1973 Report expressed dissatisfaction not only with this state of affairs but also with the whole concept of loss of expectation of life as a separate head of damages, and recommended that it should be abolished[182]—a recommendation fully supported by the Pearson Commission.[183] In Australia, these problems have been avoided: in all states, statutes which allow the survival of actions provide that claims for non-pecuniary loss shall not survive for the benefit of the estate.[184]

(iv) actions for loss of consortium and services

It is clear that the *Fatal Accidents Acts* constitute an exception to the general principles under discussion—that in negligence a plaintiff must show a duty owed to himself, and that the law compensates only the immediate accident victim and not his relatives. *The Fatal Accidents Acts*, however, are not the only exception to these principles—another exception is provided by the actions for loss of consortium and services.

These actions are of ancient origin.[185] The mediaeval law of trespass recognised that a man had a kind of proprietary right in his wife, his children and his servants, and enforced this right by giving him an action against anyone who interfered with it. This action was a variety of trespass in which damage had to be proved: in the case of the child or the servant, that damage was the deprivation of the services to which the parent or master was entitled, and in the case of the wife, the damage was the interference with consortium—the benefits of the married state. The principal component of consortium, at least in the mediaeval period, was the services rendered by the wife, but later on it became apparent that other, less tangible, material benefits were also included. The interference in question might be committed intentionally, by enticement or harbouring, by seduction of a female child or by adultery with a wife. But it became clear, at least by the nineteenth century, that actions would also lie for interferences with consortium or services committed negligently—in the case of the husband's action for loss of consortium, that this was so was recognised by *Baker* v. *Bolton*[186] already referred to.

181 see esp. Atiyah, supra n. 137, at 82-84.

182 supra n. 4, paras 92-107.

183 supra n. 5, paras 363-372.

184 e.g. Law Reform (Miscellaneous Provisions) Act 1941 (W.A.) s.4(2)(d).

185 For the history of these actions see Brett, 'Consortium and Servitium: A History and Some Proposals' (1955) 29 *A.L.J.* 321, 389, 428; Jones, 'Per Quod Servitium Amisit' (1958) 74 *L.Q.R.* 39.

186 (1808) 1 Camp. 493 (supra text and n. 126); see also Martinez v. Gerber (1841) 3 M. & G. 88; Brockbank v. Whitehaven Junction Ry. (1862) 7 H. & N. 834.

If for the present we ignore the various methods of intentional interference with consortium or services—which in any case have now been abolished by statute in England,[187] in Australia,[188] and elsewhere[189]—we are left with three instances in which a tortfeasor who negligently injures another person in an accident may find himself liable to third persons who need not be anywhere in the vicinity: the husband, if the accident victim is the wife and the accident interferes with the husband's consortium; the parent, if the accident victim is a child who rendered services to the parent (and the services element, at least in the case of young children who lived with their parents, became more fictional than real[190]); and the employer, if again the accident victim is by the accident prevented from rendering to the employer the services he would otherwise expect. Clearly, these are cases in which the law sees fit to compensate not only the primary accident victim but also others (relatives, save for the employer) who are consequentially affected. In form, these actions do not breach the principle that a plaintiff must show a duty owing to him personally and cannot build on a wrong someone else, because the actions for loss of consortium and services are completely independent of the victim's action, as is shown by cases which hold that the contributory negligence of the accident victim does not oeprate to reduce the damages awarded in the consortium action[191]—an important contrast to the position under the *Fatal Accidents Acts.*[192]

It is evident that in this area the old-established remedies are finding it hard to adjust to modern notions of tort compensation. The current idea is to compensate only the accident victim, and yet, in the particular

187 Law Reform (Miscellaneous Provisions) Act 1970 (U.K.) ss.4, 5.

188 Family Law Act 1975 (Com.) s.120; Wrongs Act 1936-1972 (.S.A) s.35.

189 Canada: Family Law Reform Act 1978 (Ont.) s.69.

190 If a child is under age, a mere right to service is sufficient; if the child is of full age, proof of actual services is required, but the most trivial acts suffice, e.g. Carr v. Clarke (1818) 2 Chit. 260 (making a cup of tea).

191 Mallett v. Dunn [1949] 2 K.B. 180: Curran v. Young (1965) 112 C.L.R. 99; Cook v. Wright [1967] N.Z.L.R. 1034, at 1037. But the contrary view obtains in the U.S.A.: Prosser, supra n. 15, at 892; in Canada: Enridge v. Copp (1966) 57 D.L.R.2d 239; and in some Australian jurisdictions: see Wrongs Act 1936-1972 (S.A.) s.27A(9), Law Reform (Miscellaneous Provisions) Ordinance 1955 (A.C.T.) s.17; Law Reform (Miscellaneous Provisions) Ordinance 1956 (N.T.) s.18.

192 Where the contributory negligence of the accident victim reduces the damages which can be awarded to the dependants: see e.g. Fatal Accidents Act 1976 (U.K.) s.5 (formerly Law Reform (Contributory Negligence) Act 1945 s.1(4)); Law Reform (Contributory Negligence Tortfeasors Contribution) Act 1947 (W.A.) s.4(2). All other Australian jurisdictions have introduced legislation providing for apportionment in cases of contributory negligence, and these statutes all have similar provisions, except for N.S.W., where contributory negligence does not reduce the damages in wrongful death actions: Law Reform (Miscellaneous Provisions) Act 1965 (N.S.W.) s.10(4).

situations to which they extend, these actions do just the opposite. There are two ways forward. One is to take a stand on the principle that only the accident victim can be compensated, and abolish the actions for loss of consortium and services because they run counter to it—and this in fact was the proposal made by the Law Commission[193] and endorsed by the Pearson Commission.[194] Yet the logic of what they are proposing is not obvious because, at the same time as they recommend the abolition of causes of action which compensate a husband or a parent for the loss of society which he suffers consequent on injury to his wife or child, they recommend the *institution* of a similar cause of action for spouses and parents in respect of a similar loss consequent upon death. The other way forward is to recognise that, in certain carefully restricted circumstances, it *is* appropriate to compensate persons other than the primary accident victim; and that since in death cases it is deemed appropriate, in circumstances carefully delineated by the two Commissions, to compensate spouses, parents and children, it is likewise appropriate to compensate such persons in injury cases—which the actions for loss of consortium and services, modernised and expanded accordingly, can do.[195]

When we look in more detail at the present rules governing the actions for loss of consortium and services, the present uncertainty, and the pull in opposite directions of the two possible solutions, are clearly revealed. The pressure to restrict the scope of the actions is clearly shown by the refusal of the House of Lords in *Best* v. *Samuel Fox*[196] to allow the wife an action similar to the husband's action—this matter will be examined in detail in the second part of this article. A similar pressure no doubt compelled the decision of the English Court of Appeal in *I.R.C.* v. *Hambrook*[197] to limit the employer's action to cases involving domestic live-in servants—thus taking the action out of the commercial sphere. In Australia and in other common-law jurisdictions, however, this pressure has not been felt and the employer's action has not been so limited.[198] Diversity can again be seen in the various

193 supra n. 4, at paras 158, 161.

194 supra n. 5, at paras 445-447.

195 From here on we are only concerned with the actions for loss of consortium and services in so far as they are relevant to the question of family relationships, and so the desirability or otherwise of giving the employer an action for the loss of the services of his employee is not further considered.

196 [1952] A.C. 716.

197 [1956] 2 Q.B. 641.

198 Comr. for Rys. v. Scott (1959) 102 C.L.R. 392; Sydney City Council v. Bosnich (1968) 89 W.N. (Pt I)(N.S.W.) 168 (Australia); A.G. v. Wilson [1973] 2 N.Z.L.R. 238 (New Zealand); Genereaux v. Petersen (1972) 34 D.L.R.3d 614, contra Schwarz v. Hotel Corp. (1970) 15 D.L.R.2d 764 (Canada).

American states—while the majority have been happy to retain and even extend the scope of the husband's action, in some jurisdictions it has been held to have been restricted or abolished by Married Women's Property Acts.[199] There have been similar differences between the various common-law jurisdictions about whether the action will lie for mere impairment of the right to consortium or services, as opposed to its total destruction. In *Best* v. *Samuel Fox*[200] the Court of Appeal held that no action lay for mere impairment, but the House of Lords was equally divided on the issue[201]—only later on did the English courts finally recognise that impairment was sufficient.[202] The English decisions were probably influenced by the fact that the High Court of Australia in *Toohey* v. *Hollier*[203] readily recognised that impairment was sufficient; but despite these precedents opinion on this issue in the various Canadian provinces is still divided.[204]

One other aspect of the scope of these remedies is controversial. The cases recognise that a husband has a right to recover for reasonable medical expenses incurred on behalf of his wife, and that a parent has a similar right in respect of expenses incurred on behalf of his child; but it does not seem to be settled whether this right is based on the actions for loss of consortium or services, or is independent, stemming from the duty to maintain. As regards the husband's action, Lord Goddard in *Best* v. *Samuel Fox*[205] and Diplock J. in *Kirkham* v. *Boughey*[206] preferred the latter explanation; as regards the parents' action, the clearest case allowing recovery, the New Zealand case of *Cook* v. *Wright,*[207] referred to both possible bases and did not decide between them.[208] In all these cases, there is probably a simpler alternative: the accident victim should recover in respect of the expenses in his own action and hand it over to whoever footed the bill.

199 See Prosser, supra n. 15, at 891.

200 [1952] A.C. 716.

201 For details see infra at

202 For details see infra text and n. 311.

203 (1955) 92 C.L.R. 618.

204 Impairment sufficient: Robar v. MacKenzie [1952] 2 D.L.R. 678 (Nova Scotia); Gardner v. McCarthy (1960) 26 D.L.R.2d 603 (B.C.); Honsey v. Sykes (1963) 37 D.L.R. 2d 225 (Sask.). Impairment insufficient: Fediuk v. Lastiwka (1958) 12 D.L.R. 2d 421 (Alb.); Sznerski v. Robinson (1961) 36 W.W.R. 46 (Man.); Canestraro v. Larade (1972) 28 D.L.R. 3d 290 (Ont.). See generally Canestraro v. Larade ibid., esp. at 293-294.

205 [1952] A.C. 716.

206 [1958] 2 Q.B. 338.

207 [1967] N.Z.L.R. 1034.

208 Cook v. Wright [1967] N.Z.L.R. 1034 refers to an English case, Hall v. Hollander (1825) 4 B. & C. 660. In other English cases, Barnes v. Pooley (1935) 51 T.L.R. 391 and Read v. Croydon Corp. [1938] 4 All E.R. 631 the defendant did not dispute the parents' right to sue.

Conclusions and Comparisons

The conclusion which we might properly draw from the enquiry so far conducted is that the common law has come to a crossroad. Although, as a general rule, the law seeks to compensate only the accident victim and not his relatives, there are wide-ranging exceptional situations in which relatives do have a separate right of action—and, although some areas have been examined only to be rejected as not being true exceptions to the principle, the *Fatal Accidents Acts* and the actions for loss of consortium and services undoubtedly do constitute true exceptions. Again, proposals for reforming the law seem to be proceeding in different directions. On the one hand it is suggested that the right of recovery under the *Fatal Accidents Acts* be extended; and on the other, it is recommended that the actions for loss of consortium and services be abolished.

Which direction, then, should the common law take? It might be thought that some help can be obtained by looking outside the common law to the practice of legal systems which have a different background—but in fact there is considerable diversity here also.[209] If we look first to the codified civil law systems of Europe and elsewhere, we find that many recognise as a general principle that injuring one person by accident also involves injuries to others in his family circle. This principle receives its widest recognition in France: there, within the ambit of article 1382 of the Civil Code, which sets out the general principle of liability for fault, anyone who suffers any sort of loss, whether pecuniary in nature or consisting merely of injury to the feelings, consequent on the death of another may recover damages[210]—this right extends not only to 'official' relatives but to anyone who can prove *douleur réelle et suffisamment profonde*,[211] and the right of mistresses to recover is fully recognised.[212] Relatives (though admittedly a more limited class) have similar rights when the accident victim is merely injured.[213] Other legal systems with a general principle similar to the French have tended to copy the French lead—this applies particularly to countries strongly

209 see generally McGregor, supra n. 170, at 15-20; Mazeaud & Tunc, *Responsabilité Civile* 6th ed. (1965) vol. i para. 292 n. 1.

210 See Mazeaud & Tunc, supra n. 209, vol. i. chap. 3; Starck, *Droit Civil—Obligations* (1972) at 75-79; Catala & Weir, 'Delict and Torts—A Study in Parallel' (1964) 38 *Tul. L.R.* 663 at 663-701.

211 Mixte 27th February 1970, D.1970.100 (L'arrêt Dangereux).

212 Id.; and see also crim. 19th June 1975, D.1975.679, allowing recovery to a mistress even where the relationship was adulterous.

213 This right, first recognised in 1946: civ. 22nd October 1946, D.1947 J.49, is limited to parents and spouses, except that in one case the claim of a fiancée was recognised: Lyon, 26th May 1966, D.1967 somm.9.

influenced by France such as Belgium or Lebanon,[214] but also to others. Thus in Spain and in the Spanish-influenced South and Central American countries the rights of relatives under the article 1382-type general Code provisions are nearly as wide as in France,[215] and the rights of relatives are also widely protected in Italy.[216] However, in other countries which have inherited the French general principle the story is different. Quebec furnishes a particularly good example, for although the Civil Code possesses a general principle of liability similar to article 1382,[217] and although French influence on the Quebec legal system has always been strong, recovery under the general principle has not been extended to relatives: in this respect Quebec has preferred to align herself with the common law, so relatives' rights are limited to those available under another section of the Code which is equivalent to the *Fatal Accidents Acts.*[218] Also interesting is the Netherlands, where relatives have no right to recover under the general principle of the Code, except for financial loss;[219] and the position is similar in the Scandinavian countries.[220] Even more interesting, perhaps, is Germany, where the code provisions are different and there is no equivalent of the French general principle: the relatives' right of recovery is limited to financial loss and the position bears a marked resemblance to the common law.[221] In Switzerland, where the delict provisions of the Code bear the marks of German influence, the position is similar.[222]

A like division of attitude is revealed when one compares Roman law with the modern uncodified civil law systems where the law of delict is still expressly founded on Roman law principles. Roman law recognised that when a member of a family was injured, this constituted an injury to the feelings of the head of the family, the *paterfamilias*, and under this principle a husband could recover for an injury done to his wife, and a father for an injury done to his child;[223] but in the modern systems this right seems to have more or less withered away. In South Africa and

214 See McGregor, supra n. 170, at 16.

215 Art. 1902 of the Spanish Civil Code is to be interpreted in the same way as the French art. 1382: Sentencia 6th December 1912, cited McGregor, supra n. 170, at 17 n. 123.

216 Catala & Weir, supra n. 210, at 689 n. 113.

217 Quebec Civil Code art.1053.

218 Id. art.1056. See Canadian Pacific Ry. Co. v. Robinson (1887) 14 Can. S.C.R. 105; Driver v. Coca-Cola (1961) 27 D.L.R.2d 20, per Tascherau J. at 26-27.

219 McGregor, supra n. 170, at 17-18.

220 Id. at 17.

221 See Handford, 'Moral Damage in Germany' (1978) 27 *I.C.L.Q.* 849 at 874-875 and authorities there cited.

222 See Swiss Code of Obligations arts. 28(2) and 47.

223 D.47.10.1.3. A similar action was available to a master in respect of an injury to his slave: D.47.10.13.

in Sri Lanka the only survival appears to be the right of a husband to sue in respect of an injury to his wife[224]—there is no decision on whether a wife has a similar right of action in respect of an injury to her husband. It seems to be generally agreed that only in the very special case of husband and wife should the Roman law doctrine now operate.[225] In Scotland, the old Roman law action has been cut down even more, and only in one special case, in which a husband is allowed an action in respect of the rape of his wife,[226] is any action by a relative allowed. However, in cases involving death, Scots law did recognise the right of the relatives to recover not only for financial losses but also for *solatium*—it was this action which, as already related, served as a model for the *English Fatal Accidents Act*.[227] South Africa also allows relatives an action in cases involving death, but only for pecuniary loss.[228] Neither the Scottish action nor the South African action seems to be of Roman law origin.

Finally, we may look briefly at legal systems under socialist influence. Here we would expect rights of recovery by relatives, at least for anything other than pure financial loss, to be non-existent, because to recognise a right of recovery for injured feelings is alien to the spirit of communism. Many legal systems follow Russia in refusing to recognise damages for injured feelings in any shape or form,[229] and some allow such damages only in actions by the accident victim himself,[230] but in at least two countries, Yugoslavia and Bulgaria, judicial interpretation of the Codes has produced the result that, in death cases, relatives may recover not only for their financial loss but also for injured feelings.[231]

There is, then, no discernible pattern in the attitudes of different legal systems to the problem under discussion. The common law systems must make their own choice. Either they can come down fairly and squarely in favour of compensating only the accident victim, allowing him to recover as part of his damages whatever sums in respect of expen-

224 Banks v. Ayres (1888) 9 N.L.R. 34; Jacobs v. Macdonald (1909) T.S. 442; Suda Bala v. Punchirala (1951) 52 New L.R. 512.

225 McKerron, *Law of Delict* 7th ed. (1971) at 55; Jacobs v. Macdonald (1909) T.S. 442 per Innes C.J.

226 Black v. Duncan, 1924 S.C. 738.

227 See supra, text and n. 150. A similar claim could also be made by means of another ancient indigenous action, assythment, still not absolete in 1972: McKendrick v. Sinclair, 1972 S.L.T. 110, but abolished by the Damages (Scotland) Act 1976 (U.K.) s.8.

228 See McKerron, supra n. 225, 151-153, and Union Government v. Warneke, 1911 A.D. 657, rejecting a claim by a husband for the loss through her death of his wife's comfort and society.

229 see Russian Civil Code arts. 457 *et seq*.

230 e.g. Czech Civil Code art. 444; Polish Civil Code art. 445—as to which see Szpunar, 'The Law of Tort in the Polish Civil Code' (1967) 16 *I.C.L.Q.* 86.

231 see McGregor, supra n. 170, at 17.

diture by third parties are thought proper, and leaving only the *Fatal Accidents Acts* as a rather special case operating as a substitute or part-substitute for a claim made by the estate of the deceased accident victim; or they can adopt the position that, although generally speaking the person who should receive compensation is the accident victim himself, there are cases where it is appropriate also to compensate his relatives, and that to achieve this object the proposals for extending the *Fatal Accidents Acts* should be implemented and the existing actions for loss of consortium and services should be modernised to bring them into line with them.

In the second part of this article we will take one specific issue—the question of whether or not the law should recognise that a wife has an action for loss of consortium equivalent to the husband's action—and, in relation to this issue, very significant for the problem as a whole, examine the choice thus presented.

BEST V. SAMUEL FOX[232]

As we have seen, the husband's action for loss of his wife's consortium is of ancient origin, and his right to sue for such a loss occasioned *negligently* has been recognised for close on two hundred years.[233] It was not until 1952, however, in the case of *Best* v. *Samuel Fox*, that the question whether the wife had a similar right as respects the loss of her husband's consortium received an authoritative answer from the House of Lords.

In this case the plaintiff's husband, a steel erector engaged on working on the roof of the defendants' premises, was knocked off the roof by a crane as a result of their negligence, and fell, sustaining serious injuries (for which he later recovered damages at the Leeds Assizes). One effect of his injuries was that he became incapable of sexual intercourse. His wife, deprived of the opportunity of sexual intercourse with her husband and of the possibility of having children, sued the defendants for interference with her right of consortium.

The action was dismissed at first instance, by the Court of Appeal and by the House of Lords. Two separate barriers confronted the plaintiff: whether the action would lie in favour of a wife at all, and whether it would lie for a mere impairment of consortium as opposed to a total loss—for here the consortium remained unaffected except in this one particular respect. The Court of Appeal concentrated on the question of impairment, and held unanimously that the action lay only in cases of total loss. On the issue of whether a wife could sue anyway, they were

232 [1951] 2 K.B. 639 (C.A.); [1952] A.C. 716 (H.L.).
233 see supra text and n. 186.

divided. Birkett L.J., who delivered the leading judgment in the Court of Appeal—and, it is suggested, the most enlightened judgment in either the Court of Appeal or the House of Lords—was prepared to allow the wife an action on exactly the same terms as the husband, and thought that any distinction between the sexes on this matter was improper, but held that the action was unavailable to any plaintiff of either sex unless there was a total loss of consortium. Cohen L.J., however, doubted whether the wife had an action and Lord Asquith was definitely of the opinion that she did not.

The House of Lords dismissed the appeal, but concentrated on the question of whether the action would lie in favour of a wife at all—and in the result all five judges held that a wife had no action for loss of consortium. On the question of impairment they were not unanimous. Lord Porter and Lord Goddard doubted whether an action would lie for mere impairment, but Lord Reid (with whom Lord Oaksey concurred) held that it would. This was one of two matters which Lord Reid, who otherwise concurred in the judgment of Lord Goddard, specifically reserved. The fifth judge, Lord Morton of Henryton, offered no opinion on this matter.

The question of whether the wife could sue thus became the major issue in the House of Lords, and the court's denial of this right is based on four main strands of reasoning. The most justifiable reason given is the general principle of compensation described earlier—that the law must compensate only the accident victim, and not those in his family circle who are consequentially affected as a result of the injury. This was the major reason put forward in the judgment of Lord Morton of Henryton (although he placed it in the context of the liability of an occupier of premises rather than of liability generally),[234] and it also figures prominently in the judgment of Lord Goddard[235]—but only merits a sentence at the end of the judgment of Lord Porter.[236] A second reason advanced by their Lordships was that the enticement cases—cases involving intentional interference with consortium, which according to the English (and Canadian, but not Australian) authorities was available to a wife as well as a husband[237]—were not in point. It had been argued that, if a husband could sue for loss of consortium caused either intentionally or negligently, and an action for intentional deprivation of consortium also lay at the suit of a wife, then, her right to bring an action for loss of consortium having been recognized, it must

234 [1952] A.C. 716, at 734-735.
235 Id. at 730-731.
236 Id. at 728-729.
237 For details of the cases, see infra. text and nn. 287-298.

be co-extensive with the right of the husband and therefore she must have an action in respect of loss of consortium occasioned by negligence. However, Lord Porter[238] and Lord Goddard[239] held that the enticement cases owed their existence to an entirely different principle—the principle, ascribed to *Lumley* v. *Gye*[240] and *Quinn* v. *Leathem*,[241] that an action lies for the violation of a legal right committed knowingly—a principle obviously not capable of extension to negligence cases. Lord Morton of Henryton expressly,[242] and Lords Reid and Oaksey by implication, concurred.

The other two reasons put forward by the House of Lords really hang together, and reveal an unwillingness on the part of the court to escape from the ties of history and rationalise the modern law. Looking back to the origins of the action for loss of consortium, they held that the husband's right to sue was founded upon the proprietary right that he was considered to have in his wife, and as such was chiefly concerned with exacting redress for the loss of material benefits such as the rendering of services. The rights of the spouses had therefore never been equal in this matter, and could not be because consortium was a right appropriate only to a husband.[243] Then, looking at this ancient right in the context of the twentieth century, they held that it was anomalous that a husband should have such an action, and that, although it was too late now to deny the husband's action, because it had existed for hundreds of years, they would not extend the anomaly by now recognising that a similar action lay at the suit of the wife.[244]

The law is therefore left in a most unsatisfactory state. The present position is indefensible. The husband has a right the existence of which is said to be anomalous, and the wife has no equivalent right. This state of affairs should not be allowed to exist: either the husband's action should be abolished, or the wife should be recognised to have a similar action.

The problem of *Best* v. *Samuel Fox* is simply the foremost particular example of the general problem discussed in the first part of this article. The general rule is that only the victim is compensated, but there are a number of miscellaneous exceptions to that general rule. Either we should confirm the general principle and abolish the exceptions, or we

238 [1952] A.C. 716 at 726-727.
239 Id. at 729-730.
240 (1853) 2 E. & B. 216.
241 [1901] A.C. 495.
242 [1952] A.C. 716 at 735.
243 Id., per Lord Porter at 727-728, per Lord Goddard at 731-732, per Lord Morton of Henryton at 735.
244 Id. per Lord Porter at 728, per Lord Goddard at 733, per Lord Morton of Henryton at 735.

should recognise that in certain circumstances it is proper to compensate others besides the accident victim, and then try to rationalise those exceptions so that there is some consistency about them.

The Arguments for Abolition

The case for the adoption of a general principle that in awarding damages compensation should be given only to the accident victim has been persuasively put by the Law Commission in their 1973 Report. They had occasion to deal with a number of instances in which third parties became involved in personal injury cases—not just the questions of losses suffered or services rendered by relatives being considered in this article, but also the question of collateral benefits of all sorts conferred upon the victim by third parties—and the general principle which they felt should govern all these cases was that only the injured person himself should have the right to recover for losses resulting from his injury.[245] Third parties should have no rights against the tortfeasor; recovery would be concentrated in the hands of the victim, trusting him to compensate any others who consequent upon the injury to him had suffered or incurred a loss. The advantages of this principle were that it was simple and straightforward and avoided a multiplicity of actions. The Pearson Commission in their subsequent Report were in entire agreement.[246]

In order to implement this general principle, the two Commissions suggested that the husband's action for loss of consortium, together with the actions for loss of services which lay at the suit of either a parent or an employer, should be abolished, since they were archaic and anomalous, and had little importance or relevance at the present day.[247] To deal with the problem of injury to a person who was thereby prevented from performing domestic services to other members of the family—the sort of loss which at present is compensated for by allowing certain of those other family members to sue for loss of consortium or services—they recommended that an injured person deprived of the ability to render services to others should himself or herself be able to recover in respect of the value of those services.[248] The inability to care for other members of the family is thus to be regarded as a loss suffered by the erstwhile provider of the services rather than by the recipients. One is immediately reminded of *Donnelly* v. *Joyce,*[249] which views the

245 Law Com., supra n. 4, at paras 110-159 (especially paras 126, 155, 157)
246 supra n. 5, paras 343-358.
247 Law Com., supra n. 4, at paras 158, 161; Pearson Com., supra n. 5, at paras 445-447.
248 Law Com., supra n. 4, at paras 156-157; Pearson Com., supra n. 5, at paras 352-358.
249 [1974] Q.B. 454, supra.

rendering of services *to* an accident victim as the fulfilling of the victim's need, and therefore as compensation for his loss, rather than as a loss suffered by the provider of the services. The two Commissions, which recommended that the accident victim should be able to recover damages in respect of services he or she cannot now render, also endorsed *Donnelly* v. *Joyce*:[250] and yet one wonders whether it is right that the need for the services *of* others, and the inability to perform services *for* others, should both be regarded as losses suffered by the accident victim—the result is that in one instance the loss is regarded as being suffered by the recipient of the services, and in the other by the provider.[251]

This issue apart, however, it is important to note that the recommendation of the two Commissions that the inability to render services should be allowed for by compensating the former provider is in line with current thinking, which is that the modern family unit requires some members to provide an income and others to perform domestic or similar services, and an injury to the provider of services has just as important an effect on the family as an injury to the income earner, and is therefore something which should be taken account of in assessing rights to compensation. The Pearson Commission were able to point to a resolution of the Council of Europe that compensation should be available for inability to carry out household tasks;[252] and a recent Canadian study by Cooper-Stevenson[253] suggests that damages should be awarded to 'homemakers' for loss of homemaking capacity. Although a homemaker can of course be either male or female, what is said in this article is of particular relevance to the question of awarding damages to injured women. The author points out that under the action for loss of consortium the basis of recovery is the value of the services *to the husband*,[254] and that to compensate the provider of homemaking services instead may produce a truer basis of assessment. He says that women who do not earn a living but provide homemaking services for the family should be compensated for loss of the ability to provide such services,[255] and that women who are earning at the time of the accident but might shortly be expected to give up earning to become homemakers should, if their damages for lost earnings are to be reduced because of this possi-

250 Id.; see Law Com., supra n. 4, at paras 111-114; Pearson Com., supra n. 5, at paras 343-351.

251 see Weir, supra n. 99.

252 Council of Europe Resolution 75(7) on Compensation for Personal Injury or Death (adopted March 1975): Pearson Com., supra n. 5, at para. 353.

253 Cooper-Stevenson, 'Damages for Loss of Working Capacity for Women' (1979) 43(2) *Sask. L.R.* 7.

254 Id. at 15.

255 Id. at 15-23.

bility, be compensated instead for their future inability to provide homemaking services.[256] No doubt the author would support the recent English decision of *Moriarty* v. *McCarthy*,[257] in which a young unmarried girl injured in an accident had her award for lost future earnings reduced because she might well have married in the near future and ceased to earn a living, but was then given the amount by which her award had been reduced as compensation for the fact that the accident had destroyed her marriage prospects. This reasoning may not assist in the case of the already-married woman who is still earning, but it is at least a step forward in the direction indicated by Cooper-Stevenson.

There is, then, considerable force in the suggestion that actions by third parties should be abolished and that the awarding of damages in personal injury cases should be rationalised by giving the injured accident victim full compensation, which includes compensation for services he can no longer render to others. However, the shortcoming of such proposals is that they exclude from consideration one important aspect of damages presently awarded in an action for loss of consortium—the compensation which a husband receives, and which if the action were extended to a wife she would also receive, for loss of society, companionship and assistance.[258] In actions for loss of consortium this is usually the major item in the award, since it is recognised that consortium implies much more than the mere rendering of services; and, since it is a loss which, in its nature, can be suffered only by the spouse of the victim and not by the victim himself or herself, there is no way in which it can be dealt with by compensating the accident victim. It is submitted, then, that the Law Commission's view that the abolition of the action for loss of consortium and the adoption of their other proposals would leave no important loss uncompensated,[259] and the view of the Pearson Commission that the action has little importance or relevance,[260] are open to criticism on this ground. Moreover, the recommendations of the two Commissions in this area are inconsistent with their other recommendations that in the area of fatal injuries the right of third parties to recover for loss of society should be *recognised*.[261]

It is suggested, then, that, while not wishing to deny that there is much good sense behind the proposals of the two Commissions, there is also a lot to be said in favour of admitting that in certain cases third

256 Id. at 23-25.
257 [1978] 1 W.L.R. 155.
258 see infra, text and n. 347.
259 supra n. 4, at para. 121.
260 supra n. 5, at para. 446.
261 Law Com., supra n. 4, at paras 160-180; Pearson Com., supra n. 5, at paras 418-431; see supra text and nn. 171-175.

parties should have rights to sue, and damages should be awarded for all proper itmes of loss so long as they do not duplicate items awarded to the accident victim. We should note in particular what is said by Luntz:

> The intervention of the legislature would be needed to produce equality either by abolishing the husband's cause of action or by retaining it and conferring a similar cause of action on the wife . . . [T]he arguments in favour of the former course are not obviously overwhelming.[262]

What, then, are the arguments in favour of rationalising the action for loss of consortium by allowing the wife to sue? It will be suggested, first, that the right of consortium should be viewed in its contemporary context, and that this compels the recognition that the spouses should have equal rights to sue; second, that the reasoning of the House of Lords in *Best* v. *Samuel Fox* is, in refusing to recognise these propositions, and in other respects, open to criticism; third, that developments since the case was decided show that the law is moving towards the recognition of the wife's right to sue; and fourth, that the consortium action need not in any way duplicate damages awarded to the victim.

Consortium in the Contemporary Context

The House of Lords in *Best* v. *Samuel Fox* made much of the fact that the husband's right of consortium originated as a species of property right and that such a right could not be reconciled with modern notions of marriage. What was not recognised, at least not by all the members of the court, is that in today's society consortium need not be restricted by these out-of-date notions, but can be adapted to reflect twentieth-century ideas—and that this development has been recognised by the courts. Consortium today is no longer simply a matter of property, or of things which have an overt monetary value such as the performance of domestic services, but is a conception which encompasses all the benefits which accrue from the married state. In the words of Birkett L.J. in the Court of Appeal in *Best* v. *Samuel Fox*, the most forward-looking judgment either in this court or in the House of Lords, 'Companionship, love, affection, comfort, mutual services, sexual intercourse—all belong to the married state. Taken together, they make up the consortium.'[263] This contrasts starkly with the view of Lord Goddard in the House of Lords that consortium is still what it was originally—exclusively con-

[262] supra n. 144, at 303. A similar view was expressed by Barwick C.J. in Curran v. Young (1965) 112 C.L.R. 99, at 101; and by White J. in Sloan v. Kirby (1979) 20 S.A.S.R. 263, at 276 (commenting on the extension of the action to a wife in S.A., as to which see text and n. 319.

[263] [1951] 2 K.B. 639 at 665.

cerned with the rendering of services, analagous to the right of a master to sue for injury to his servant if the servant was thereby rendered unable to perform his duties.[264] Such a view of consortium has long been out of date, and many courts have recognised this fact, choosing instead to define consortium in the contemporary context after the manner of Birkett L.J. Even in *Best* v. *Samuel Fox* itself Lord Goddard was the only judge who uncompromisingly maintained the older view. This view was specifically dissented from by Lords Reid and Oaksey, who otherwise concurred in his judgment,[265] and Lord Porter also went some way towards the modern view.[266] In the Court of Appeal both Cohen L.J.[267] and Lord Asquith[268] accepted the modern notion, as apparently also did Lord Morton of Henryton in the House of Lords, since his judgment proceeds on different principles.

If we accept modern notions of consortium, it surely follows that we must recognise that consortium is a right which is enjoyed equally by both parties to the marriage. At the present day it is indefensible to suggest that the husband has a right not enjoyed by his wife. The interests of each spouse in the consortium of the other spouse cannot be different, but must be the same. Once more, this point is forcefully brought home by the judgment of Birkett L.J.:

> It would appear from the history of the husband's action for loss of consortium that it was a very anomalous thing, and, that being so, it ought not to be extended. But this would leave the husband in the possession of a cause of action which was denied to his wife, and that is a position that I am not prepared to take up. The husband's cause of action, if based on the idea of 'servitium', is based on a view of the law which, in my opinion, is quite obsolete and discredited. It is quite impossible to reconcile it with modern thought and modern ideas. Lord Wensleydale in *Lynch* v. *Knight*[269] could say that the position of a wife resembled that of a hired domestic, tutor, or governess. It is much to be doubted whether anybody today would subscribe to such language or feel it to be in conformity with the recognised and established position of the wife. In so far, therefore, as a distinction in law is sought to be made between the position of a husband and that of a wife in the matter of consortium on the ground that the husband has a proprietary interest

264 [1952] A.C. 716, at 731-732.
265 Id. at 735-736.
266 Id. at 726-728.
267 [1951] 2 K.B. 639 at 666.
268 Id. at 668-669.
269 (1861) 9 H.L.C. 577. For discussion of Lord Wensleydale's view, see text and nn. 275-285 infra.

> in the wife whereas the wife has no corresponding interest in the husband, I am of opinion that it no longer has any application.[270]

This again is a view which commands wide acceptance in the courts.[271] In *Best* v. *Samuel Fox* it was endorsed not only by Birkett L.J. but by the other members of the Court of Appeal[272] but it failed to get very far in the House of Lords. Lord Goddard's conception of consortium of course excluded any notions of equality, even at the present day,[273] and this was an aspect of his judgment from which Lords Reid and Oaksey did not specifically dissent. Lord Porter likewise held that even today the rights of the spouses were not necessarily equal.[274]

Criticism of the Reasoning in Best *v.* Samuel Fox

The major deficiency in the reasoning of the House of Lords, then, is the refusal, particularly in the leading judgments delivered by Lords Goddard and Porter, to recognise and accept modern notions of consortium. Of the four elements in the reasoning listed above, this was responsible for two—that the spouses' rights were not equal in the old law, the husband's right to sue being founded on property, and that in the modern law the husband's action is anomalous and should not be extended.

The adherence to these older views owes much to the judgment of Lord Wensleydale in *Lynch* v. *Knight*[275]—this judgment was strongly relied upon both by Lord Porter[276] and by Lord Goddard.[277] The case was important to the question presented in *Best* v. *Samuel Fox*, because it was the first case in which the question of whether a wife had an action for loss of consortium was raised—albeit in the context of an action for slander. The defendant told a husband that his wife had almost been seduced before their marriage, whereupon the husband in true Victorian fashion turned his wife out of the matrimonial home. In an action for slander, this loss of consortium by the wife was the alleged special damage.[278] Lord Wensleydale held that a wife could not main-

270 [1951] 2 K.B. 639 at 663.

271 Gray v. Gee (1923) 39 T.L.R. 429, per Darling J. at 431; Place v. Searle [1932] 2 K.B. 497, per Scrutton L.J. at 512; Newton v. Hardy (1933) 149 L.T. 165, per Swift J. at 166; Wright v. Cedzich (1930) 43 C.L.R. 493, per Isaacs J. (dissenting) at 502-503; Applebaum v. Gilchrist [1946] 4 D.L.R. 383, per Robertson C.J.O. at 390-391; Canestraro v. Larade (1972) 28 D.L.R.3d 390, per Addy J. at 296.

272 [1951] 2 K.B. 639, per Cohen L.J. at 666, per Lord Asquith at 668-669.

273 [1952] A.C. 716 at 731-732.

274 Id. at 727.

275 (1861) 9 H.L.C. 577.

276 [1952] A.C. 716, at 727-728.

277 Id. at 731-733.

278 After the Slander of Women Act 1891 (U.K.) it would no longer be necessary to prove special damage in a case of this sort.

tain an action for loss of consortium, and his judgment rejects both principles put forward in the previous section of this article. He said[279] that the benefit which the husband has in the consortium of the wife is of a different character from that which the wife has in the consortium of a husband: the husband's loss of a wife was something of material value, her assistance in the conduct of the household and the education of children resembling the services of a hired domestic, and being capable of estimation in material terms; whereas the wife's loss of a husband, involving only the loss of society and affectionate intention, which the law cannot estimate or remedy, was not. The law chiefly attended to the protection of material interests, and gave no remedy for mental pain and anxiety.

The attention given to this judgment in *Best* v. *Samuel Fox* should not be allowed to obscure the fact that two other judges in *Lynch* v. *Knight*[280] were of the opposite opinion. Lord Campbell L. C.[281] thought that the wife, as well as the husband, could sue for loss of consortium, and he said that the loss of conjugal society, though not a pecuniary loss, was a loss that the law could recognise. Lord Cranworth,[282] though he emphasised that his was not a 'decided opinion', was 'strongly inclined' to agree with Lord Campbell. Lord Brougham, the other member of the court, is usually said to have been of the opinion that a wife could not sue. It does not, however, seem clear beyond doubt that this was his view. He said that he agreed with Lord Campbell (whose judgment he read) 'with this exception, that I am rather inclined to think . . . that the action does not lie.'[283] He may be talking about the wife's action for loss of consortium, but it is not clear from the context that he is doing so; and he may instead be talking about a situation different from the facts of the case before him which he refers to later in his judgment—statements which impute actual seduction before marriage.[284]

It may well be that all these statements are of limited value in relation to consortium actions because the question in issue was not whether such an action lay in itself, but whether or not a wife's loss of consortium constituted special damage in slander; and, moreover, the actual decision was that, even assuming that loss of consortium by a wife constituted the necessary special damage, on the facts of the case it was not

279 (1861) 9 H.L.C. 577, at 598-599.
280 Id.
281 Id. at 589.
282 Id. at 595.
283 Id. at 593.
284 He refers to this as an issue discussed by Lord Campbell, but Lord Campbell in fact discusses adultery—a second obscurity in Lord Brougham's judgment.

the natural and probable consequence of the defendant's slander and was therefore too remote. Nevertheless, Lord Wensleydale was the only judge who said that no action lay, whereas there were two judges who said that an action would lie—and these two judges, along with Lord Brougham, made up the majority which held that the damage was too remote. Lord Wensleydale was doubtful on this point and his judgment is therefore in essence a dissenting judgment.

It is suggested, then, that the House of Lords in *Best* v. *Samuel Fox* paid far too much attention to the judgment of Lord Wensleydale in *Lynch* v. *Knight*[285] and not enough to the other judgments; and that this was an important contributory factor in their failure to recognise the modern notion of consortium founded on equality, so accounting for two of the four reasons they put forward in support of their decision.

What, then, of the other two strands of reasoning? One involved the enticement cases—the cases that hold that a wife, as well as a husband, has a cause of action for intentional interference with the right of consortium by enticement away or harbouring of the other spouse. The right of the wife to sue in such circumstances is well recognised—or at least, in England and some other jurisdictions, it was before these causes of action, along with those for seduction and adultery, were abolished by statute.[286] In England, though once doubted,[287] the wife's right of action has been recognised ever since the 1920s.[288] In Canada, the right was first admitted much earlier, by a decision of 1893;[289] this decision was speedily overruled,[290] and the wife's right of action was denied for some time thereafter,[291] but eventually in 1946 the courts recognised that they had been in error[292] and today it is widely recognised that the wife has a right of action.[293] In the United States also, the wife's right to sue was recognised in the 1890s and is now almost universally accepted.[294] Only in Australia has recognition of the wife's cause of action been denied—by the High Court in *Wright* v. *Cedzich*,[295] over-

285 (1861) 9 H.L.C. 577.
286 see supra nn. 187-189.
287 Butterworth v. Butterworth [1920] P. 126.
288 Gray v. Gee (1923) 39 T.L.R. 429; Place v. Searle [1932] 2 K.B. 497; Newton v. Hardy (1933) 49 T.L.R. 522; Elliott v. Albert [1934] 1 K.B. 650; Welton v. Broadhead, 1958 C.L.Y. 3297.
289 Quick v. Church (1893) 23 O.R. 262.
290 Lellis v. Lambert (1897) 24 O.A.R. 653.
291 Talmage v. Smith [1928] 3 D.L.R. 75 (Ont.), Barks v. Done [1934] 1 D.L.R. 789 (Ont.).
292 Applebaum v. Gilchrist [1946] 4 D.L.R. 383 (Ont.).
293 Frampton v. Whiteman [1954] 1 D.L.R. 337 (Ont.); Judge v. Smith (1961) 30 D.L.R.2d 521 (B.C.); Wener v. Davidson (1970) 15 D.L.R.3d 631 (Alb.).
294 See Prosser, supra n. 15, at 881-882.
295 (1930) 43 C.L.R. 493.

ruling the earlier recognition of this right in *Johnson* v. *Commonwealth of Australia*;[296] but *Wright* v. *Cedzich*[297] is open to criticism on much the same grounds as *Best* v. *Samuel Fox*, in that it fails to recognise modern notions of consortium, and in the context of all the other cases recognising the wife's right to sue for intentionally caused loss of consortium it is obviously an out-of-date decision—criticisms which were trenchantly made in a vigorous dissenting judgment by Isaacs J.[298]

The House of Lords in *Best* v. *Samuel Fox* held that these cases were based on the principle, endorsed by *Lumley* v. *Gye*[299] and *Quinn* v. *Leathem*,[300] that an action lies for the violation of a legal right committed knowingly—a principle obviously not capable of application to cases of unintended harm.[301] However, with great respect, it is doubted whether this explanation of the enticement cases is correct. Enticement antedates the *Lumley* v. *Gye*[302] principle—it was first recognised in *Winsmore* v. *Greenbank*[303] in 1745. This was a claim by a husband: Willes C.J. made it clear that the gist of the action was the loss of consortium, and in fact said that such a loss would be actionable although

296 (1927) 27 S.R. (N.S.W.) 133, supra text and nn. 67-71.

297 (1930) 43 C.L.R. 493.

298 The majority judgments make the following points: (1) That consortium was originally a proprietary right available only to the husband: (1930) 43 C.L.R. 493, per Knox C. J. and Gavan Duffy J. at 500, per Rich J. at 519-522, per Starke J. at 532-533. This view has been criticised supra text and nn. 275-285. The judgments are inconsistent: Knox C.J. and Gavan Duffy J. simply adopt the view of Lord Wensleydale in Lynch v. Knight (1861) 9 H.L.C. 577, but Rich J. says that this case does not assist because it is concerned only with whether loss of consortium by a wife constitutes special damage for the purposes of slander; (2) That there were no cases where a wife has sought to sue—and that this is not explained by her procedural inability to do so without joining her husband as plaintiff before the Married Women's Property Acts (it had been suggested that a husband would be unwilling to cooperate in suing a woman who enticed him away from his wife): (1930) 43 C.L.R. 493, per Knox C.J. and Gavan Duffy J. at 499, per Rich J. at 522-525, per Starke J. at 535. This point was also made by Lord Goddard in Best v. Samuel Fox [1952] A.C. 716 at 730. Others, however, have been content to accept the procedural explanation. (3) Some of the judges pointed to the conflicts in the Canadian case-law: (1930) 43 C.L.R. 493, per Rich J. at 524, per Starke J. at 534—now of course resolved: see supra text and nn. 289-293. (4) The judges criticise the English authorities—but are here inconsistent with each other. Knox C.J. and Gavan Duffy J. simply say there are differences of view: (1930) 43 C.L.R. 493 at 500; Rich J. says they are based on a false assumption—the relevance of Lynch v. Knight (1861) 9 H.L.C. 577: (1930) 43 C.L.R. 493 at 531; and Starke J. says that they are based on modern notions: Id., at 533-534.

299 (1853) 2 E. & B. 216.

300 [1901] A.C. 495.

301 This view was also endorsed by Isaacs J. (dissenting) in Wright v. Cedzich (1930) 43 C.L.R. 493.

302 (1853) 2 E. & B. 216.

303 (1745) Willes 577.

it was only accidental, rather than wilful or malicious.[304] Further, the cases allowing a wife to recover, both English and Canadian, do so on the basis that the rights of the spouses should be equal—the *Lumley* v. *Gye*[305] principle is only referred to as an ancillary reason for granting recovery, and that in only a few of the cases.[306]

This leaves us with the final reason put forward in *Best* v. *Samuel Fox*—that as a general policy the law should compensate only the accident victim and not his relatives.[307] This reason, of course, has much more substance than any of the others, since, as we have seen, this is indeed what the law tries to do. However, this argument cannot justify leaving the law in a state where a husband has an action and a wife does not. If we wish to give full effect to this policy we must abolish the husband's action as well; otherwise, we must recognise that the wife has an action as well as the husband. As we have seen in the first part of this article, the general principle is not without exception; and to recognise the wife's action would not be to create a new exception but simply to rationalise an existing one.

Developments since Best v. Samual Fox

Everything that has been said so far could have been said (and a lot of it was said) in *Best* v. *Samuel Fox* itself. But the law has not stood still since 1952. Over a period of nearly thirty years since that time, developments have occurred over a wide front, and they clearly reveal a trend in favour of modernising and rationalising the action for loss of consortium.

The first development is that doubts as to whether the action will lie for mere impairment, as opposed to total loss, have been resolved (except in Canada). It will be recalled that the Court of Appeal in *Best* v. *Samual Fox* held that no action would lie for mere impairment[308] and that Lords Porter and Goddard in the House of Lords also doubted whether an action would lie,[309] although Lords Reid and Oaksey held positively that it would.[310] However, subsequent English cases have held that the action *will* lie for mere impairment—and it is significant that

304 Id. at 581.

305 (1853) 2 E. & B. 216.

306 Place v. Searle [1932] 2 K.B. 497, per Slesser L. J. at 520; Applebaum v. Gilchrist [1946] 4 D.L.R. 383, per Laidlaw J. A. at 394-395; Wener v. Davidson (1970) 15 D.L.R.3d 631, per Kirby J. at 639-640.

307 For references, see text and nn. 234-236 supra.

308 [1951] 2 K.B. 639, per Birkett L.J. at 664-665, per Cohen L.J. at 665-666, per Lord Asquith of Bishopstone at 669-670.

309 [1952] A.C. 716, per Lord Porter at 728, per Lord Goddard at 733-734.

310 Id. at 736.

the first judge so to hold was Lord Goddard himself in *Hare* v. *B. T. C.*[311] These decisions owed much to the important decision of the High Court of Australia in *Toohey* v. *Hollier*[312] holding that impairment was sufficient. In Canada, however, opinion is still divided,[313] and in Ireland the action lies only for total loss.[314] The general trend in these decisions, however, is clear. If the doubts about impairment are now set aside, to what extent can we now rely on the doubts of the judges in *Best* v. *Samuel Fox* as to the existence of the wife's right of action.?

More directly related to the particular problem in hand, perhaps, are legislative developments. The House of Lords in *Best* v. *Samuel Fox* was clearly of the opinion that if the position it had reached was unsatisfactory then it was for the legislature to do something about it.[315] So far, the United Kingdom Parliament has failed to abolish the action for loss of consortium, although the Law Commission and the Pearson Commission have both recommended it[316]—and when in 1970 it abolished kindred actions in the area of family relationships[317]—enticement, harbouring, seduction, adultery—it preserved the action for loss of consortium. If anything, it has moved in the other direction—the Sex Discrimination Act 1975 (U.K.) surely confirms modern notions about the equality of the sexes[318] and is totally against the spirit of the decision in *Best* v. *Samuel Fox*. Further afield, legislative developments have been even more interesting, because in South Australia[319] and in Alberta[320] the legislature has placed the action for loss of consortium on a statutory footing and made it available to both husband and wife. If these jurisdictions can do this, while still maintaining a *general* policy of compensating only the accident victim, surely there is no reason why the other legislatures or final courts of appeal should not do the same.

311 [1956] 1 W.L.R. 250. See also Lawrence v. Biddle [1966] 2 Q.B. 504; Cutts v. Chumley [1967] 1 W.L.R. 742.

312 (1955) 92 C.L.R. 618.

313 See supra text and n. 204.

314 Spaight v. Dundon [1961] I.R. 241.

315 [1952] A.C. 716, per Lord Porter at 728, per Lord Goddard at 733.

316 Law Com., supra n. 4, paras 158, 161; Pearson Com., supra n. 5, paras 445-447. The actions have however been abolished in British Columbia: Family Relations Act 1972 (B.C.) s.4 (now Family Relations Act 1978 (B.C.) s.75), and Ontario: Family Law Reform Act 1978 (Ont.) s.69.

317 Law Reform (Miscellaneous Provisions) Act 1970 (U.K.) ss.4, 5.

318 s.1 of this Act defines discrimination against a woman as treating her less favourably than the same person would treat a man, or applying to her a requirement or condition which cannot be shown to be justifiable irrespective of the sex of the person to whom it is applied.

319 Wrongs Act 1936-1972 (S.A.) s.33.

320 Domestic Relations Act 1970 (Alb.) s.35.

The United States Cases

When *Best* v. *Samuel Fox* was before the Court of Appeal, the plaintiff's counsel, as part of their argument, cited to the court the United States decision of *Hitaffer* v. *Argonne Co.*,[321] in which a federal court applying the law of the District of Columbia had recently held that a wife had an action for negligently occasioned loss of consortium equivalent to the action of the husband. Birkett L.J.[322] and Lord Asquith[323] however pointed out that this was an isolated decision, and that all the other United States cases pointed the other way—and the plaintiffs therefore did not persist with this line of argument before the House of Lords.

Hitaffer v. *Argonne Co.*,[324] however, has proved to be not an isolated decision but the start of a revolution. Although there was some initial opposition to the decision, and a number of jurisdictions rejected it, from about 1959 onwards there has been a definite movement in favour of recognition of this cause of action, and today thirty-nine states in addition to the District of Columbia allow a wife to sue for negligent interference with her consortium, as opposed to only eleven states which have rejected it.[325] The trend in favour of recovery has been particularly marked since 1967—in the period since then twenty-four jurisdictions recognised the action for the first time and in only four jurisdictions were there decisions that denied it. Of the eleven jurisdictions denying

321 (1950) 183 F.2d 811.

322 [1951] 2 K.B. 639, at 654-655.

323 Id., at 669.

324 (1950) 183 F.2d 811.

325 Recognising the cause of action: Ala.: Swartz v. U.S. Steel Co. (1974) 304 So.2d 881; Alaska: Schreiner v. Fruit (1974) 519 P.2d 464; Ark.: Missouri Pacific Transport Co. v. Miller (1957) 299 S.W.2d 41; Ariz.: City of Glendale v. Bradshaw (1972) 503 P.2d 805; Cal.: Rodriguez v. Bethlehem Steel Corp. (1974) 525 P.2d 669; Del.: Youner v. Adams (1961) 167 A.2d 717; Fla.: Gates v. Foley (1967) 247 So.2d 41; Ga.: Brown v. Georgia-Tennessee Coaches (1953) 77 S.E.2d 25; Haw.: Nishi v. Hartwell (1970) 473 P.2d 116; Idaho: Nichols v. Sonneman (1966) 415 P.2d 562; Ill.: Dini v. Narditch (1960) 170 N.E.2d 889; Iowa: Acuff v. Schnitt (1956) 78 N.W.2d 480; Ind.: Troue v. Mesher (1969) 252 N.E.2d 800; Ky.: Kotsiris v. Ling (1970) 451 S.W.2d 411; Mass: Diaz v. Eli Lilly (1973) 302 N.E.2d 555; Md.: Deems v. Western Maryland R. Co. (1967) 231 A.2d 517; Mich.: Montgomery v. Stephen (1960) 101 N.W.2d 227; Minn.: Thill v. Modern Erecting Co. (1969) 170 N.W.2d 865; Mo.: Novak v. Kansas City Transit (1963) 365 S.W.2d 539; Mont.: Duffy v. Lipsman-Fulkerson Co. (1961) 200 F. Supp. 71; Neb.: Cooney v. Moomaw (1953) 109 F.Supp. 448; Nev.: General Electric Co. v. Bush (1972) 498 P.2d 370; N.J.: Ekalo v. Construction Service Corp. (1965) 215 A.2d 1; N.Y.: Millington v. Southeastern Elevator Co. (1968) 239 N.E.2d 897; N.D.: Hastings v. James River Aerie No. 2337 (1976) 246 N.W.2d 747; Ohio: Leffler v. Wiley (1968) 239 N.E.2d 235; Okl.: Duncan v. General Motors (1974) 499 F.2d 835; Pa.: Hopkins v. Bianco (1973) 302 A.2d 855; R.I.: Mariani v. Nanni (1962) 185 A.2d 119; S.D.: Hoekstra v. Helgeland (1959) 98 N.W.2d 669; Tex.: Whittlesey v. Miller (1978) 572 S.W.2d 665; Wis.: Moran v. Quality Aluminium (1967) 150

recovery, in one[326] the only authority belongs to the 1950s when *Hitaffer* v. *Argonne Co.*[327] was still something of a novelty.

In the light of these authorities, the Restatement of Torts Second,[328] which formerly permitted recovery to a husband but denied it to a wife, was amended in 1969 to permit recovery at the suit of a wife also. The current draft, as amended in 1977, clearly places the spouses in a position of absolute equality:

> One who by reason of his tortious conduct is liable to one spouse for illness or other bodily harm is subject to liability to the other spouse for the resulting loss of the society and services of the first spouse, including impairment of capacity for sexual intercourse.

The arguments which have persuaded the courts to grant recovery are comprehensively dealt with in *Hitaffer* v. *Argonne Co.*[329] and the other leading authorities.[330] *Hitaffer* v. *Argonne Co.*[331] clearly recognises the two fundamental points already put forward—that consortium is not limited to the rendering of services but 'also includes love, affection, companionship, sexual relations, etc., all welded into a conceptualistic unity',[332] and that, since at the present day the rights of spouses are equal, this compels the recognition that a wife should be able to sue for loss of consortium on exactly the same lines as her husband.[333] Further,

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N.W.2d 139. In seven states the cause of action was created by statute: Col. (1961), Miss. (1968), N.H. (1967), Ore. (1941), S.C. (1969), Tenn. (1969), W.Va. (1977). Refusing to recognise the cause of action: Conn.: Gallagher v. Pequot Spring Water Co. (1963) 199 A.2d 172; Kan.: Albertson v. Travis (1978) 576 P.2d 1090; La.: McKey v. Dow Chemical Co. (1974) 295 So.2d 516; Me.: Potter v. Schafter (1965) 211 A.2d 891; N.M.: Roseberry v. Starkovitch (1963) 387 P.2d 321; Utah: Ellis v. Hathaway (1972) 493 P.2d 985; Va.: Carey v. Foster (1965) 345 F.2d 772; Vr.: Herbert v. Layman (1966) 218 A.2d 706; Wash.: Ash v. S.S. Muller (1953) 261 P.2d 118; Wyom.: Bates v. Donnafield (1971) 481 P.2d 347. In N.C., any possibility of an action is ruled out by a statute of 1945.

326 Washington, Connecticut.

327 (1950) 183 F.2d 811.

328 s.695.

329 (1950) 183 F.2d 811.

330 See especially Millington v. Southeastern Elevator Co. (1968) 339 N.E.2d 897 (N.Y.) and Rodriguez v. Bethlehem Steel Corp. (1974) 525 P.2d 669 (Cal)—cases recognising the wife's action in the key states of New York and California, both containing very detailed opinions.

331 (1950) 183 F.2d 811.

332 Id., at 814. See also Millington v. Southeastern Elevator Co. (1968) 339 N.E.2d 897 (N.Y.), at 899; Rodriguez v. Bethlehem Steel Corp. (1974) 525 P.2d 669 (Cal), at 684; Tribble v. Gregory (1974) 288 So.2d 13 (Miss.), at 16.

333 (1950) 183 F.2d 811, at 816. See also Millington v. Southeastern Elevator Co. (1968) 339 N.E.2d 897 (N.Y.), at 898-900; Clouston v. Remlinger Oldsmobile Cadillac (1970) 258 N.E.2d 230 (Ohio), at 232, specifically rejecting Lord Wensleydale in Lynch v. Knight (1861) 9 H.L.C. 577 as out of date.

the court was prepared to recognise the new cause of action despite the then unanimous state of the authorities denying recovery—it cited no fewer than twenty-nine such decisions.[334] Moreover, it was not dissuaded from its decision by two of the standard arguments usually raised in cases where the recognition of a new cause of action is at stake—that the injuries were too remote, and that the damage was incapable of being estimated in money terms.[335] Subsequent cases have also rejected two more of these standard arguments—that recovery should be denied because it is difficult to see where the boundaries of the new cause of action should be drawn, and that reform should be left to the legislature.[336] Finally, *Hitaffer* v. *Argonne Co.*[337] referred to the cases in which a wife has been allowed to sue for an intentional interference with consortium—in the United States, enticement and alienation of affections have lain at the suit of a wife since the 1880s[338]—and the point was made that it was indefensible for a wife's consortium to be protected only against intentional interference when a husband's consortium was protected against both intentional and negligent invasions.[339]

In the United States the most substantial argument against allowing an action for loss of consortium at the suit of the wife has been that it would result in double recovery, since the injured husband would also sue, and both parties might recover for the same items of damage. However, it is possible to guard against this by joinder of the two actions, as is required by some states and encouraged by others[340]—double recovery is then avoided by excluding from the wife's consortium claim any elements of damage which can be recovered by the husband in his own action. This is a problem that must be faced by any jurisdiction which recognises the wife's action—and indeed already confronts all common-law jurisdictions when it is the wife who is injured and the husband who is suing for loss of consortium. We therefore come to the final matter to be considered: whether, if we recognise the wife's action, we can avoid dual recovery.

The Question of Damages

If the wife's right to sue for negligent interference with her con-

334 (1950) 183 F.2d 811, at 812-813.

335 Id., at 814-815.

336 Millington v. Southeastern Elevator Co. (1968) 339 N.E.2d 897 (N.Y.), at 902-903; Rodriguez v. Bethlehem Steel Corp. (1974) 525 P.2d 669 (Cal.), at 673-683.

337 (1950) 183 F.2d 811.

338 See Prosser, supra n. 15, at 881-882.

339 (1950) 183 F.2d 811, at 816-817.

340 See Rodriguez v. Bethlehem Steel Corp. (1974) 525 P.2d 669 (Cal.), at 684-685. Note that in Best v. Samuel Fox [1952] A.C. 716 the actions were brought separately.

sortium is recognised, it must be in all respects co-extensive with the husband's right. We can therefore begin by examining the husband's action and asking how the items of damage are apportioned between his consortium action and his wife's ordinary damages action so as to prevent double recovery.

Luntz[341] has listed the heads of damage under which, according to the courts, the husband may recover in his consortium action as follows:

1. Medical expenses
2. Services
3. Society, companionship and assistance
4. Sexual intercourse
5. Wages lost and travelling expenses

However, some of these would normally be more appropriately included in the victim's action. This is surely the case with medical expenses. There are certainly cases where the husband has recovered for medical expenses incurred on behalf of his wife in his consortium action, but it has been suggested that in fact the basis for such recovery is not consortium but a husband's duty to maintain his wife,[342] and in any case what normally happens is that the accident victim, whether husband or wife, would recover for medical expenses in his or her own action. Much the same applies to lost wages and travelling expenses. The cases have allowed a husband to recover, in a consortium action, for loss of wages due to the need to take time off from work while his wife is injured, to look after children or visit her in hospital, and also for travelling and extra living expenses—if these expenses aid recovery and so constitute a reasonable attempt to mitigate loss of consortium.[343] However, it is also possible for the injured wife to claim for these items, or most of them, in her own action[344]—a possibility reinforced by the philosophy of *Donnelly* v. *Joyce*[345] that in such cases the loss suffered is the accident victim's loss because the accident creates a need for them. If the victim can claim in respect of such items, this is simpler than bringing them under the heading of loss of consortium.

Services which the accident victim no longer performs come into a somewhat different category. Normally, a husband would recover for the loss of his wife's services in his consortium action, and if such action were made available to the wife one cannot see any reason why she

341 Supra n. 144, at 304-306.
342 See supra text and nn. 205-208.
343 See supra text and nn. 34-41.
344 e.g. Schneider v. Eisovitch [1960] 2 Q.B. 430, Hunter v. Scott [1963] Qd.R. 77.
345 [1974] Q.B. 454.
346 Law Com., supra n. 4, at paras 156-157; Pearson Com., supra n. 5, at paras 352-358.

should not recover for the loss of her husband's services—after all, if deprivation of the wife's domestic services is a loss to the husband, because it will mean paying someone else to perform them, surely deprivation of the husband's contribution to the running of the family home, especially if he is handy at painting, decorating, repairs and the other common chores of husbands, will constitute a loss to the wife because such services will likewise have to be paid for. However, if the proposals of the Law Commission and the Pearson Commission[346] are put into effect, and an accident victim is allowed to recover damages himself or herself for the fact that he or she has been rendered incapable of performing services for the family, then obviously such recovery must be excluded from the consortium action.

There remain two items for which recovery is clearly going to be had only in the consortium action—the loss of companionship or society, and the deprivation of sexual intercourse. The former is in many ways the most important aspect of a consortium action, and clearly the accident victim cannot recovery damages in respect of it. That this is an item for which compensation may be had in a consortium claim was clearly recognised in *Toohey* v. *Hollier*[347]. There has been more doubt about recovery in a consortium action for the fact that the injury to the victim has deprived the other spouse of the pleasures of sexual intercourse. Some cases suggested that this was compensable only when the deprivation was permanent, and that the spouse had been deprived of the opportunity of begetting children and raising a family.[348] However, other cases hold that loss of the opportunity to reproduce is not crucial, and that damages may be had for loss of sexual intercourse over a limited period.[349] This, of course, is where we began, since it was this loss that was in issue in *Best* v. *Samuel Fox*.

It would seem, then, that a husband in his consortium action should be able to recover for the loss of society and companionship, and of the opportunity to enjoy sexual intercourse. He should also be able to recover for loss of services, for medical expenses, and for lost wages and travelling expenses, if these items are not going to be claimed in the victim's action. If the wife's action for loss of consortium is to be recognised, the damages should be assessed on exactly the same basis. It is interesting to note that in the United States, the courts, having recognised the action of a wife, have had to settle these questions in that con-

347 (1955) 92 C.L.R. 618.

348 e.g. Birch v. Taubmans [1957] S.R. (N.S.W.) 93.

349 e.g. Shutt v. Extract Wool (1969) 113 S.J. 672. It seems, however, that there must be a total deprivation, at least for a substantial period: a diminution in the quality or frequency of sexual intercourse cannot be the subject of an award of damages: Bagias v. Smith (1979) F.L.C. 90-658.

text and have come up with more or less exactly the same answers. Thus, recovery for nursing services rendered by the wife is excluded from her consortium action, since the husband victim recovers for the value of such services in his own action;[350] and likewise excluded is loss of earnings suffered by the wife consequent on giving up a job in order to provide the nursing services.[351] This means that in a consortium action a wife may recover for loss of society and companionship, of services and of sexual intercourse.[352]

CONCLUSIONS

We are now in a position where we may attempt to draw some conclusions. The general policy of compensating only the accident victim and not his relatives is a sound one and we should continue, as a general principle, to adhere to it. However, there are exceptional circumstances when it is proper for other persons to claim compensation. Unless at any time it is thought better to concentrate all claims in the hands of the victim's estate, the *Fatal Accidents Acts* will continue to provide dependents of a deceased accident victim with an action for the financial losses which they suffer as the result of the death; and, especially if the *Fatal Accidents Acts* are to be extended, as regards particular dependents, by allowing also a claim for 'bereavement' or 'loss of society', there are sound reasons for permitting a like claim when the victim is only injured and not killed. Far from being abolished, therefore, claims for loss of consortium should be refurbished, rationalised and even perhaps extended so that they lie in all the circumstances in which it is proposed that dependents should be able to sue for loss of society under the *Fatal Accidents Acts*. Irrespective of any of this, while the husband's right to sue for loss of consortium remains, it is indefensible that the wife should be denied a similar right. May we one day, therefore, look forward to the reversal of *Best* v. *Samuel Fox* by the English courts—or to a refusal to follow it in Australia?

350 Tribble v. Gregory (1974) 288 So.2d 13 (Miss.), at 17, Rodriguez v. Bethlehem Steel Corp. (1974) 525 P.2d 669, (Cal.) at 687.

351 Id.

352 Tribble v. Gregory (1974) 288 So.2d 13 (Miss.), at 17; see also Hitaffer v. Argonne (1950) 183 F.2d 811, at 819; Millington v. Southeastern Elevator Co. (1968) 239 N.E.2d 697 (N.Y.), at 898-899, Rodriguez v. Bethlehem Steel Corp. (1974) 525 P.2d 669 (Cal.) at 687.