

LAW REFORM COMMISSION OF BRITISH COLUMBIA

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The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

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Appendix C

**MINOR REPORT
(LRC 61)**

January 18, 1983

The Hon. Allan Williams, Q.C.
Attorney General of the
Province of British Columbia
Parliament Buildings
VICTORIA, British Columbia
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Dear Mr. Attorney:

Report No. 61
*Standing of a Common Law Spouse to
Apply Under the Family Compensation Act*

At common law, no right of action existed against a person whose wrongful act, neglect or default caused the death of another: *Baker v. Bolton*, (1808) 170 E.R. 1033; *Admiralty Commrs. v. S.S. Amerika*, [1917] A.C. 38. The dependants of the deceased could not recover any compensation for their loss. That defect of the common law is corrected by the *Family Compensation Act*, R.S.B.C. 1979, c. 120, which is based upon the English *Fatal Accidents Act*, commonly known as Lord Campbell's Act.

Under the *Family Compensation Act*, an action for damages against the person who caused the deceased's death may be brought on behalf of the deceased's wife, husband, parent, child or person to whom the deceased stood in *loco parentis* (s. 3). "Child" includes a grandchild or stepchild; "parent" includes a grandparent or stepparent (s. 1). The intent of the *Family Compensation Act* is to compensate members of the deceased's family for actual pecuniary loss suffered from the deceased's death, as well as for having been deprived of the deceased's support, guidance, and other monetary and non-monetary contributions he might have made to his family.

There are a number of aspects of the Act and its operation which call for study. These include what the proper basis of compensation should be and who should have status to bring an action. We are currently gathering materials on this topic and some preliminary research has been undertaken.

While we are unable to predict when a comprehensive Working Paper will be prepared, our preliminary work has identified one issue on which we believe immediate action is desirable. That issue concerns the status of a so-called "common law spouse" of the deceased under the Act.

In *Louis v. Esslinger; Dunphy et al. v. Esslinger*, (1981) 121 D.L.R. (3d) 17 (B.C. S.C.) a recent decision of the Chief Justice of the Supreme Court of British Columbia, it was held that the word "wife" means lawfully married wife. Consequently, a common law wife had no entitlement under the Act to damages for the death of her common law husband. Presumably "husband" means lawfully married husband, with similar consequences. The Chief Justice concluded that if it is desirable for an unmarried person to claim for the loss of the person with

whom he or she lives, that right must be created by legislation. He went on to say that if eligibility under the Act were extended to common law spouses, it would fall to the court to determine the amount of damages to be recovered having regard to the nature of the dependancy, the stability of the relationship, its likely duration, and all other factors that bear upon the question of damages in that class of case.

The increase in common law relationships existing today is a fact to which the law must, we think, have regard. The Commission is aware that many different kinds of relationships and arrangements are embraced by the colloquial term "common law marriage." In many cases a man and woman may co-habit in a relationship which, tacitly or expressly, is understood to be casual or for convenience, and we doubt whether it is desirable or necessary to extend the provisions of the *Family Compensation Act* to those people. Nevertheless, we have concluded that a man and a woman who live together in a relationship resembling, but not sanctioned by, marriage deserve the protection of the Act. In those cases the loss of a common law spouse, in terms of financial and emotional support, may be as grave as if the parties had been married.

Other jurisdictions have already taken this step. Both Ontario and Prince Edward Island permit common law spouses to apply under their fatal accidents legislation. South Australia enacted such legislation in 1975. Similar rights to apply are provided in the Australian Capital Territory and in the Northern Territory. Permitting common law spouses to apply under fatal accidents legislation has been recommended by the Law Reform Commission of Western Australia and the Tasmanian Law Reform Commission. Moreover, the status of common law spouses has been acknowledged in British Columbia under the *Worker*s Compensation Act*, the *Estate Administration Act*, the *Insurance (Motor Vehicle) Act*, and the *Family Relations Act*. Sections 17(11), (12) and (13) of the *Worker*s Compensation Act* provide:

(11) Where a worker has lived with and contributed to the support and maintenance of a common law wife, and

- (a) where he and the common law wife have no children, for a period of 3 years; or
 - (b) where he and the common law wife have children, for a period of one year
- I immediately preceding his death, and where he does not leave a dependent widow, the board may pay the compensation to which a dependent widow would have been entitled under this Part to the common law wife.

(12) Where

- (a) a worker has lived with and contributed to the support and maintenance of a common law wife for the period set out in subsection (11);
 - (b) the worker also left surviving a dependent widow from whom, at the date of death, he was living separate and apart; and
 - (c) there is a difference in the amount of compensation payable to the widow by reason of the separation and the amount of compensation that would have been payable to her if she and the worker had not been living separate and apart,
- the board may pay compensation to the common law wife up to the amount of the difference.

(13) In addition to any other compensation provided, a dependent widow, common law wife or foster mother in Canada to whom compensation is payable is entitled to a lump sum of \$500.

Under the *Estate Administration Act*, R.S.B.C. 1979, c. 114, s. 85, a common law spouse may apply for maintenance from a deceased spouse*s estate. Common law spouse is defined in the Act as follows:

...”common law spouse” means either a person who is united to another person by a marriage that, although not a legal marriage, is valid by common law, or a person who has lived and cohabited with another person as a spouse and has been maintained by that other person for a period of not less than 2 years immediately preceding his death;...

Under the regulations enacted pursuant to the *Insurance (Motor Vehicle) Act*, R.S.B.C. 1979, c. 204, a common law spouse is entitled to Part VII accident benefits for death, disability, medical, rehabilitation, and funeral expense. The definition used in the regulations (1.02(68)) is as follows:

...“husband, wife, or spouse” means a person with whom the insured lived for the 2 years immediately preceding the accident that gives rise to the claim, and who manifested an intention to continue to live indefinitely as husband or wife of the insured, even though not legally married;

The *Family Relations Act*, R.S.B.C. 1979, c. 121, recognizes the rights of common law spouses to maintenance and support. The following definition is used:

...“spouse...includes...

- (c) except under Part 3, a man or woman not married to each other, who lived together as husband and wife for a period of not less than 2 years, where an application under this Act is made by one of them against the other not more than one year after the date they ceased living together as husband and wife.

While the Commission has concluded that common law spouses should be entitled to damages under the *Family Compensation Act*, we think some care should be taken to legislatively define in what cases that entitlement should arise. We think that a common law spouse should be entitled to damages under the Act only when the relationship with the deceased was subsisting and of some duration. For consistency with the *Estate Administration Act*, the *Insurance (Motor Vehicle) Act*, and the *Family Relations Act*, therefore, eligibility under the *Family Compensation Act* should depend upon establishing that the relationship with the deceased lasted for a period of not less than two years. It should not be necessary, however, that the relationship have been maintained immediately up to the deceased*s death. The *Family Relations Act* recognizes that the rights of a common law spouse persist until within one year of the termination of the relationship. The wrongful act of another should not be permitted to foreclose those rights. Moreover, problems that may arise from establishing whether a common law relationship was subsisting at the time of the deceased*s death should be eased by providing that status as a common law spouse persists up until one year after the termination of the relationship. For example, if the common law spouses were separated at the time of the deceased*s death, providing that status as a common law spouse continues until one year after the relationship terminated may free the court from inquiring into whether the separation was permanent or temporary. We think the definition to be used in the *Family Compensation Act* should correspond to that provided by the *Family Relations Act*.

The Prince Edward Island *Fatal Accidents Act*, P.E.I.S. 1978, c. 7, s. 1(f), extends eligibility under the Act to dependents. The definition of dependent includes common law spouses as follows:

- (vi) a person of the opposite sex to the deceased not legally married to the deceased who lived and cohabited with the deceased as the spouse of the deceased and was dependent upon the deceased at the time of his death for maintenance and support or who was entitled to maintenance and support under any contract, order or judgment of any court in this province or elsewhere.

We do not think that the definition to be used in British Columbia legislation should require proof of dependency. That is a factor considered by the courts in determining entitlement to damages, not eligibility under the Act.

Prince Edward Island also extends eligibility under the Act to common law spouses who were receiving maintenance from the deceased. We think that that is not desirable and that the Prince Edward Island approach goes too far. Under the British Columbia Act, a former spouse who is receiving maintenance is not eligible for compensation, and there is no reason to prefer a common law spouse over a former lawfully married spouse. Whether a former spouse who received maintenance from the deceased until his death should be eligible for compensation under the Act is a question we hope to examine in a subsequent project when we can devote our resources to a more detailed consideration of the Act.

The Commission recommends that:

1. (a) The *Family Compensation Act* be amended to provide that an action under the Act may be brought on behalf of the deceased*s common law spouse.
- (b) For the purposes of Recommendation 1(a) “common law spouse” means a person of the opposite sex to the deceased not legally married to the deceased who lived together with the deceased as husband and wife for a period of not less than two years and whose relationship with the deceased was subsisting within at least one year of the deceased*s death.

Any further questions that may arise with respect to determining damages for a common law spouse should be adequately resolved by the current practice of the courts under the *Family Compensation Act* when calculating damages for a husband or wife. Damages should be determined with reference to the nature of the dependency, the stability of the relationship, its likely duration, and all other factors usually considered by the courts in an action under the *Family Compensation Act*.

The last aspect of this reform which we think should be mentioned, but which does not require legislative attention, is how damages should be calculated if the deceased leaves surviving him a wife and a common law spouse (or, perhaps, several common law spouses) who are eligible for compensation under the Act. The Act provides that only one damage award is

made, which is divided among those eligible for compensation under the Act. The defendant*s liability remains limited to that portion of the deceased*s resources which was applied for the benefit of his dependants. Consequently, expanding the class of applicants under the Act will not necessarily increase the defendant*s liability. Whether a member of that class is entitled to share in the award, and how large a share that member should have, are questions which must be resolved by reference to the prevailing circumstances. The weighing of competing entitlement of a wife and a common law spouse or several common law spouses to a share in a damage award made under the Act can safely be left to the courts to resolve.

Please accept this letter as Report No. 61 of the Commission recommending changes in the statute law. The recommendations for changes in the law set out in this letter were approved by the Commission at a meeting on the 13th of December, 1982. In conformity with our practice, I have taken the liberty of sending copies of this Report to the following persons in your Ministry: Messrs. Vogel, Adamson, Roger and Copley.

Yours truly,
Hon. Mr. Justice J. S. Aikins
Chairman

JSA/tjl