SC582

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

CORAM : FROST, J.

Monday,

13th July, 1970.

BETWEEN RUTH MARIE FERREIRA McLEAN

Plaintiff

and

WILLIAM HENRY CARMICHAEL
BURNS PHILP (NEW GUINEA) LIMITED
AUSTRALASIAN PETROLEUM COMPANY PTY. LTD.

Defendants

REASONS FOR JUDGMENT

1970
June 29 and 30.
July 8 and 13.

PORT MORESBY
Frost, J.

This is an enquiry as to the amount of damages the Plaintiff is entitled to recover under a Judgment against the defendants for damages in respect of the death of her husband Neil Robin McLean, who on 14th October 1967 died by electric shock caused by an electrical installation negligently installed by the defendants.

The action is brought under the Law Reform (Miscellaneous Provisions) Ordinance 1962, Part IV, which is the Territory counterpart of the Fatal Accidents Acts of England, for pecuniary loss consequent on the death, so that it is necessary to consider the financial circumstances of the parties.

At the time of death the deceased was aged 28 years, and the plaintiff 33 years. They were married in March 1966. The deceased was in excellent health as is the plaintiff; her husband was of robust constitution and engaged in strenuous sports. He was employed by the defendant, Burns Philp (New Guinea) Ltd., as coastal shipping manager under a two year contract which was to expire on 20th March, 1969, at a salary of $300.00 per month. The plaintiff also worked, being employed as a clerk in a senior capacity by the Royal Papua & New Guinea Constabulary at a salary of $141.00 per fortnight. The couple had the leasehold of a small farm at 17 Mile near Port Moresby which they worked as a market garden, and this took all their spare time, for they went there nearly every day. They ran a car, which in view of the use it was put to, involved rather heavy running expenses. Under the deceased's will, the plaintiff received $23,471.00 of which $20,000.00 was payable under a policy of insurance on his life.

The plaintiff and her husband had a joint account in the Bank of New South Wales, Port Moresby into which the whole of her

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salary was paid and any balance of the deceased's salary, after living expenses had been deducted. From his salary deductions were made for tax, staff provident fund and also purchases of food, clothing and other items from the defendant Burns Philp (New Guinea) Ltd. and a subsidiary company, which are customarily made by employees of that company. All other expenses were paid from the joint account. During the period from 20/3/67 to 30/6/67, rent was deducted at the rate of $25.00 per month, and the total purchases were approximately $310.00, being approximately $22.00 per week, and from 30/6/67 until October 1967 rent at the same rate was deducted, and total purchases were higher being $521.00, which average out at about $34.00 per week.

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It is necessary now to refer to deceased's family background. He had been brought up in Coffs Harbour in New South Wales where his father, Neil McLean, managed and ran a large banana plantation of 210 acres, 63 acres being planted, in which his mother had a half share with her brother Bruce Carson. It was said to be the biggest plantation in the district, and has the highest yield in the Commonwealth.

The plaintiff and deceased had talked the matter over before his death, and decided, at the end of the contract to return to Coffs Harbour and to go on the plantation, as his father, then nearly 60 years was too old to work the plantation. The matter had come to a head because Mr. Neil McLean had written suggesting that they buy Bruce Carson's share. In a letter dated 28th August 1967 to his parents, the deceased wrote as follows:-

"Received your letter today and am writing at once to offer my support for your idea to buy out Uncle Bruce.

I haven't mentioned it before, but for many years now it has been my idea to eventually settle on the farm, and really put it to work. To my way of thinking it would be a criminal shame to split the farm up; the place would be uneconomical to work if this was done. My idea was to gradually acquire Uncle Bruce's share and then come to some financial arrangement with Bruce and Jennifer". (Deceased's brother and sister). "Ruth and I have been saving and building our capital towards this end and at the moment we can muster about $7,000.00 in cash plus if necessary another couple of thousand against securities.

We would like to participate with you on a share basis to buy out Uncle. If we can go in with you and we are successful in buying out Uncle, then I think that we would probably be able to come

home at the end of this term. Provided we can maintain our saving rate which is currently averaging $300.00 per month in the bank we should be able to save enough to buy out Pinkstone's place, for which I estimate at the most to pay $1,500.00, but check me on this, and also have enough to start building a house up near the fig tree. My current contract will expire in eighteen months. Please let us know as soon as you can what your plans are, for it may take us a while to marshal our cash".

The plaintiff said that the deceased's plan was to acquire the whole property as his own, but over a period of time, acquiring the leases under which more than half the planted acres were held, and eventually buying out the whole property. Her own intention was to give up work and settle down and have a family.

The only other evidence was given by Mr. Neil McLean. He himself had worked the plantation over a period of 19 years since it had been left to his wife, jointly with her brother under her father's will. He had brought it into production from virgin land. He said that having received his son's letter, arrangements were made to buy Bruce Carson's interest in the plantation, and the purchase was completed prior to the son's death, the land being transferred to his wife. He said that it was then their intention to give the plantation to his son on his return from Port Moresby, but of course this statement cannot be accepted as evidence of the wife's intention and she was the owner of the plantation. So far as the actual working of the plantation was concerned, he intended that the deceased would take over the part worked by himself of 15 acres and then the various leases, which had either expired or were soon to expire, under which the rest of the planted acres were worked. Indeed he told his son that the plantation was his. In the event, after the son's death the father felt that he was too old to work the plantation, and the whole plantation was sold for $60,000.00 from which a mortgage of $10,000.00 was discharged.

Apart from his evidence, which I admitted, that since the sale, plantation values have increased, and the planted area could be increased by half as much again, no other evidence was called as to the value of the plantation.

The evidence as to the income derived from the plantation

was also meagre. All I have to found my judgment on is the father's evidence that from each acre of "good average A1 plantation land" an income of $470.00 after allowance for labour could be earned, and this would apply to all the planted acres. Thus as the planted acreage increased, so would the net income. From the planted area of 63 acres, an income of over $29,000.00 per annum should thus be derived. To substantiate such a very high income, Mr. White was amply justified in submitting that financial records should have been produced. Some guide as to the profitability of the plantation might have been given by the assets accumulated by the parents during the 19 years when the plantation was worked. At the time of the purchase, the parents had sufficient to buy out Bruce Carson, - but, unfortunately, there was no evidence as to the sum paid. They owned a large house in Coffs Harbour of a value also unspecified, and 6 blocks of land worth $2,000.00 each, but again there was no evidence as to the price paid.

The plaintiff's case consisted of two main claims, the first for loss of expectation of life and the second for the pecuniary loss the plaintiff has suffered in consequence of her husband's death. Before the Law Reform (Miscellaneous Provisions) Act 1934 of England, it was recognized that an injured person was entitled, if liability was proved or admitted, to recover damages for loss of expectation of life. The effect of that Act was that if the death of a person was caused by a wrongful act or neglect which would have entitled him (if death had not ensued) to an action for damages in respect thereof, that cause of action survived after his death for the benefit of his estate. The corresponding Section in the Territory is Section 9 of the Ordinance, and as there is no statutory provision that this cause of action is not to survive, the plaintiff as administratrix is entitled to sue for damages in respect of loss of expectation of life.

After the passage of the English Act widely varying amounts were awarded under this head until the decision of the House of Lords in Benham v. Gambling (1) in which the House reduced the damages that had been awarded in respect of the loss of expectation of life of a child aged 2½ from £1,200. 0. 0 to £200. 0. 0. Viscount Simon L.C.,

(1) (1941) A.C. 157.

in whose judgment all the Law Lords agreed, said that the question resolved itself "into that of fixing a reasonable figure to be paid by way of damages for the loss of a measure of prospective happiness" (page 166). It was plain that he considered that each case must be individually considered in view of his words that "before damages are awarded in respect of the shortened life of a given individual under this head, it is necessary for the Court to be satisfied that the circumstances of the individual life were calculated to lead, on balance, to a positive measure of happiness, of which the victim has been deprived by the defendant's negligence" (ibid). But "no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not of loss of future pecuniary prospects..... The degree of happiness to be attained by a human being does not depend on wealth or status" (ibid). His Lordship concluded that "very moderate figures should be chosen".

Thereafter, in England with rare exceptions £200. 0. 0. was taken as the invariable figure for the ordinary adult death. "The House had lowered the figure from what would presumably otherwise have been the standard because of the extreme youth of the child and then raised it because of his most favourable circumstances" Naylor v. Yorkshire Electricity Board (2). In that case the House again considered the matter. Taking the facts from the headnote, the deceased was a young man of twenty years of age who was killed by an electric shock while employed by the appellant as a jointer's mate. He was a happy healthy young man who would probably become a jointer at the age of 21 had he lived. He had become engaged to be married one week before he was killed. In an action by his mother as administratrix of his estate for damages on behalf of his estate there was unchallenged economic evidence that since 1941 (the year in which Benham v. Gambling (3) was decided) the purchasing power of the pound had declined by two-and-a-half times. Ashworth J. awarded £500. 0. 0 (which was in fact the current equivalent of £200. 0. 0 in 1941) for loss of expectation of life, which on appeal, the Court of Appeal increased to £1,000. 0. 0.

(2) (1968) A.C. 529, per Lord Devlin at p. 548.
(3) (1941) A.C. 157.

The House of Lords upheld the appeal and restored the trial judges' award of £500. 0. 0. The House held that the variation in the sum to be awarded is in small compass and reaffirmed that in all cases a very moderate figure should be chosen. The respondent submitted that it was wrong to take the figure of £200. 0. 0 as if the current equivalent had been settled for all time, and that the sum to be awarded was to be measured in the light of all relevant circumstances, which was the argument which had been accepted by the Court of Appeal.

Viscount Dilhorne, referring to Benham v. Gambling (4) said "This House did not say what sum should be awarded in all cases or say what was the minimum or maximum figure that should be given. It gave guidance as to the approach to be made when assessing damages for this loss and, while it recognised that the particular circumstances of the deceased might properly lead to a variation in the amount awarded, it held that it should be a very moderate figure" (ibid, p. 540), and he held that the judgment of Ashworth J. should not be interfered with. Lord Morris took the same view. He recognized that each case should be individually considered (ibid. p. 544), but in stating that it was proper to refer to what had been assessed in other cases (ibid. p. 545), he seems also to have recognized that a conventional sum was necessarily involved. Indeed there can be little variation in the sum to be awarded if a very moderate figure is to be chosen, as is indicated in the speech of Lord Guest when he said that a "slightly higher" award may be justified in the case of an adult than for a very young child (ibid. p. 547). However both Lord Devlin and Lord Upjohn expressly held that in the ordinary case the damages to be awarded for loss of expectation of life must necessarily be a conventional sum.

The following passage from the speech of Lord Devlin, in which he refers to the respondent's argument, (supra) I think should be set out in full.

"The difficulty about the argument is that it is only in a most exceptional case that the principles laid down in Benham v. Gambling (5) admit of any flexibility in the result. Every assessment of general damage for physical injury, whether it causes loss of life or of a limb or of a faculty, has got to start from the basis of a

(4) (1941) A.C. 157.
(5) (1941) A.C. 157.

conventional sum. If it did not, assessments would be chaotic. Every judge has within his knowledge not only the figure of £500. 0. 0 as the conventional sum appropriate to loss of life, but a number of other conventional sums appropriate to losses of limbs and faculties. But the conventional figure for loss of a limb or a faculty is only the starting-point for a voyage of assessment which may, and generally does, end up at a different figure. To a great reader the loss of an eye is a serious deprivation; the value of a leg to an active sportsman is higher than it is to the average man. Then there is usually some additional financial loss, actual or potential, to be taken into account.

But while the loss of a single faculty may be more serious for one individual than for another, the loss of all the faculties is, generally speaking, the same for all. Thus for loss of expectation of life the conventional figure has become the norm, unless the case is definitely abnormal. What, then, apart from the special case, would justify an increase or reduction in the price of happiness? No one - least of all any lawyer - can tell. The directions laid down in Benham v. Gambling (6) are such that, except in a strictly defined minority of special cases, the starting-point for the assessment must also be the finish. In Rose v. Ford (7) Lord Wright, having said that damages must be fair and moderate, foresaw that special cases might occur 'such as that of an infant or an imbecile or an incurable invalid or a person involved in hopeless difficulties.' Viscount Simon L.C. in Benham v. Gambling (8) elaborates on this. Except for the extremities of childhood and old age, prospective length of years makes no difference. Social position and worldly possessions are also irrelevant.

Nevertheless the figure of £500. 0. 0 is, when compared with awards arising out of comparatively slight physical injury, extremely low. It is not immediately obvious why, as Viscount Simon L.C. says (9) 'damages which would be proper for a disabling injury may well be much greater than for deprivation of life.' Compensation for the diminution of happiness due to the amputation of a leg cannot logically be less than compensation for happiness lost altogether. Nor is it immediately obvious why loss of happiness that is caused by prolonged unconsciousness should command higher compensation than a similar loss caused by death. The fact is that the whole of this branch of the law has been settled on what Lord Wright in Rose v. Ford (10) called 'the basis of convenience rather than of logic.' The law has endeavoured to avoid two results, both of which it considered would be undesirable. The one is that a wrongdoer should have to pay large sums for disabling and nothing for killing; the other is that the large sum appropriate to total disablement should come as a windfall to the beneficiaries of the victim's estate. To arrive at a figure which avoids these two undesirable results is a matter for compromise and not for judicial determination.... It would, I think, be a great

(6) (1941) A.C. 157.
(7) (1937) A.C. 826, 850; 53 T.L.R.
(8) (1941) A.C. 157.
(9) (1941) A.C. 157, 168.
(10) (1937) A.C. 826, 841.

improvement if this head of damage was abolished and replaced by a short Act of Parliament fixing a suitable sum which a wrongdoer whose act has caused death should pay into the estate of the deceased. While the law remains as it is, I think it is less likely to fall into disrespect if judges treat Benham v. Gambling (11) as an injunction to stick to a fixed standard than if they start revaluing happiness, each according to his own ideas".

Since the decision of the House of Lords, the same issue was considered by the Court of Appeal in Cain v. Wilcock (12). In that case an award of £500. 0. 0 for loss of expectation of life for a child aged 2½ years was challenged in that no allowance was made for the tender years of the child. The Court of Appeal held that £500. 0. 0 could not be regarded as other than a moderate award, and dismissed the appeal. Willmer L.J. said, and I follow the headnote, that the Court should not enter into minute calculations in cases of this character; generally speaking it would be wise to stick, except in very exceptional circumstances, to that which may be regarded as the conventional, although admittedly artificial figure.

In the states of Australia, except Queensland, the right to claim damages for curtailment of expectation of life has been abolished by legislation (see, for example, Administration and Probate Act 1958 of Victoria, Section 29(2)(c)(iii)). There are two reported decisions of the Supreme Court of Queensland in recent years, both decided before Naylor v. Yorkshire Electricity Board (13). In Gillies v. Hunter Douglas Pty. Ltd. & Anor. (14), at the time of his death the plaintiff's former husband was aged 29 years, and they had one daughter aged 7½ years. He was employed as a senior salesman on a gross salary of £1,300. 0. 0 per year, with the use of his employer's car; he had a secure future. The Court (Mack, J.) assessed damages for loss of expectation of life at £750. 0. 0. In Smith v. Cupples (15), Stable J. assessed damages of £1,000. 0. 0 under the same head, the deceased being a Constable 1st class in the Queensland Police Force, aged 35 years. The damages awarded in Queensland are thus in excess of the Australian equivalent of the conventional sum of £500. 0. 0

(11) (1941) A.C. 157.
(12) (1968) 1 W.L.R. 1961.
(13) (1968) A.C. 529.
(14) (1963) Q.W.N. 1966.
(15) (1962) 47 Q.W.N.

in England.

I now turn to the facts of the present case. All the indications are that the deceased had before him the prospect of a long and happy life. He was happily married and wanting a family. He loved outdoor sport, he was energetic, and looking forward to taking over the plantation, which, apart from the material gains which are irrelevant on this branch of the case was certainly a large enough venture to satisfy his ambition. I am to apply the law as laid down by the House of Lords, and whilst the sum awarded in Naylor v. Yorkshire Electricity Board (16) is some guidance, the quantum of damages must be arrived at having regard to the very different circumstances of the Territory. In a population of over 2 million there are fewer than 60,000 persons of European and Asiatic origin, and their incomes are at least as much and in many cases higher than for comparable work in Australia. The great majority of the indigenous people are villagers engaged in subsistence agriculture, although more and more are gaining small cash incomes. For those in the Public Service or private industry, the rate of remuneration is only a fraction of the rate for Europeans. Mr. Wood submitted, that I should have regard only to the circumstances of the deceased as an expatriate Australian, and that the cases of the villager and the native born person in employment should be left for consideration when they arise. Mr. White, submitted that I should take a single conventional sum for the Territory and bearing in mind that the level of incomes for native born persons is increasing, even if the steps forward are in some cases small, it should be not more than of the order of $1,000.00.

The conclusion I have reached is that in arriving at a reasonable sum whilst I must leave out of account for this purpose the case of the tribesman living in his remote valley, I should take as a monetary standard the range of earnings of all people who live in the Territory, irrespective of race. As both "social position and worldly possessions are ..... irrelevant" (Lord Devlin supra), the sum I arrive at, I recognize, will then be one applicable, with variations in a small compass, to all persons in the Territory. The deceased

(16) (1968) A.C. 529.

is thus not to be treated as an Australian and his case judged on Australian standards, but rather as one of the more affluent members of a single community which includes at the other end of the material scale unskilled workers, who earn much less than the incomes for comparable work in Australia, the villager and the unemployed. The need for restraint is shown by the fact that it is entirely irrelevant that the deceased met his death in this case by an accident which is normally covered by insurance. I consider that in the present case a reasonable sum is $800.00, for I consider that any higher sum would not, in the circumstances of the Territory, be regarded as a very moderate one.

Before leaving this part of the case, I should refer to Lord Devlin's suggestion that Parliament should fix a suitable sum to be paid into the estate of the deceased for this type of claim. In my opinion in the circumstances of the Territory to which I have referred, an even stronger case exists for such a legislative provision. In enacting the Law Reform (Miscellaneous Provisions) Ordinance 1967 which provides for a solatium limited to $600.00 to be awarded to the parents of a child wrongfully killed, the Territory Legislature has already dealt with a similar problem. But it is doubtful whether it was recognized that the South Australian Statute (Wrongs Acts Amending Act 1940 as amended) on which the 1967 Ordinance was modelled, was enacted on the very different legal basis that the action for damages for loss of expectation of life had been abolished in South Australia (Survival of Causes of Action Act, 1940 Section 3(b)). Accordingly whether or not Lord Devlin's suggestion is adopted in the Territory, it would seem that consideration should be given to the repeal or widening of the provisions of the 1967 Ordinance as in South Australia for otherwise the parents of a deceased child will remain entitled to receive both the statutory solatium and also damages for loss of expectation of the child's life, whilst, on the law as it now stands, the wife or husband is limited to the latter claim only in respect of the death of a spouse.

I turn now to the plaintiff's claim for pecuniary loss in consequence of the death of her husband. The claim is to be decided upon the same principles as are applicable in England, with one

exception to which I shall immediately refer. In assessing damages under this head, the Territory Ordinance, following the English legislation, provides that there shall not be taken into account sums payable under a contract of insurance on the death of the deceased, etc. but goes further in exempting "any benefit or gratuity in cash or in kind received as a result of the death by a person for whose benefit the action is brought." Law Reform (Miscellaneous Provisions) Ordinance (supra) Section 13. In my opinion, in effect, Section 13 is the same as Section 7 of the Law Reform Act, 1936 of New Zealand which provided that, "in assessing damages in any action under the Principal Act there shall not be taken into account any gain whether to the estate of the deceased person or to any person for whose benefit the action is brought, that is consequent on the death of the deceased person". The Supreme Court (Ostler, J.) held that the words "any gain.... to any person for whose benefit the action is brought, that is consequent on the death of the deceased person" were so wide and clear that it was impossible to hold that they could have any other than their literal meaning and must have been intended by the Legislature to include any gain to the defendant from the deceased's estate. Alley v. Buckland (17). I consider that the Territory provision has the same meaning and consequently not only are the insurance moneys irrelevant, but also the estate actually left by the deceased and any acceleration thereof or which he might have accumulated had he lived his life out, and to which the plaintiff would have probably succeeded. I take the law to be applied from the following passage which I shall set out in full from the judgment of the Privy Council delivered by Viscount Simon in a similar action, Nance v. British Columbia Electric Railway Company Ltd. (18), on appeal from the Court of Appeal for British Columbia, the law of British Columbia being to the same effect as the Territory legislation with the exception that a deduction was in that case to be made for the acceleration of the interest in the deceased's estate, the reference to which I shall thus omit.

(17) (1941) N.Z.L.R. 575.
(18) (1951) A.C. 601.

"The claim to damages in the present case falls under two separate heads. First, if the deceased had not been killed, but had eked out the full span of life to which in the absence of the accident he could reasonably have looked forward, what sums during that period would he probably have applied out of his income to the maintenance of his wife and family? Secondly, in addition to any sum arrived at under the first head, the case has been argued on the assumption, common to both parties, that according to the law of British Columbia it would be proper to award a sum representing such portion of any additional savings which he would or might have accumulated during the period for which, but for his accident, he would have lived, as on his death at the end of this period would probably have accrued to his wife and family by devolution either on his intestacy or under his will, if he made a will.

A proper approach to these questions is, in their Lordships' view, one which takes into account and gives due weight to the following factors; the evaluation of some, indeed most, of them can, at best, be but roughly calculated.

Under the first head - indeed, for the purposes of both heads - it is necessary first to estimate what was the deceased man's expectation of life if he had not been killed when he was; (let this be 'x' years) and next what sums during these x years he would probably have applied to the support of his wife. In fixing x, regard must be had not only to his age and bodily health, but to the possibility of a premature determination of his life by a later accident. In estimating future provision for his wife, the amounts he usually applied in this way before his death are obviously relevant, and often the best evidence available; though not conclusive, since if he had survived, his means might have expanded or shrunk, and liberality might have grown or wilted..... Supposing, by this method, an estimated annual sum of $y is arrived at as the sum which would have been applied for the benefit of the plaintiff for x more years, the sum to be awarded is not simply $y, multiplied by x, because that sum is a sum spread over a period of years and must be discounted so as to arrive at its equivalent in the form of a lump sum payable at his death as damages..... a further allowance must be made for a possibility which might have been realized if he had not been killed but had embarked on his allotted span of x years, namely, the possibility that the wife might have died before he did. And there is a further possibility to be allowed for - though in most cases it is incapable of evaluation - namely, the possibility that, in the events which have actually happened, the widow might remarry, in circumstances which would improve her financial position.

A figure having been arrived at under this first head, there should be added to it a figure arrived at under the second head. The question there is what additional amount he would probably have saved during the x years if he had so long endured, and what part, if any, of these additional savings his family would have been likely to inherit."

More recently this branch of the law has been considered by the House of Lords in Mallett v. McMonagle (19), on appeal from the Court of Appeal in Northern Ireland and Taylor v. O'Connor (20). In view of the large income which counsel for the plaintiff submitted that deceased would probably have earned, and the facts of Taylor v. O'Connor (21), I should refer to that case. The decision is conveniently summarized in the headnote. The respondent's husband died in 1965 as a result of a car accident caused by the respondent's fault. The deceased was 53 years old, the respondent 52. He was a partner in a firm of architects, devoted to his work and in good health. In 1964-5, his earnings were £14,890. 0. 0. It was agreed that during the next 12 years his earnings would have been £21,000. 0. 0 a year. Taxation left him about £7,500. 0. 0. Out of that he would have paid £1,500. 0. 0 back into the firm as additional working capital. It was estimated that, had he lived, he would have spent £1,000. 0. 0 a year on himself and £3,000. 0. 0 in ways beneficial to his wife and daughter (who was 18 years old at the time of his death). He would have saved about £2,000. 0. 0 per annum. On a claim by the respondent on behalf of herself and her daughter against the appellant the trial judge awarded £54,196. 0. 0 damages. It was held that the sum arrived at by the trial judge was within the reasonable range of possible awards and should be upheld. The respondent was entitled to damages in respect of loss of her dependency and loss of her interest in the savings her husband would have made. (There was also taken into account in diminution a sum of £10,000. 0. 0 inherited on the death of her husband, which is not deductible in the Territory). In this case the damages in respect of the loss of dependency it was held, should make available to her to spend each year a sum free of tax equal to the amount of the dependency. The trial judge adopted a multiplier of 12. Lord Reid considered this on the low side, Lord Morris considered a multiplier of 10 would not have been unreasonably low, but both Lord Guest and Viscount Dilhorne considered the multiplier of 12 not excessive. The points of law affirmed or established in that case which are relevant to the present case seem to me as follows :-

(19) (1969) 2 W.L.R. 767.
(20) (1970) 2 W.L.R. 472.
(21) (1970) 2 W.L.R. 472.

(1) The matters involved in assessing damages are in some degree speculative.

As Lord Reid said "The general principle is not in doubt. They (the defendants) are entitled to such a sum as will make good to them the financial loss which they have suffered and will suffer as a result of the death. But future loss is necessarily conjectural. If all had gone well the husband would have earned very large sums for a long period so that he could have maintained them at least at their standard of living at the time of his death and made other provision for their future. But all might not have gone well. Any of them might have died prematurely, he might not have been able to earn these sums and other misfortunes might have occurred: so allowance must be made for this." at page 474.

An added matter in the present case is whether the plaintiff would have had children; if so, it would have effected the benefit she would have received.

(2) Having arrived at a figure for the deceased's lost earnings, and the pecuniary benefit which the plaintiff probably would have derived therefrom as an annual sum, the final stage in the calculation is to choose the appropriate multiplier which, when applied to that annual sum, gives the amount of damages as a lump sum (per Lord Pearson at pages 486-7). The selection of the multiplier, which is necessarily less than the number of years' loss of dependency, involves two separate matters - "the present value of the series of future payments, and the discounting of that present value to allow for the fact that the person receiving the damages might never have enjoyed the whole of the benefit of the dependency. It is quite unnecessary in the ordinary case to deal with these matters separately". per Lord Reid at p. 475. Further, actuarial tables or actuarial evidence generally should not be used as the primary basis of assessment. "There are too many variables, and there are too many conjectural decisions to be made before selecting the tables to be used....." per Lord Pearson at page 487. See also per Lord Reid at page 475 and Lord Morris at page 481. "In my opinion, the multiplier is intended to provide in a rough measure adequate compensation for the loss sustained. No

precise method can be expected. It is well hallowed in practice and depends in some measure on the expertise of judges accustomed to try these cases". per Lord Guest at page 482.

(3) Where the facts are special and the claim necessarily a high one, matters such as income tax require special consideration. In the normal case, for example, where a widow receives say £8,000. 0. 0 as damages, and invests in and receives dividends, she will pay very little income tax, and that element can be disregarded but where the award is high (as in Taylor v. O'Connor) (supra) it is a special factor which should be taken into account (per Lord Pearson at page 489, per Lord Morris at page 480.)

(4) The possibilities of inflation are not to be ignored, but four of the Law Lords conceded that such a consideration was not a valid reason for increasing the multiplier (Lord Morris, Lord Guest, Viscount Dilhorne, Lord Pearson). Lord Pearson took the view that the sum of damages should be assessed on the basis that it will be invested with a view to capital appreciation, and the preferable way to take inflationary trends into account was to increase the annual sum for loss of dependency, as did Lord Guest (at page 482).

In the present case, both counsel submitted that I should at the outset assess the loss of dependency for the period, viz. 17 months up to 20th March 1969 when the deceased's contract would have expired. There are two ways of looking at the parties' financial arrangements. Mr. Wood submitted that the deceased provided the plaintiff with a home for which he paid the rent, and also her food and clothing for which he also paid, and thus enabled her to save the whole of her salary. Her dependency on this basis was thus the amount of the rent ($25.00) and one half of the other expenses, viz. about $70.00 per month, and allowing for other incidental expenses including electricity, would amount to about $120.00 per month. Mr. White, however, submitted that the true financial arrangements between the plaintiff and her husband were similar to those found by Devlin J. as he then was, in Burgess v. Florence Nightingale Hospital (22). In that case the plaintiff and his wife were professional

(22) (1955) 1 Q.B. 349.

dancing partners before and after their marriage. Their joint fees were paid to the husband in cash, which was paid into a drawer and either of them took from the drawer whatever money was necessary for any particular purpose. In a claim by the husband under the Fatal Accidents Act for, inter alia, the loss of his wife, who died as a result of the negligence of a surgeon, both as a dancing partner and for the loss of her contribution to their joint expenses, it was held that when a husband and wife with either separate incomes or a joint income were living together and sharing their expenses and in consequence of that fact their joint living expenses were less than twice the expenses of each one living separately, then each, by the fact of sharing, was conferring a benefit on the other which arose from the relationship of husband and wife, and was therefore recoverable by the husband under the Act. Devlin J. said that "if the position had been reversed, and it had been the wife who was suing by reason of the death of her husband, no one would have thought of contending that at least a half was not paid by the husband", (at page 362). What I understand His Lordship to be saying is that the wife's dependency is one half of the expenses attributable to her support. Now in the present case, the husband and wife were each earning approximately the same amount, they had a joint account, into which their money was paid, and they were running the farm in equal partnership. Accordingly, I consider that both were contributing to the joint living expenses. I considered whether it would be convenient to take also into account over this period that the deceased was contributing one half of his savings, which the plaintiff also lost, but it seems preferable to consider these in relation to the purpose which deceased had in mind, viz. as capital for the plantation. Taking the approximate joint expenses at $190.00 per month, the wife's loss of dependency is one half of her expenses or nearly $50.00 per month, so that over this period the loss of benefit is only about $600.00, or perhaps a little more per year.

The substantial loss is that incurred by the plaintiff for the period after the deceased's contract had expired. I was impressed by the plaintiff and Mr. Neil McLean, and accept their evidence

supported as it is by the deceased's letter in this respect, that the deceased intended then to return to Australia and work on the banana plantation. There is no admissible evidence as to any intention by his mother to give him the plantation but if there had been such evidence, I would not have been justified in drawing the inference that the deceased would have accepted the gift. It is true that his father said that for his son Bruce and his daughter Jennifer, he had both the house and the blocks of land but the deceased seems to have been of independent mind, for he contemplated purchasing his uncle's share and coming to some financial arrangement with Bruce and Jennifer. I consider that this is the basis on which I should approach the case. This would have left his parents independent of him also for income.

When I come to calculate his future earnings, I have only the oral evidence of Mr. McLean. I consider that he was a witness of patent honesty. But I can accept his assessment of the income to be derived from the plantation only with some reservation, in the absence of financial records and of any evidence as to the stability or otherwise and the prospects of banana growing as an industry, and as to the significance to be given to accounting items, such as depreciation, which may not need to be taken into account by practical men who accept a round figure of $470.00 per acre as the annual income, but which may well be applicable over a large planted area of 63 acres. This case is different also from that of Taylor v. O'Connor (supra) for in that case the plaintiff's husband had an established practice as an architect. In this case the prospect was one for the future. I am prepared to assume, as both the plaintiff and his father obviously did, that the plaintiff had enough knowledge of banana growing, but there was no evidence that he had any experience. To estimate his earnings in the future inevitably involves much speculation. It is useful to take some specimen calculations. If the plaintiff's husband had adhered to his plan of first taking over Pinkstones' lease of 6½ acres that would have given him an income of approximately $3,000.00 per annum. He had sufficient capital for this and to build a house. If he had then taken over his father's area of 9½ acres and the family lease of 5½ acres his additional income would have been $7,050.00, or about $10,000. in all. The tax on this income is $3,500.00 approximately, leaving a

balance of $6,500.00. From this he could have made annual instalments of $3,000.00 for the purchase of the plantation and left a balance for himself and his family of $3,500.00. If the annual income is taken at much less than the father's estimate, and the maximum income to be derived from the plantation is taken as $20,000.00, the sum left after tax is about $10,000.00, which would have enabled annual instalments of $4,000.00 to be made, and a balance for deceased and his family of $6,000.00. The total period over which he would have earned an income from the plantation, I consider would be 30 years, when he would have attained 60 years; his income would then have been derived from the plantation as an investment. From the figures quoted in Taylor v. O'Connor (supra) the deceased's expectation of life would have exceeded 30 years, as would the plaintiff's. But the gradual growth of his income over his working life is so much a matter of speculation that it almost reaches the stage of an absence of evidence. On the probabilities, I consider that deceased's net annual earnings, after deduction of payments for the plantation, would reach $3,500.00 for the first 10 years, and thereafter $6,000.00. There is no evidence whatever as to his personal expenditure, but from the sums saved in Port Moresby, I would infer that he had no expensive tasks or hobbies. Taking a proportion of 1/3 attributable to himself, his wife and family would have had the benefit of $2,200.00 per annum over the first ten years and thereafter $4,000.00. The wife's loss of benefit would then depend on whether they had children. But on the whole whilst I am satisfied that the evidence is sufficient for me to find that the average annual sum lost by the plaintiff from her husband's earnings for her maintenance over the whole period would amount to $1,500.00 per year, including an allowance for income tax, the calculation is so much in the realm of speculation, I am not satisfied that the loss would exceed that sum.

The next step is to choose the multiplier. I find helpful upon this point a passage from the speech of Lord Diplock in Mallett v. McMonagle (supra) at page 773.

"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 lived until retiring age, but also the chance that by illness or injury he might have been disabled from gainful occupation. The 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."

The deceased was still in his late twenties, although the plaintiff was older. Allowance is to be made for the prospects of remarriage. The plaintiff's evidence on this matter was that she had no thought of remarriage. She had been a widow for three years, and she had no particular friends. She is now 36. Whilst the prospects to be considered are of a remarriage improving her financial position, her prospects may be increased by the award of damages. On the whole I have decided that I should take a multiplier of 14, so that for the loss of dependency the sum to be awarded is $1,500.00 multiplied by 14, which is $21,000.00.

Next the loss of her husband's savings is to be taken into account. I am satisfied that his earnings would have been sufficient to have enabled him to purchase the plantation over the period of his working life by annual instalments, either at the full price or at a reduced price which having regard to the natural feelings of his parents, towards him, is the more likely. But I am not satisfied that the evidence is sufficient for me to find that the savings would exceed the value of the plantation, which I shall take as $60,000.00,

its sale price. Whether the deceased could have planted more acres in addition to working the 63 acres already planted, the evidence in my opinion, is not sufficient for me to say. What proportion of the savings is to be allowed to the plaintiff must also to some extent be based on conjecture. The plaintiff may have predeceased her husband, or may have had children to whom her husband may have left it entirely or as to a moiety or the plaintiff may have inherited it wholly. On the whole I would assess her loss of savings as the 1/3 she would have received on intestacy viz. $20,000.00.

The total award for loss of pecuniary benefit is therefore $41,000.00. I have followed the course taken by Lord Morris in Taylor v. O'Connor (supra), and checked the sum I have arrived at against the basic facts of this case including both the probable high income to be earned by the deceased and the fact that his career on the land lay untried in the future, and the result seems to me a reasonable one. There are to be added $800.00 for loss of expectation of life and $100.00 for funeral expenses, making my assessment of the total award of damages, $41,900.00.

Solicitor for the Plaintiff : J.K. Smith.

Solicitors for 1st and 2nd Defendants : Norman White & Reitano.