LEGISLATIVE COMMENT

LOSS OF SERVICES: AN ANACHRONISTIC ALTERNATIVE TO THE CHILD CUSTODY LAWS

A. J. BRADBROOK* AND R. R. S. TRACEY**

A. INTRODUCTION

One of the least publicised provisions of the *Family Law Act* 1975 (Cth) is contained in section 120. This section states

> "After the commencement of this Act, no action lies for criminal conversation, damages for adultery, or for enticement of a party to a marriage."[1]

The purported abolition of these antiquated actions follows repeated recommendations to that effect by the English Law Reform Committee[2] and Law Commission[3] and has been accepted by legal commentators as a necessary and long-overdue reform. These actions originate from the common law concept of unity of property whereby the wife and children of the marriage were regarded as the husband's chattels. Although an action for damages for adultery was later made available to wives as well as husbands,[4] the legal proceedings tended to create great bitterness between the parties and were contrary to the spirit of reconciliation. Similarly, the action for enticement of a spouse is based on a property interest claimed by one spouse in the other which is totally alien to present-day society's notion of the husband-wife relationship.

Clearly, section 120 of the *Family Law Act* is drafted too narrowly to abolish the action for enticement that a parent can bring against a third party who deprives him of his child's services and hence State common law continues to govern the action.[5] The action brought by the parent is

* M.A. (Cantab.), LL.M. (York), Ph.D. (Melbourne); Barrister and Solicitor of the Supreme Courts of Nova Scotia and Victoria. Senior Lecturer in Law, University of Melbourne.

** LL.M. (Melb.); Barrister at Law, Supreme Court of New South Wales and Barrister and Solicitor of the Supreme Courts of Victoria and the Australian Capital Territory, Lecturer in Law, University of Melbourne.

1 The action for criminal conversation was abolished by the *Matrimonial Causes Act* 1959-71 (Cth), s. 44(5). Section 120 of the *Family Law Act* 1975 merely reaffirms its abolition.

2 Eleventh Report of the Law Reform Committee (1963), Cmnd. 2017.

3 Law Commission, Family Law: *Report on Financial Provision in Matrimonial Proceedings* (Law Com. No. 25: 1969), paras. 99-102. See also Working Paper on Loss of Services (No. 19: 1966).

4 *Matrimonial Causes Act* 1959-71, s. 44.

5 *Cf.* New Zealand where the action for enticement of children has been abolished but the action as between spouses has been expressly preserved. *Domestic Actions Act* 1975 (N.Z.), ss. 3 and 4. See Wilson, "Enticement of a Spouse: A Revival?" [1976] *N.Z.L.J.* 383.

based on the common law action *per quod servitium amisit,* which originated in the master-servant laws and was extended by the courts in 1653 to the parent-child relationship.[6]

This action is normally invoked to compensate parents whose children are injured by the negligence of third parties, and although the action is based on an anachronistic fiction,[7] it causes little if any injustice to either litigant in this context. This fact is presumably responsible for the lack of attention shown by the various law reform bodies in Australia to the suggestion of reform of this area of law.

The purpose of this article is to show that although the application of the action *per quod servitium amisit* to the parent-child relationship may work fairly in relation to normal tortious actions, when used as a basis for the action for enticement of a child it has serious and potentially calamitous consequences in family law. The problem is that in certain circumstances the action for enticement can be used by a cunning litigant as an alternative to the normal child custody laws, and where this action is invoked it can effectively sabotage the principles and safeguards built into the legislation and case law in Australia on child custody. The relevance of the tortious action for enticement to the child custody laws seems to have been totally overlooked in the past by legal commentators.

B. THE MISCHIEF

A close examination of the case of *Lough* v. *Ward*[8] will illustrate the extent of the threat to the custody laws posed by the action for enticement. This case concerned a girl who, at the age of sixteen years and seven months, left her father's house without his consent and entered "The Abbey of Christ the King", a religious establishment owned by the defendants. The Abbey consisted of only 14 members, and in 1935 it had severed its connection with the established Church. The Abbey had three religious orders: the first order required vows of obedience, poverty and self-sacrifice, the second order required the additional vow of undertaking some definite piece of social and religious work, and the vows of the third order were to pray, attend services and render Canonical obedience. By the time of the trial the girl had taken the vows of the first and third orders. At the Abbey the girl was maintained and clothed at no expense to her parents and had no desire to leave although she was free to do so at any time. Her mother and brother were only allowed to see her at the Abbey in the defendants' presence, and requests by a friend and sister-in-law for interviews were refused. According to Cassels J., to her home and her family the girl might almost have been dead.[9]

[6] *Norton* v. *Jason* (1653) Sty. 398; 82 E.R. 809.

[7] In cases of enticement, the requirement of showing that the child had been rendering services has been regarded as almost, if not completely, a fiction. The slightest evidence of service has been held to be sufficient for the action *per quod servitium amisit.* See, for example, *Evans* v. *Walton* (1867) L.R. 2 C.P. 615; *Rist* v. *Faux* (1863) 4 B. & S. 409; 122 E.R. 513; *Fores* v. *Wilson* (1791) Peake 77; 170 E.R. 85. However, if the child is too young to render services, then the fiction cannot be sustained: *Hall* v. *Hollander* (1825) 4 B. & C. 660; 107 E.R. 1206.

[8] [1945] 2 All E.R. 338. See also *Evans* v. *Walton* (1867) L.R. 2 C.P. 615.

[9] [1945] 2 All E.R. 338, 339.

The plaintiff sought to recover damages against the defendants for enticing the girl against his will to depart from his services. He also claimed an injunction to restrain the defendants from harbouring the girl or causing him to be deprived of her services. On these facts, Cassels J. awarded both damages and an injunction against the defendants on the basis that the girl had been enticed away and harboured in the Abbey. He further affirmed that a father, as head of the family, has the right to the services of his children until they attain the age of majority or marry under that age.[10]

The court stressed that these proceedings were not by way of *habeas corpus,* and thus the court had no power to order the girl to return to her father's home.[11] However, by granting an injunction restraining the defendants from continuing to harbour the girl, the court clearly reasoned that the girl would be obliged to return home as she simply had nowhere else to go. That this was the intention of the court can be seen from the following remark

> "I think it would be contrary to her interests that she should remain with the enticers . . . Surely it is better that, between now and the age of twenty-one, she should resume her family life and regain that parental affection which is there for the asking. She may remain as devout as she wishes, but she will at least have time for reflection, which seems to be denied to her now."[12]

Thus, it can be seen that the plaintiff in *Lough* v. *Ward* effectively managed to achieve his goal of enforcing his rights as custodian without having to invoke the child custody laws at all.

It is unclear whether the action for enticement is in every case a possible alternative to *habeas corpus* proceedings. As the right to services is based on the right to custody, it is only the legal custodian who is able to sue under the action for enticement. At common law, this right vested in the father, and the action for enticement was unavailable to the mother unless she was awarded custody by court order. However, as section 61(1) of the *Family Law Act* 1975 (Cth)[13] has abolished the common law right of the father to custody in favour of joint custody in both parties to a marriage, the remedy in *Lough* v. *Ward* is presumably available to either the father or the mother against a third party, except where one of the spouses is deprived of custody by court order. In the case of inter-parental custody disputes, one spouse obviously cannot bring an action for enticement against the other spouse where both have joint custody. Logically, if a court awards sole custody to one spouse, the action for enticement should lie against the other spouse;[14] however, whether our courts would

[10] Ibid. 350. Note that the right to service can extend to children of full age: *Bennett* v. *Allcott* (1787) 2 Term. Rep. 166; 100 E.R. 90.

[11] Ibid. 350.

[12] Ibid. 350.

[13] Section 61(1) reads

> "Subject to any order of a court for the time being in force, each of the parties to a marriage is a guardian of any child of the marriage who has not attained the age of 18 years and those parties have the joint custody of the child."

[14] This would seem to be the position in Tasmania, Queensland, Victoria and the Australian Capital Territory, and under Commonwealth law, where legislation has reversed the common law rule prohibiting tortious actions between spouses (see

be prepared to extend the antiquated remedy in *Lough* v. *Ward* to inter-parental child custody disputes remains to be seen.

Where the remedy in *Lough* v. *Ward* can be invoked, it has very serious consequences for the development of the child custody laws and the effectiveness of the existing legislation on this matter contained in the *Family Law Act* 1975. These consequences must be considered in detail.

There are only two statutory principles contained in the *Family Law Act* to which courts must adhere when exercising their discretion in awarding custody. Both these principles are included in section 64(1), which reads in part

> "In proceedings with respect to the custody or guardianship of, or access to, a child of the marriage—
>
> (a) the court shall regard the welfare of the child as the paramount consideration;
>
> (b) where the child has attained the age of 14 years, the court shall not make an order under this Part contrary to the wishes of the child unless the court is satisfied that, by reason of special circumstances, it is necessary to do so; . . ."

The principle of the paramountcy of the child's welfare in section 64(1)(a) has been copied from the now repealed *Matrimonial Causes Act* 1959-71 (Cth), section 85(1), and has as its statutory origin section 1 of the *Guardianship of Infants Act* 1925 (U.K.), commonly referred to as the "infant's charter".[15] It is generally recognized as by far the most significant principle underlying the child custody laws.

Unfortunately, the nature of the action for enticement and harbouring is such that the welfare of the child is, in this context, an irrelevant consideration. The action for enticement is a tortious action, where the sole objective of the court is to protect the rights of the parties to the dispute, whereas in custody litigation the rights of the parties are secondary to that of the welfare of the child. While Cassels J. in *Lough* v. *Ward* made a number of references in his judgment to what he considered to be for the welfare of the girl, it was no more than a happy coincidence that in the facts of this case a consideration of her welfare led the judge to the same decision as a consideration of the rights of her father. Indeed, Cassels J. left no doubt that the only valid concern in an action for enticement is the rights of the person who has been deprived of services. At one stage he referred to the welfare of the child as a hypothetical issue,[16] and ended his judgment with the categorical statement that

Married Women's Property Act 1965 (Tas.) s. 4, *Law Reform (Husband and Wife) Act* 1968 (Qld), *Marriage (Liability in Tort) Act* 1968 (Vic.), *Married Persons (Torts) Ordinance* 1968 (A.C.T.), *Family Law Act* 1975 (Cth), s. 119). However, in the remaining Australian jurisdictions, where the abrogation of the common law rule is limited to motor accidents, it is not possible for one spouse to bring an action for enticement against the other under any circumstances.

[15] Even before the welfare of the child was safeguarded by legislation, Australian courts held that it is the paramount consideration in child custody litigation: see, for example, *Goldsmith* v. *Sands* (1907) 4 C.L.R. 1648; *Moule* v. *Moule* (1911) 13 C.L.R. 267; *R.* v. *Boyd; Ex parte MacPherson* [1919] V.L.R. 538.

[16] At p. 349 Cassels J. states: *"If* I have to consider her welfare and give consideration to that . . ."

"There has been by the defendants a violation of the plaintiffs' rights. As a parent he was entitled as against the defendants, who are strangers, to the continued services of his daughter during her infancy."[17]

Thus, if a litigant attempts to secure the return of his child by use of the action for enticement the safeguard contained in section 64(1)(a) of the *Family Law Act* 1975 can be avoided. Similarly, the action for enticement avoids the requirement contained in section 64(1)(b) that the court must uphold the wishes of the child if the child has attained the age of fourteen years unless special circumstances are shown to exist.

It would also seem that the action for enticement circumvents the application of the case law on the significance of the wishes of the child in *habeas corpus* proceedings. The leading case on this point is *R.* v. *Howes*,[18] where a father was seeking the return of his fifteen-year old daughter by *habeas corpus* proceedings notwithstanding her protests that she did not wish to go home. Cockburn C.J. stated that an age must be fixed beyond which *habeas corpus* will not be enforced in child custody proceedings contrary to the wishes of the child, and for a girl that age should be sixteen.[19] In *Lough* v. *Ward,* Cassels J. recognized the relevance of the child's wishes in *habeas corpus* proceedings but noted their irrelevance in an action for enticement

"It is also important to observe that these are not *habeas corpus* proceedings. If they were the court would consult the wishes of the child, and, as Dorothy is over 16 years of age and, therefore, has attained what the law calls the age of discretion, the court might not intervene."[20]

Thus, it is clear that if the father in *Lough* v. *Ward* had invoked *habeas corpus* proceedings no order would have been made in the light of the fact that the daughter had attained the age of discretion by the time of the trial. One can speculate that the age of the girl was the factor motivating the decision of counsel for the father to proceed with an action for enticement rather than *habeas corpus* proceedings.

In summary, in cases where it is applicable, it can be highly advantageous to a parent to invoke the principle in *Lough* v. *Ward* rather than to use the traditional custody proceedings, especially where the child has

[17] [1945] 2 All E.R. 338, 350.

[18] (1860) 3 El. & El. 332; 121 E.R. 467.

[19] The age of sixteen years as the age of choice for females was also accepted in *Re Andrews* (1873) L.R. 8 Q.B. 153, and *Mallinson* v. *Mallinson* (1866) L.R. 1 P. & D. 221. There are only *dicta* in English cases relating to male infants. These *dicta* suggest that the age of fourteen years is the age of choice for males: see, for example, *Thomasset* v. *Thomasset* [1894] P. 295, 298 (C.A.). In Ireland it has been held that the age of choice for male infants is fourteen years: *State* v. *Meagan* [1942] I.R. 180.

Note that the power of choice for infants depends on age alone, not on mental capacity: *R.* v. *Clarke; Re Race* (1857) 7 El. & Bl. 186; 119 E.R. 1217; *Re Andrews* (1873) L.R. 8 Q.B. 153.

[20] [1945] 2 All E.R. 338, 348. However, Cassels J. went on to cite *Re Agar-Ellis* (1883) 24 Ch.D. 317 (C.A.) as authority for his opinion that in exceptional circumstances the court might still apply *habeas corpus* even if the child has exceeded the age of discretion. The validity of this opinion is extremely doubtful. Some writers e.g. P. M. Bromley, *Family Law* (4th ed., London, Butterworths: 1971) p. 281, believe that the opinion of Cassels J. may be based on a misreading of the judgments in *Re Agar-Ellis.*

exceeded the age of discretion. In addition, the safeguards built into the *Family Law Act* 1975 (Cth) pertaining to child custody can apparently be circumvented with alarming ease.

To make matters worse, the effect of the decision in *Lough* v. *Ward* may be actively to encourage parents to proceed against third parties by the action for enticement in the hope of obtaining an order for damages in addition to the return of the child. In *Lough* v. *Ward,* the father was awarded £500 in damages, a not inconsiderable sum in 1945 when the case was decided. The court is not limited to a consideration of the value of the services of which a parent may be deprived, but may in appropriate circumstances award exemplary damages. Of course, no damages can be obtained in normal child custody proceedings.

Clearly, the use of the action for enticement in the context of the parent-child relationship can lead to an abuse of our child custody laws. It would seem that it is only the widespread ignorance in the legal profession of the possible ramifications of *Lough* v. *Ward* in the parent-child context that has prevented the threat from becoming a reality in many cases. The need for reform of this area of law would appear to be obvious, but the nature of the desired reform is less certain.

C. POSSIBLE REFORMS

The first problem confronting those who would seek to rectify the potential for mischief inherent in *Lough* v. *Ward* is to decide which Parliament has the power to pass remedial legislation. The constitutional position is by no means clear but it would appear that both Federal and State Parliaments would need to be involved.

Two constitutional questions arise: (a) is section 120 of the *Family Law Act* 1975 (Cth) valid in so far as it abolishes the right of action for enticement of a party to a marriage; and (b) can the Federal Parliament also abolish the right of action for enticement of children? The High Court has not considered these questions, but its decision in *Russell* v. *Russell*[21] does offer guidance to the approach it might take to them. The case was concerned with a number of challenges to the validity of the *Family Law Act.* It was argued, *inter alia,* that sections of the Act permitting maintenance and custody proceedings unrelated to divorce proceedings and actions for custody, guardianship and maintenance of children were not laws authorised by placita 21 and 22 of section 51 of the Constitution.[22]

A majority of the Court[23] rejected the notion that the marriage power[24]

[21] (1976) 9 A.L.R. 103. This case was heard in conjunction with another: *Farrelly* v. *Farrelly*. Most of the issues raised were common to both and for the purposes of citation in this article they are treated as being the same case.

[22] Section 51 of the Constitution gives the Commonwealth Parliament power to make laws with respect to

"(xxi) Marriage;

(xxii) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants."

[23] Stephen, Mason and Jacobs JJ.

[24] Section 51(21):

had to be read down in the light of section 51(22). The presence in the Constitution of a power to make laws with respect to parental rights and the custody and guardianship of infants *in relation to divorce and matrimonial causes* was held not to imply that other such laws, not so related, could not be made pursuant to the marriage power. That power enabled "the Parliament to provide for the enforcement of such rights, duties and obligations as may be created in exercise of the marriage power".[25] It followed that maintenance and custody proceedings could be maintained independently of divorce proceedings.

There was however an important limitation. In the view of Stephen and Mason JJ. the marriage power and section 51(22) only supported laws regulating custody proceedings between the parties to a marriage with respect to the natural or adopted children of both the parties. Regulation of maintenance proceedings was limited to actions between the parties to a marriage or one of them and the natural or adopted children of that marriage.[26] Jacobs J. was prepared to go further and include children accepted as members of the household of the parties to a marriage[27] but the final order of the Court in relation to these matters was in the form proposed by Stephen and Mason JJ.[28]

It has already been observed that the action for enticement originated from the common law concept of unity of property within marriage. The husband had a right to the services of his wife and children and could use an enticement action to protect that right. The marriage power would therefore justify laws made for the purpose of regulating such actions. Moreover, since legislation prohibiting an activity which forms part of a subject matter of legislative power under section 51 of the Constitution is nonetheless a law with respect to that activity,[29] the abolition of the action for enticement is also within Federal legislative competence. However, as *Russell* v. *Russell* indicates, that competence is limited as to parties. It extends to actions between parties to a marriage and would therefore admit the prohibition of the institution of an action by one party to a marriage against the other for enticement of a natural or adopted child of the marriage.[30] But an action between a party to a marriage and a third party is a different matter and one which, it is submitted, Commonwealth legislative power does not embrace.

The result is that in so far as section 120 deals with enticement it is invalid. The Commonwealth could introduce legislation abolishing the action as between parties to a marriage in respect of the natural or adopted children of the marriage, but that is as far as it may go. Actions for enticement of spouses and all other enticement actions involving

[25] (1976) 9 A.L.R. 103, 138. *Cf. Attorney-General for State of Victoria* v. *The Commonwealth* (1962) 107 C.L.R. 529.
[26] (1976) 9 A.L.R. 103, 140.
[27] Ibid. 145-7.
[28] Ibid. 152.
[29] *Murphyores Incorporated Pty Ltd* v. *Commonwealth* (1976) 9 A.L.R. 199, 205 and 211.
[30] A situation which could arise if one party has sole custody of the child.

children (including ex-nuptial children) can only be abolished by State Parliaments.[31]

If the foregoing constitutional arguments are correct there is no valid State or Commonwealth legislation which impinges on the common law right of action for enticement. Neither the Australian Law Reform Commission nor any of the various State Law Reform Commissions has even considered the issues involved. The only law reform body in Australia to have investigated this matter is the Chief Justice's Law Reform Committee in Victoria, which in 1970 appointed a sub-committee[32] under the chairmanship of Mr Justice Barber to investigate a number of miscellaneous reforms in family law, one of which was the application of the action *per quod servitium amisit* in the parent-child context. Sadly, the sub-committee failed to reach a consensus on any of the issues under consideration and no recommendations were advanced.[33]

There would seem to be two alternative avenues of approach for the Commonwealth and the States if they resolve to abolish the mischief in *Lough* v. *Ward*. Firstly, legislation could be enacted abolishing the action *per quod servitium amisit* in its entirety or restricting its application to the rare cases where a third party deprives a master of his servant's services; the right of parents to sue third parties for the loss of their children's services would be expressly prohibited. Secondly, and more conservatively, we could retain the basic right of parents to sue for the loss of their children's services but exclude the application of this remedy in cases of seduction or enticement. This second alternative approach was adopted in 1970 in the United Kingdom. Section 5 of the *Law Reform (Miscellaneous Provisions) Act* 1970 (U.K.) states

> "No person shall be liable in tort under the law of England and Wales—
>
> . . .
>
> (b) to a parent (or person standing in the place of a parent) on the ground only of his having deprived the parent (or other person) of the services of his or her child by raping,[34] seducing or enticing that child."

[31] This view derives support from some recent remarks made by the Commonwealth Attorney-General. After the decision in *Russell* v. *Russell* he introduced the Family Law Amendment Bill (see now Act No. 63 of 1976) to amend the *Family Law Act* to bring it into conformity with the High Court's pronouncements. The amendments did not include changes to section 120. There were, however, amendments to the maintenance and custody provisions and in introducing them the Attorney-General said that "disputes between one party to a marriage and, say, a grandparent of a child of the marriage would fall outside the jurisdiction of the Act and would therefore have to be resolved according to relevant State law. Likewise disputes between a husband and a wife over a stepchild would be outside the Act"; *Commonwealth Parliamentary Debates (House of Representatives)* 20 May 1976, p. 2327. Woodward J. of the Family Law Division of the Supreme Court of New South Wales has also expressed doubt on the constitutional validity of the enticement provisions of section 120: *In the Marriage of Yule* (1976) 11 A.L.R. 173, 175.

[32] Its official title was the *Sub-committee to Consider the English Law Reform (Miscellaneous Provisions) Bill.*

[33] Information supplied by Professor H. Luntz, Secretary, Chief Justice's Law Reform Committee.

[34] "Raping" was specifically mentioned as well as "seducing", since although raping is an aggravated form of seduction (see *Mattouk* v. *Massad* [1943] A.C. 588 (P.C.)), it seems that a parent may, in the case of rape, have an alternative basis

In view of the inappropriateness in today's society of the theory that children are the servants of their parents, logically the first alternative reform would seem preferable. However, it must remembered that the action for enticement is merely one example of the operation of the action *per quod servitium amisit*. The action *per quod* is more commonly invoked to compensate parents for medical expenses incurred in the treatment of injuries inflicted on their children by third parties. We must ensure that in attempting to abolish the action for enticement we do not inadvertently disallow the justifiable claims of parents for medical expenses.

The authorities are conflicting on whether there is any right of recovery independent of the action *per quod servitium amisit* for parents for medical expenses incurred on behalf of their children.[35] In Victoria Pape J. held in *Lloyd* v. *Lewis*[36] that a father is entitled to recover medical expenses incurred on behalf of his child even though the action *per quod servitium amisit* is not specifically pleaded as the basis for the claim. According to Fullagar J. in *Blundell* v. *Musgrave*,[37] the father has a right of recovery on the basis that anyone under a legal obligation to pay for medical expenses may recover them from a tortfeasor

> "An action for such expenses would not be an action *per quod servitium amisit*, and, the necessity for medical aid being a natural and probable result of the tort, it might be said that its cost is recoverable by any person who is under a legal duty to supply it or pay for it."[38]

However, other judges have different opinions. Taylor J. in *State Government Insurance Office (Queensland)* v. *Crittenden*[39] left the issue open, while Windeyer J. in *Commissioner for Railways (N.S.W.)* v. *Scott*[40] insisted that the action *per quod servitium amisit* is the sole basis of recovery for parents of medical expenses incurred on behalf of their children

> "I incline to the view that, in general, moneys which a master became legally obliged to pay to or for his servant by reason of an injury incapacitating the servant are recoverable by the master in an action against the wrongdoer—and that (apart from special statutory provvisions) the only form which such an action could take would be the common law action *per quod servitium amisit*, such damages being consequential upon the loss of *servitium*."[41]

The law relating to the assessment of damages in personal injury litigation has recently been examined by the English Law Commission.[42]

for his claim, viz. that the rape constituted a tort against his daughter leading to a loss of her services. The Law Commission thought it desirable to make it clear that this alternative basis could not be relied on in such a case, and so referred specifically to rape. See *Halsbury's Statutes of England*, 3rd ed. 1971, Vol. 35, p. 553, General Note.

35 For a general discussion of this issue, see H. Luntz, *Assessment of Damages for Personal Injury and Death* (Sydney, Butterworths: 1974), 307-9.
36 [1963] V.R. 277.
37 (1956) 96 C.L.R. 73.
38 Ibid. 97-8.
39 (1966) 117 C.L.R. 412, 420.
40 (1959) 102 C.L.R. 392.
41 Ibid. 462.
42 Law Commission, *Report on Personal Injury Litigation Assessment of Damages* (Law Com. No. 56: 1973).

The Commission recommended, *inter alia,* that the action for loss of services of a servant or child should be abolished and replaced by a right of recovery in his own action for an injured person for the reasonable value of any gratuitous services which he rendered to anyone in his family group before his accident.[43] The Commission wrote

> "For purely historical reasons the husband deprived of his wife's services and the father of his daughter's are given a right to recover damages by the so-called *per quod* action but no other dependent has any right to recover compensation for lost dependency. We do not think that this sort of compensation should be so narrowly circumscribed nor . . . do we think that the right of recovery should belong to someone other than the victim himself. We think that where, within the family group, gratuitous services were, prior to his injury, rendered by a tort victim, he should be paid such compensation as will enable him to replace those services which he is no longer able to give."[44]

If this new recommended form of recovery were adopted by legislation in Australia, the mischief in *Lough* v. *Ward* could best be remedied by the total abolition of the action *per quod servitium amisit.* However, in the absence of such reform and in light of the prevailing uncertainty as to the basis of the father's action for the recovery of medical expenses incurred on behalf of his child, it would seem unwise to abolish the action *per quod servitium amisit* in its entirety and run the risk of setting aside all future claims by fathers for medical expenses for their children who are injured by third parties.

Thus, expediency suggests that the most appropriate reform would be the enactment of legislation copying the provisions of section 5 of the *Law Reform (Miscellaneous Provisions) Act* 1970 (U.K.), thereby preserving the action *per quod servitium amisit* but outlawing its operation in cases of seduction and enticement of children. Hopefully, this reform will be achieved before widespread misuse is made of the principle in *Lough* v. *Ward.*

[43] Ibid. para. 155.
[44] Ibid. para. 157.