Claims for Loss of Services and Society

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

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

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

> '... no person shall be liable in tort –
>
> (a) to a husband on the ground only of having deprived him of the services or society of his wife ...'

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

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

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

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

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

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

When Hong Kong came to consider the issue of damages for personal injury and death, the Law Reform Commission (LRC) made a valiant effort to think independently – or at least not narrowly to follow English

precedent. They suggested the adoption of a bereavement provision. They were agreed that the husband's action for loss of services and consortium was anomalous. However, rather than simply abolish it they proposed the creation of a remedy for family members for the loss of society of a person killed or injured. The sort of situation that they envisaged was where the injured person was in a coma or some similar situation, though they felt it unwise to spell out the possibilities.

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

(1) do away with the *actio quod servitium amisit;*

(2) create a 'bereavement' remedy in the FAO;

(3) create a new, extended remedy for loss of society; and

(4) create a new remedy for loss of ability to render services.

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

Perhaps the power that exists since *Pepper v Hart* [1993] AC 593 to consider the legislative history would sort out such uncertainties in future, provided that anyone thought to look (as apparently did not happen in *Chan Ki*). Perhaps counsel will remember this possibility once it is enacted into Hong Kong law (the new s 19A of the Interpretation and General Clauses

Ordinance (Cap 1), when passed, will permit reference to sources such as Law Reform Commission Reports if legislation is 'ambiguous or obscure'). On the other hand, it is undesirable that the law should be so puzzling to those who do not have long memories and a knowledge of the more arcane pieces of common law history – even more unsatisfactory that the result might be injustice. Perhaps the solution would be to amend the law.

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

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

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

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

Jill Cottrell
University of Hong Kong

失去服務或情誼的索償

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

一名丈夫根據《致命意外條例》（第 22 章）提出的受養索償，有時可根據家務的失去而擬定。由於妻子喪生，家務無人處理，丈夫須僱請家務助理人員甚或放棄自己的工作。此外，僱請其他人士協助不一定能彌補妻子在世時提供個人照顧的元素，而就此法庭也可頒發額外的損失賠償（以下兩宗英國案例通常被引述作為典據：*Mehmet v Perry* [1997] 2 All ER 529 及 *Regan v Williamson* [1976] 2 All ER 241）。

然而，在 *Leung Sing Kiu v Wong Shek Keung* [1989] 1 HKC 206 一案中，當時的高等法院聆案官陳振鴻裁定一名丈夫不能根據《致命意外條例》就此等「服務」獲得索償。此案例最近被另外兩位聆案官引用及依循：見 *Chan Ki v Travel Trade Communication Network and Marketing Services Ltd* [1998] 2 HKC 57 及 *Ngai Chit Chuen v Lui Chi Hung* [1997] HKLY 440 兩案。這些裁決的基礎，均是《法律修訂及改革（綜合）條例》（第 23 章）第 20B 條，該條文規定：

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

條文的實際影響可能不會太大，因為案件的「受害人」往往亦包括兒童，而法院可就該些兒童的損失頒發賠償。但在偶然情況下，不論英國或香港的法庭都會把丈夫的此類索償與兒童的此類索償分開處理及評估。

各級法庭是否已視第 20B 條取消了此等責任？在尊重以往法院判決的情況下，筆者認為第 20B 條並非旨在對致命意外法例產生影響；事實上，等同第 20B 條的英國法例條文（即《1982 年司法執行法令》第 2 條）從未曾被解釋為對致命意外法例造成影響。

有關法例草擬者的原意，其實是「藉此廢除『因他人的原因，使其失去服侍』這項普通法訴訟，若被告人的侵權行為導致某人失去妻子的服務及相伴（以及失去子女或家僕的服務），該人便可提出該項訴訟索償。」就該項訴訟而言，女性基本上乃被看成其丈夫的財產。「情誼」是指性方面的相伴，亦遍及婚姻生活的其他方面。到了二十世紀中期，普遍認為該項訴訟已變得相當落伍過時，而相伴這元素最終也只獲得象徵式的賠償。上述 1982 年法令第 2 條，替該項訴訟以及受害的兒童或僕人可展開的其他類似訴訟劃上了句號（至少就失去服務的索償而言）。 ➤

法例草擬者從未有想過人們會把這條文與《致命意外法令》扯上關係，特別是當後者沒有提及「服務」一詞為然。在香港，上述第 20B 條的原意並非影響《致命意外條例》下純粹屬法定性質的補償。（條例原本是英國法律委員會草擬者的：見《人身傷害訴訟報告：損害賠償之評估》（報告第 56 號，1973 年）附錄五，第 122 頁。）草擬者當初也不會把上述兩項有關條例連接起來，原因是在普通法下一名已失去妻子的丈夫不能就失去服務及情誼提出訴訟。香港有關條文的旁註已很清楚地交代情況：「廢除失去情誼或服務的普通法訴訟」。直到有關修訂被融入香港法例編正版的時候，「普通法」這字眼已不再出現（準確的旁註其實也有用的）。

但與此同時，英國的立法機關察覺到，《致命意外法令》採取的「純經濟角度著眼」方式，或許未能滿足家庭的需要，特別是在沒有經濟倚賴的情況下為然。英國因此採納了「親屬喪亡之痛」(bereavement) 的條文，該條文現已包括在《致命意外法令》內。現時死者的一些至親家庭成員可就失去死者而追討定額賠償。

到了香港研究有關人身傷害及死亡賠償的問題時，法律改革委員會（以下簡稱「法改會」）大膽地嘗試獨自尋找出路 — 或至少不盲目跟隨英國的做法。法改會一方面也建議採納「親屬喪亡之痛」的條文，亦同意丈夫就失去服務及相伴而提出的訴訟是不合常理的。然而，法改會並不建議乾脆廢除該類訴訟，而是建議替死者或傷者的家庭成員建立一種失去情誼的補償。法改會認為不適宜詳細列出所有受該項補償涵蓋的情況，但他們考慮到的情況之一是傷者陷入昏迷狀態。

就失去服務而言，法改會考慮了兩個可行的模式：一是由家庭成員提出訴訟，二是由傷者自行就失去繼續提供服務的能力而提出訴訟。法改會建議採納第二種模式。其實這項建議可說是不必要的，因為事實上英國上訴法院早已確認該項訴訟權利乃普通法下的權利（見 *Daly v General Steam Navigation Co* [1981] 1 WLR 120 一案）。但法改會認為香港法院沒有責任依循該宗案例，故此把有關權利融入法例內是較為妥當的做法。結果，有關法例於 1986 年作出了下列各項修訂：

(一) 取消「因他人的原因，使其失去服侍」的普通法訴訟；

(二) 在《致命意外條例》下新增一項「親屬喪亡之痛」補償；

(三) 就失去情誼新增一項範圍較廣的補償；及

(四) 就失去提供服務能力新增一項補償。

一個可能的情況是，鑒於第 20C 條的存在，本港一些司法界成員在解釋第 20B 條對《致命意外條例》的影響時被誤導了

第 20C 條規定：（一）就失去情誼而言，傷者的親屬可獲設有固定上限的補償；及（二）傷者本身可就失去像意外前一樣提供服務的能力而提出訴訟。一個可能的情況是，鑒於第 20C 條的存在，本港一些司法界成員在解釋第 20B 條對《致命意外條例》的影響時被誤導了。

自 *Pepper v Hart* [1993] AC 593 一案起，法院有權把有關法例的立法歷史列入考慮之列。只要任何人願意考慮此點（這在 *Chan Ki* 一案顯然不存在），法例內的不明確之處是有望得到釐清的。其實上述權力很可能被納入香港法例內 — 《1999 年釋義及通則（修訂）條例草案》建議新增一第 19A 條，獲通過後，假若法例條文出現「歧義或語意含糊」，可考慮該條文以外的材料，例如法改會報告。到時訴訟大律師們也許會更留意考慮其他材料的可能性。但另一方面，至少對於不甚了解普通法歷史的人來說，法律絕不應是這樣晦澀難解的 — 特別是當不公平的情況因而出現為然。解決問題的最好辦法，也許便是對法律作出修訂。

技術上，單單廢除第 20B 條是不可能的，因為當一項條文廢除普通法而該條文隨後被廢除時，普通法不會因而恢復生效。但這情況是強差人意的。任何明智的律師，都應能從法律彙報及法例文本掌握到香港的法律為何，而毋須翻查廢除已久的法例。故此，廢除第 20B 條的同時，也許可在第 20C 條增加一項條文，大意是「為免生疑問，就〔…〕的普通法訴訟現告廢去」。

在表示對陳振鴻聆案官的尊重下，他在 *Leung Sing Kiu* 一案中指出《法律修訂及改革（綜合）條例》第 20C 條及《致命意外條例》第 4 條的草擬均出現奇怪之處，是有其道理的。第 20C 條替失去情誼提供了定額補償（現時款額為十五萬元），可由某些指定親屬索取。補償款項只有一筆，先由死者配偶索取，若沒有配偶的話則由子女索取，如此類推。然而，可以就失去情誼而成功索償的人士的名單，卻有別於可按《致命意外條例》就親屬喪亡之痛索償的人士的名單。箇中原因為何便不得而知了。此外，在《致命意外條例》下，與死者分開生活的妻子享有的索償權，竟較妾侍與「普通法妻子」享有的為優先。為何會有此奇怪現象？應緊記我們在談及就親屬喪亡之痛而非就經濟損失所提出的申索。

另一更使人莫名奇妙的情況，也已由陳振鴻聆案官指出。第 20C 條列出有權就失去情誼提出訴訟的人士，當中提述到傷者的丈夫（或妻子）或子女後，繼而提述死者的妾侍等人。情況大概是，在同一時間，一份搬字過紙、未經細心考慮的「親屬喪亡之痛」條文被引進了《致命意外條例》內。結果是有關草案意圖作出的改變，在立法局審議過程中被廢去了效力。陳振鴻聆案官作出上述意見時是八十年代，但時至今日，有關問題仍未得到正視和處理，委實值得關注。

最後，筆者還想提出另一點。兩項有關的條例都在歧視非婚生兒童的父親。舉例說，《法律修訂及改革（綜合）條例》第 20C(1)(e) 條規定：「如並無能夠根據 (a)、(b)、(c) 或 (d) 段親自或由他人代為提出申索的人，則死者的父母或（如死者是非婚生者）死者的母親」。這豈不是與各項人權法例條文背道而馳嗎？

Jill Cottrell
香港大學法律系高級講師