

IN THE SUPREME COURT)
OF THE TERRITORY OF)
PAPUA AND NEW GUINEA)

CORAM : FROST, J.
FRIDAY,
3RD OCTOBER, 1969.

BETWEEN : YAKINAVAI TOKURADAL Plaintiff
- and -
CHIMBU COFFEE CO-OPERATIVE
LIMITED Defendant.

1969.
Sep. 11
Oct. 3
PT. MORESEBY
Frost, J.

REASONS FOR JUDGMENT.

This is an assessment of damages under a judgment obtained by the plaintiff against the defendant for damages in respect of the death of the plaintiff's husband, Maneto Kuradal Torakupa, caused by the negligent driving of the defendant's servant, pursuant to the Law Reform (Miscellaneous Provisions) Ordinance 1962, Part IV, which is the Territory counterpart of the English Fatal Accidents Act.

At the date of his death on the 4th June, 1967, the deceased Maneto was thirtyseven years of age and employed by the Administration as a Local Government Assistant, Grade II, at Kundiana. The plaintiff, who was then thirtyfour years of age, has brought the action on behalf of herself and two children of the marriage, Manico, at the date of death aged just eleven, and Andrew, then aged nearly six years. Both the plaintiff and the deceased are Tolais. Counsel referred me to the statement of the law to be found in Davies v. Powell Duffryn Associated Collieries Ltd. (1), Nance v. British Columbia Electric Railway Co. Ltd. (2) and Parker v. The Commonwealth of Australia. (3). Mr. Heath also referred me to a recent decision of the House of Lords on appeal from Northern Ireland, Mallett v. McMonagle (4), and especially a passage from the speech of Lord Diplock who found it desirable to restate the law

(1) (1942) A.C. 601.
(2) (1951) A.C. 601.
(3) 112 C.L.R. 295, per Windeyer J. at pp. 307 - 308.
(4) (1969) 2 W.L.R. 767.

applicable to this class of action. I propose briefly to set out the passages in full:-

"My Lords, the purpose of an award of damages under the Fatal Accidents Act is to provide the widow and other dependants of the deceased with a capital sum which with prudent management will be sufficient to supply them with material benefits of the same standard and duration as would have been provided for them out of the earnings of the deceased had he not been killed by the tortious act of the defendant, credit being given for the value of any material benefits which will accrue to them (otherwise than as the fruits of insurance) as a result of his death.

To assess the damages it is necessary to form a view upon three matters each of which is in greater or less degree one of speculation: (1) the value of the material benefits for his dependants which the deceased would have provided out of his earnings for each year in the future during which he would have provided them, had he not been killed; (2) the value of any material benefits which the dependants will be able to obtain in each such year from sources (other than insurance) which would not have been available to them had the deceased lived but which will become available to them as a result of his death; (3) the amount of the capital sum which with prudent management will produce annual amounts equal to the difference between (1) and (2) (that is "the dependency") for each of the years during which the deceased would have provided material benefits for the dependants, had he not been killed.

Since the essential arithmetical character of this assessment is the calculation of the present value of an annuity it has become usual both in England and in Northern Ireland to arrive at the total award by multiplying a figure assessed as the amount of the annual "dependency" by a number of "years' purchase". If the figure for the annual "dependency" remained constant and could be assessed with certainty and if the number of years for which it would have continued were also ascertainable with certainty it would be possible in times of stable currency, interest rates and taxation to calculate with certainty the number of years' purchase of the dependency which would provide a capital sum sufficient to produce an annuity equal in amount to the dependency for the number of years for which it would have continued. If the estimated "dependency" did not remain constant, but altered at intervals during the period of its enjoyment, an accurate assessment of the appropriate award would involve calculating the present value of a series of annuities for fixed periods progressively deferred. For reasons to which I shall advert this is seldom, if ever, done. Anticipated future variations in "dependency" are normally dealt with by an adjustment in the multiplicand to be multiplied by the single multiplier - the number of years' purchase."

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"The starting point in any estimate of the number of years that a dependency would have endured is the number of years between the date of the deceased's death and that at which he would have reached normal retiring age. That falls to be reduced to take account of the chance, not only that he might not have until retiring age, but also the chance that by illness or injury he might have been disabled from gainful occupation

"former risk can be calculated from available actuarial tables. The latter cannot. There is also the chance that the widow may die before the deceased would have reached the normal retiring age (which can be calculated from actuarial tables) or that she may remarry and thus replace her dependency from some other source which would not have been available to her had her husband lived. The prospects of remarriage may be affected by the amount of the award of damages. But in so far as the chances that death or incapacitating illness or injury would bring the dependency to an end increase in later years when, from the nature of the arithmetical calculation their effect upon the present capital value of the annual dependency diminishes, a small allowance for them may be sufficient where the deceased and his widow were young and in good health at the date of his death. Similarly even in the case of a young widow the prospect of remarriage may be thought to be reduced by the existence of several young children to a point at which little account need be taken of this factor. In cases such as the present where the deceased was aged 25 and his widow about the same age, courts have not infrequently awarded 16 years' purchase of the dependency. It is seldom that this number of years' purchase is exceeded."

At the time of his death, the deceased was employed as a Local Government Assistant, Grade II, receiving an annual salary of \$1152, which was paid fortnightly in the net sum of approximately \$43. There was also a deduction of \$2.15 for retirement benefits. In June, 1968, his salary would have increased to \$1290 and in June, 1969 to \$1350, which was the top of the range for his classification. Eminent witnesses called for the plaintiff filled in the bare facts as to his salary and position and have painted a picture of the deceased's ability, ambition and prospects in life. Mr. Parrish, Secretary of the Department of Labour, knew the deceased in Madang between 1957 and 1961. Mr. Williamson, the Assistant Director, Local Government, Department of the Administrator, knew the deceased before that in Rabaul, and was able to speak of his later advancement. I was also assisted by the evidence of Mr. Henry, the Secretary of the Employers' Federation of Papua and New Guinea, and of Mr. Oala Oala-Rarua, the Assistant Ministerial Member for the Treasury, for the deceased had been active in the trade union movement and both gentlemen were able to speak of him as a negotiator in the sphere of industrial awards. From this evidence, I am satisfied that the deceased was a very capable Local Government Assistant. In Madang, he decided to continue his studies whilst working. He studied by corres-

and passed Standard 9. He was interested in political and industrial affairs; he was a Member of the Legislative Council in 1961 to 1964, indeed, Mr. Roxua said he was the youngest member. He was a member also of the Madang Advisory Council. He was President of the Madang Workers Association. When the time came to appoint a Chairman of a steering committee to establish a Federation of Workers' Associations in the whole of the Territory, the deceased was the only candidate considered and was duly elected as Chairman. He was a capable and responsible negotiator, as well-qualified as anyone in the trade union movement to conduct industrial negotiations. He spoke English, in a slow and careful manner. Mr. Roxua considered that the deceased had the potential of obtaining one of the key positions in the trade union movement as it developed in the Territory. He had ambitions also in politics and had intended to stand for the House of Assembly in the next election. He had applied for admission to a Local Government course - a long course - at the Administrative College in 1968 and he would have been admitted, Mr. Williamson said, if not in that year, certainly in 1969. Mr. Williamson considered that he would have completed it successfully and that he had excellent prospects of obtaining employment as a Council Clerk with one of the councils with a large revenue, which would give him a salary of \$2,000 - \$3,000 a year. If he had stayed with the Local Government division, his next step, in 1970, would have been promotion to Local Government Officer at a salary of \$1400 on a range of up to \$1710 per annum, upon increments of \$60 a year.

Whether the trade union movement will develop in the Territory to such an extent that it will support well-paid positions, or whether the deceased would have secured such a position, I feel is speculative, but I accept the evidence as to the deceased's ability and I consider that his earnings would have steadily increased. It was probable, in my opinion, that he would have successfully completed the Local Government course at the Administrative College and then would have been eligible for employment by a council with a large revenue in

range of \$2,000 to \$3,000. Indeed, if the deceased, a mature man, apparently wise in counsel, with a capacity to study, highly regarded in the sphere of industrial relations, could not have obtained such a position, it is difficult to say in this period of economic development in the Territory which persons could have been found to fill such position. It will be necessary for me then to return to this matter later for the purposes of arriving at an average yearly salary, which will depend on the number of years I take as the period of dependency. The only other evidence was that of Dr. Enders, who was able to say, because of his long experience of the Tolai people, that average life expectancy of the Tolai people was about sixty years.

I propose now to turn to the value of the loss of support which the plaintiff has established. She gave evidence of the expenditure of the deceased's approximate fortnightly salary of \$40. He gave her \$10, of which she banked some and also bought some food and cigarettes for herself. The deceased himself spent about \$20 a fortnight on food and cigarettes and he also retained a further sum of \$10 for himself. She said he bought food daily - two tins of meat a day, costing fifty cents each. It was a happy household, the children were well-clothed and fed, and she had enough clothes. They were stationed at Chuave at the date of his death. They lived in a house made of European materials which belonged to the council and for which no charge was made. Over the years, as the deceased's salary had increased, so had he given her more money. Both were fit and healthy. He had left \$13 in the bank. Evidence was led as to the cost of the children's education after the death of the deceased, to enable me to make an estimate of the sum attributable to their support. The two children are both at school. Monica, now in Standard 5, is to go to Vunapepe School next year. At present, she is boarding and her food costs \$2 a week. Next year, the food will also have to be brought to her, and it will be \$10 for school fees. Andrew, who is an adopted child, goes to the village school. It was the intention of the deceased to keep both children as long as possible at school. The

plaintiff was cross-examined as to the deceased's personal expenditure, and admitted that the deceased was well-stocked with clothes, he smoked two packets of cigarettes a day and he used to go to the hotel to drink on occasions. She herself smoked one packet of cigarettes a day.

Mr. Hoath submitted that I should find the value of the deceased's support was, at the date of death, including the sum paid for retirement benefit and housing, about \$25 a fortnight, that is, about five-eighths of his salary at the time of death, and that I should take \$2,000 a year as the deceased's average earnings for the rest of his working life, which he submitted was eighteen years, apparently basing himself on a retiring age of fiftyfive years, and that on these sums, it would be proper to allow \$24 a week for the loss of the plaintiff's support. He submitted that, for the risk of the plaintiff's predeceasing the deceased, and the prospects of her remarriage, the period of dependency should not be reduced lower than fifteen years. On the actuarial table set out in Volume 40 of Australian Law Journal, page 243, which by consent was put in evidence, from these data a sum of approximately \$13,000 is arrived at as the presently payable sum which would provide an annuity of \$24 a week for fifteen years.

Mr. White submitted that to go beyond the deceased's salary prospects as a Local Government Officer, with a top range of \$1710 would be speculative, that the value of the deceased's earnings which the plaintiff derived at the date of death for her support was \$15 a fortnight, and taking this proportion of his earnings over a period of ten or, at the most, twelve years' dependency, Mr. White arrived at a total loss of \$7,650, the present value of which is approximately \$6,000. Mr. White submitted also an alternative calculation, taking the deceased's earnings year by year, but his final submission was that the award should be of that order.

Now, the plaintiff's evidence as to the expenditure of the deceased's salary was meagre and I am really left to make an estimate. In my opinion, Mr. Hoath's estimate of \$25 a fortnight allows for

for the decedent's food and scale of personal expenditure. I propose to take the figure of \$20 as the sum which the plaintiff derived per fortnight from the decedent for her support. I also take into some account the fact that the plaintiff has now returned to her village, where she will, in the traditional way of village society, be provided with a house, as one of the material benefits referred to by Lord Diplock to be considered (*ibid*, page 771). Thus, the proportion of the decedent's earnings to be attributable to the plaintiff's support, in my judgment, is one-half. It is logical next to consider the multiplier, because that will determine the sum to be allowed as the decedent's average salary. I consider that the possibility of the plaintiff's remarriage is not to be overlooked. A Tolai man whom she met at the decedent's funeral in the Highlands has written to her, she says five times, and after two years when he will be in Rabaul on leave, he will ask her to marry him. In the meantime, she has seen him in Rabaul. She was asked whether she would marry him and she said she did not know; if he was a reasonable person, and had good ways, she could marry him, but if not, she would not marry him. Mr. Heath submitted that I should bear in mind that apparently the plaintiff is unable to have further children, which might affect, if not her prospects of remarriage, the stability of any remarriage she might make. Now, it is a difficult matter for a court to estimate the plaintiff's chance of remarriage. The court has little to go on except the impression the plaintiff makes on it in her brief appearance in court, and what knowledge it has of village society in the Territory. On the whole, taking into account all relevant considerations, I have decided to allow a period of dependency of twelve years. Coming now to the average salary which the decedent would have earned over that period, I consider that the first three years' income should be taken as the decedent's earnings as a Local Government Officer, Grade II, that is \$1152 to \$1350, and over the rest of the period, I consider Mr. Heath's submission is sound that the probabilities are that the decedent would have become a Council Clerk, with a salary range of \$2,000 to \$3,000, and I thus arrive at an average

annual salary of \$1000. The plaintiff's loss of support over this period of twelve years is thus \$900 a year. To arrive at the capital sum which will produce a weekly amount equivalent to the dependency, it is necessary to go to the actuarial table and start with the weekly economic loss which is a little more than \$17 per week. By making approximate calculations, based on the figures given for \$15 and \$20 a week, as the weekly economic loss, and the figures given for periods of ten and fifteen years, I arrive at a total sum which will provide the capital sum required to produce the weekly amount which the plaintiff has lost, over a period of twelve years. I must also allow the sum of \$25 bank savings, which is material benefit to be deducted. I have thus arrived at a sum of \$9,000 damages.

This sum is to be divided between the plaintiff and the two children. I consider that the loss of support which flows from the death of the deceased should be taken in the case of each child as \$3 a week, to be continued over a period of six years for Monica, for whom, again by resorting to the table, I allow a capital sum of \$720, and over ten years in the case of Andrew, for whom I allow a capital sum of \$1180, making a total for the children of \$1,900.

There will be judgment for the plaintiff for \$9,000, with costs to be taxed.

I order that of that sum, the defendant pay into court, within fourteen days, the sum of \$1900, of which \$720 is to be invested by the Registrar on behalf of the infant Monica, who was born on the 9th May, 1956, and \$1180 on behalf of the infant Andrew, who was born on the 6th September, 1961, such respective sums to be paid out to each child, together with the income or interest accrued on such investments, on such child attaining the age of twentyone years, or in the meantime as this court may order. The balance is to be paid to the plaintiff.

Solicitor for the plaintiff : W. A. Loler, Public Solicitor.
Solicitors for the defendant : Norman White & Reitano.