A BASIC INTRODUCTION TO ASSESSING DAMAGES IN A *COMPENSATION TO RELATIVES ACT* CLAIM

New South Wales

Compensation to Relatives Act 1897 No 31

An Act to consolidate enactments relating to compensation to relatives of persons killed by accidents.

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1 Name of Act

This Act may be cited as the *Compensation to Relatives Act 1897*.

2 Repeal

The enactments mentioned in the Schedule to this Act to the extent therein expressed are hereby repealed.

3 An action to be maintainable against any person causing death through neglect despite the death of the person injured

(1) Whensoever the death of a person is caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death has been caused under such circumstances as amount in law to a serious indictable offence.

(2) In any such action any reasonable expenses of the funeral or the cremation of the deceased person and the reasonable cost of erecting a headstone or tombstone over the grave of the deceased person may be recovered.

(3) In assessing damages in any such action there shall not be taken into account:

(a) any sum paid or payable on the death of the deceased under any contract of insurance, or

(b) any sum paid or payable out of any superannuation, provident, or like fund, or by way of benefit from a friendly society, benefit society, or trade union, or

(c) any sum paid or payable by way of pension under:

(i) the *Widows' Pension Act 1925-1942*,

(ii) the *Coal and Oil Shale Mine Workers (Pensions) Act 1941-1942*,

(iii) the *Australian Soldiers' Repatriation Act 1920-1943* of the Parliament of the Commonwealth,

(iv) the *Widows' Pensions Act 1942-1945* of the Parliament of the Commonwealth,

(v) the *Invalid and Old-age Pensions Act 1908–1945* of the Parliament of the Commonwealth,

or under any Act (Commonwealth or State) amending or replacing any such Act.

4 By whom and for whom action may be brought

(1) Every such action shall be for the benefit of the spouse, brother, sister, half-brother, half-sister, parent, and child of the person whose death has been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased, and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action is brought, and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict find and direct.

(2) If there is more than one spouse of the person whose death has been so caused, the action is (without limiting the application of subsection (1) to other persons) for the benefit of each of the spouses, who are to be separate parties to the action.

5 Only one action shall lie

Not more than one action shall lie for and in respect of the same subject matter of complaint.

6 Plaintiff to deliver a full particular of the person for whom such damages shall be claimed

In every such action the plaintiff on the record shall be required, together with the declaration, to deliver to the defendant or the defendant's attorney a full particular of the persons for whom and on whose behalf such action is brought, and of the nature of the claim in respect of which damages are sought to be recovered.

6A Payment into court

(1) In every such action the defendant may pay money into court as a compensation in one sum to all persons entitled under this Act for the wrongful act neglect or default without specifying the shares into which the sum is to be divided by the jury.

(2) If the sum paid in is not accepted, and if an issue is taken by the plaintiff as to its sufficiency, and the jury think the same sufficient, the defendant shall be entitled to the verdict upon that issue.

(3) No portion of the sum paid in shall be paid out of court except under the order of a judge.

6B Alternative action

(1) Where there is no executor or administrator of the person deceased, or where the person's executor or administrator does not bring an action

under this Act within six months after the death of the person deceased, the person or any one or more of the persons for whose benefit the action might be brought by such an executor or administrator may bring the action.

(2) Any action so brought shall be for the benefit of the same person or persons and shall be subject to the same provisions and procedure, as nearly as may be, as if it were brought by such an executor or administrator.

6C Survival of action

(1) Every action and cause of action under this Act shall survive notwithstanding the death of the wrongdoer.

(2) (Repealed)

(3) Any damages recovered against the executor or administrator shall be payable in like order of administration as the debts of the wrongdoer.

6D Action before judge without jury

Where an action under this Act is tried before a judge without a jury, the provisions of this Act with respect to a jury and to the verdict of a jury shall be construed as applying to a judge and to the judgment of a court, as the case may be.

6E Application of Act

(1) This Act applies whether the subject-matter of the complaint arises within or outside New South Wales, and whether the wrongdoer, the person whose death has been caused, or any other person concerned was or is a British subject or not.

(2) This Act applies to actions commenced either before or after the commencement of the *Compensation to Relatives (Amendment) Act 1928*.

(3) This Act shall bind the Crown.

7 Construction of Act

(1) The following words are intended to have the meanings hereby assigned to them respectively, so far as such meanings are not excluded by the context or by the nature of the subject matter, that is to say, the word ***parent*** shall include father and mother, and grandfather and grandmother, and stepfather and stepmother, and any person standing in loco parentis to another; and the word *child* shall include son and daughter, and grandson and granddaughter, and stepson and stepdaughter, and any person to whom another stands in loco parentis;

and the word ***declaration*** shall include any statement of the cause of action appropriate to the court in which the action is brought.

(1A), (1B) (Repealed)

(2) In this Act ***administrator*** means administrator within the meaning of the *Probate and Administration Act 1898* and includes the public trustee acting as collector of an estate under an order to collect.

(3) In this Act ***executor*** means the executor to whom probate has been granted and includes an executor by right of representation.

(4) In this Act, ***spouse*** means:

(a) a husband or wife, or

(b) a de facto partner.

Note. "De facto partner" is defined in section 21C of the *Interpretation Act 1987.*

8 Rights of action in respect of past events

The amendments made to this Act by the *Property (Relationships) Legislation Amendment Act 1999* do not operate to confer on any person a right of action in relation to any act, neglect or default that took place before those amendments took effect.

The Task

***Matthew v Flood* (1939) SASR 389 at 392-393 per Cleland J**

"*it has been established that the damages are limited to the pecuniary loss which arises in consequence of the death…*

The principle cause of pecuniary loss is naturally the loss of the deceased's net earnings, present and future, less any deductible pecuniary advantage which may arise from the death. The estimate of this loss depends on the reasonable inferences which are to be drawn from the established facts, and in drawing those inferences regard must be had to what the future earnings of the deceased would have been had he not been killed, and that those earnings may be either more or less than those which he was earning at the time of his death The question for what period he might be reasonably expected to earn them must also be considered. All probable contingencies arising from ill-health, unemployment, and all the other probable human contingencies and the practical interruptions of his earning power are to be also taken into account

Although this assessment cannot be arrived at by any arithmetical or actuarial calculations, it by no means follows that an assessment cannot be made The same difficulty arises in every case in assessing damages for personal injuries which do not result in death. When once the actual definite facts are established it becomes proper to draw from them all reasonable and proper inferences, and upon those inferences to arrive at a reasonable assessment of the damages by the use of the 'broad axe and a sound imagination'. It has been the practice to sometimes set out in detail, and calculate and assess, the various items which go to make up the assessment of the total damage, and for this purpose to 'descend to wearisome and possibly erroneous depths of analysis' This seems to me to be an idle and futile attempt to give an appearance of certainty to an assessment which, after all, in its final results, depends upon a number of inherent incalculable uncertainties"

***Farley v Commissioner for Railways* [1964-5] NSWR 1545 (FC) at 1547**

"All but the simplest claims under [Lord Campbell's] Act present uncertain and imponderable elements, so that an accurate arithmetical approach is quite impossible. "

The Task

***Public Trustee v Zoanetti* (1945) 70 CLR 266 at 26-7 per Dixon J**

"..in ascertaining the pecuniary loss resulting from [a person's] death there must be taken into consideration, on the one side, the reasonable expectations of benefit upon which the claimant would have been entitled to rely, had his life not been brought to an end, and, on the other side, the pecuniary benefits arising on his death, to which the claimant had a reasonable expectation, whether as of right or otherwise"

***Watson v Dennis* (1968) 88WN (PT1)(NSW) 491 at 495 per Walsh JA**

"All that means is this that you seek to reach a value for benefits which the deceased would probably have applied for the maintenance of his wife and family if he had not been killed But, in the absence of special provision, you also have to set off against that any payments or benefits which, because of the death, are received by the wife or family"

***Nguyen v Nguyen* (1990) 169 CLR 245 at 263 -per Dawson, Toohey and McHugh J J**

"Commonly the claim is based upon the loss of the financial contribution made by the deceased to the household and is referred to as a claim for the loss of a breadwinner. But the deceased may have made a contribution in services rather than money in which case damages are recoverable for their loss, whether or not they are, or are to be, replaced provided that a pecuniary value can be placed upon them"

Civil Liability Act 2002 No 22

5T Contributory negligence—claims under the Compensation to Relatives Act 1897

(1) In a claim for damages brought under the *Compensation to Relatives Act 1897*, the court is entitled to have regard to the contributory negligence of the deceased person.

(2) Section 13 of the *Law Reform (Miscellaneous Provisions) Act 1965* does not apply so as to prevent the reduction of damages by the contributory negligence of a deceased person in respect of a claim for damages brought under the *Compensation to Relatives Act 1897*.

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Civil Liability Act 2002 No 22

12 Damages for past or future economic loss—maximum for loss of earnings etc

(1) This section applies to an award of damages:

(a) for past economic loss due to loss of earnings or the deprivation or impairment of earning capacity, or

(b) for future economic loss due to the deprivation or impairment of earning capacity, or

(c) for the loss of expectation of financial support.

(2) In the case of any such award, the court is to disregard the amount (if any) by which the claimant's gross weekly earnings would (but for the injury or death) have exceeded an amount that is 3 times the amount of average weekly earnings at the date of the award.

(3) For the purposes of this section, the amount of average weekly earnings at the date of an award is:

(a) the amount per week comprising the amount estimated by the Australian Statistician as the average weekly total earnings of all employees in New South Wales for the most recent quarter occurring before the date of the award for which such an amount has been estimated by the Australian Statistician and that is, at that date, available to the court making the award, or

(b) if the Australian Statistician fails or ceases to estimate the amount referred to in paragraph (a), the prescribed amount or the amount determined in such manner or by reference to such matters, or both, as may be prescribed.

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Motor Accidents Compensation Act 1999 No 41

125 Damages for past or future economic loss—maximum for loss of earnings etc

(cf s 151I WCA)

(1) This section applies to an award of damages:

(a) for past or future economic loss due to loss of earnings or the deprivation or impairment of earning capacity, or

(b) for the loss of expectation of financial support.

(2) In the case of any such award, the court is to disregard the amount (if any) by which the injured or deceased person's net weekly earnings would (but for the injury or death) have exceeded $2,500.

Note. See section 146 for indexation of that amount.

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Civil Liability Act 2002 No 22

15C Damages for loss of superannuation entitlements

(1) The maximum amount of damages that may be awarded for economic loss due to the loss of employer superannuation contributions is the relevant percentage of damages payable (in accordance with this Part) for the deprivation or impairment of the earning capacity on which the entitlement to those contributions is based.

(2) The relevant percentage is the percentage of earnings that is the minimum percentage required by law to be paid as employer superannuation contributions.

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Motor Accidents Compensation Act 1999 No 41

142 Damages for the loss of services

(1) No damages for the loss of the services of a person are to be awarded in respect of a motor accident.

(2) Subsection (1) does not apply to the award of damages in an action brought under the *Compensation to Relatives Act 1897*.

(3) The provisions of section 141B (3)-(7) apply to an award of damages brought under that Act with respect to the loss of the services of the deceased person in so far as the award relates to attendant care services.

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Motor Accidents Compensation Act 1999 No 41

141B Maximum amount of damages for provision of certain attendant care services

(cf s 72 MAA)

(1) Compensation, included in an award of damages, for the value of attendant care services:

(a) which have been or are to be provided by another person to the person in whose favour the award is made, and

(b) for which the person in whose favour the award is made has not paid and is not liable to pay,

must not exceed the amount determined in accordance with this section.

(2) No compensation is to be awarded if the services would have been provided to the person even if the person had not been injured by the motor accident.

(3) Further, no compensation is to be awarded unless the services are provided (or to be provided):

(a) for at least 6 hours per week, and

(b) for a period of at least 6 consecutive months.

(4) If the services provided or to be provided are not less than 40 hours per week, the amount of compensation must not exceed:

(a) the amount per week comprising the amount estimated by the Australian Statistician as the average weekly total earnings of all employees in New South Wales for:

(i) in respect of the whole or any part of a quarter occurring between the date of the injury in relation to which the award is made and the date of the award, being a quarter for which such an amount has been estimated by the Australian Statistician and is, at the date of the award, available to the court making the award—that quarter, or

(ii) in respect of the whole or any part of any other quarter—the most recent quarter occurring before the date of the award for which such an amount has been estimated by the Australian Statistician and is, at that date, available to the court making the award, or

(b) if the Australian Statistician fails or ceases to estimate the amount referred to in paragraph (a), the prescribed amount or the amount determined in such manner or by reference to such matters, or both, as may be prescribed.

(5) If the services provided or to be provided are less than 40 hours per week, the amount of compensation must not exceed the amount calculated at an hourly rate of one-fortieth of the amount determined in accordance with subsection (4) (a) or (b), as the case requires.

(6) Unless evidence is adduced to the contrary, the court is to assume that the value of the services is the maximum amount determined under subsection (4) or (5), as the case requires.

(7) Except as provided by this section, nothing in this section affects any other law relating to the value of attendant care services.

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Civil Liability Act 2002 No 22

15B Damages for loss of capacity to provide domestic services

(1) Definitions

In this section:

assisted care, in relation to a dependant of a claimant, means any of the following kinds of care (whether or not the care is provided gratuitously):

(a) any respite care (being care that includes accommodation that is provided by a person other than the claimant to a dependant who is aged or frail, or who suffers from a physical or mental disability, with the primary purpose of giving the dependant or claimant, or both, a break from their usual care arrangements),

(b) if the dependant is a minor (but without limiting paragraph (a))—any care that is provided to the dependant by a person other than the claimant where:

(i) the person is a parent of the dependant (whether derived through paragraph (a) (i) or (ii) of the definition *of **dependants*** in this subsection, adoption or otherwise), and

(ii) the care includes the provision of accommodation to the dependant.

dependants, in relation to a claimant, means:

(a) such of the following persons as are wholly or partly dependent on the claimant at the time that the liability in respect of which the claim is made arises:

(i) the husband or wife of the claimant,

(ii) a de facto partner of the claimant,

Note. "De facto partner" is defined in section 21C of the *Interpretation Act 1987*.

(iii) a child, grandchild, sibling, uncle, aunt, niece, nephew, parent or grandparent of the claimant (whether derived through subparagraph (i) or (ii), adoption or otherwise),

(iv) any other person who is a member of the claimant's household, and

(b) any unborn child of the claimant (whether derived through paragraph (a) (i) or (ii), adoption or otherwise) at the time that the liability in respect of which the claim is made arises and who is born after that time.

gratuitous domestic services means services of a domestic nature for which the person providing the service has not been paid or is not liable to be paid.

(2) **When damages may be awarded**

Damages may be awarded to a claimant for any loss of the claimant's capacity to provide gratuitous domestic services to the claimant's dependants, but only if the court is satisfied that:

(a) in the case of any dependants of the claimant of the kind referred to in paragraph (a) of the definition *of* ***dependants*** in subsection (1)—the claimant provided the services to those dependants before the time that the liability in respect of which the claim is made arose, and

(b) the claimant's dependants were not (or will not be) capable of performing the services themselves by reason of their age or physical or mental incapacity, and

(c) there is a reasonable expectation that, but for the injury to which the damages relate, the claimant would have provided the services to the claimant's dependants:

(i) for at least 6 hours per week, and

(ii) for a period of at least 6 consecutive months, and

(d) there will be a need for the services to be provided for those hours per week and that consecutive period of time and that need is reasonable in all the circumstances.

Note. Section 18 provides that a court cannot order the payment of interest on damages awarded for any loss of capacity of a claimant to provide gratuitous domestic services to the claimant's dependants.

(3) If a dependant of the claimant received (or will receive) assisted care during the 6-month period referred to in subsection (2) (c) (ii) and the court is satisfied that the periods of that care were (or will be) short-term and occasional, the court may:

(a) in determining whether the claimant would have provided gratuitous domestic services to the dependant during a particular week for at least the 6 hours referred to in subsection (2) (c) (i), disregard the week if assisted care was (or will be) provided during that week, and

(b) in determining whether the claimant would have provided gratuitous domestic services to the dependant during the 6-month period referred to in subsection (2) (c) (ii), disregard any periods during which the assisted care was (or will be) provided in that 6-month period,

but only if the total number of weeks in which the care was (or will be) provided during the 6-month period does not exceed 4 weeks in total.

(4) Determination of amount of damages

The amount of damages that may be awarded for any loss of the claimant's capacity to provide gratuitous domestic services must not exceed the amount calculated at the same hourly rate as that provided by section 15 (5) regardless of the number of hours involved.

(5) In determining the amount of damages (if any) to be awarded to a claimant for any loss of the claimant's capacity to provide gratuitous domestic services to the claimant's dependants, a court:

(a) may only award damages for that loss in accordance with the provisions of this section, and

(b) must not include in any damages awarded to the claimant for non-economic loss a component that compensates the claimant for the loss of that capacity.

(6) Circumstances when damages may not be awarded

The claimant (or the legal personal representative of a deceased claimant) may not be awarded damages for any loss of the claimant's capacity to provide gratuitous domestic services to any dependant of the claimant if the dependant has previously recovered damages in respect of that loss of capacity.

(7) A person (including a dependant of a claimant) may not be awarded damages for a loss sustained by the person by reason of the claimant's loss of capacity to provide gratuitous domestic services if the claimant (or the legal personal representative of a deceased claimant) has previously recovered damages in respect of that loss of capacity.

(8) If a claimant is a participant in the Scheme under the *Motor Accidents (Lifetime Care and Support) Act 2006*, damages may not be awarded to the claimant under this section in respect of any loss of the claimant's capacity to provide gratuitous domestic services to the claimant's dependants while the claimant is a participant in the Scheme if (and to the extent that):

(a) the loss resulted from the motor accident injury (within the meaning of that Act) in respect of which the claimant is a participant in that Scheme, and

(b) the treatment and care needs (within the meaning of that Act) of the claimant that are provided for or are to be provided under the Scheme include the provision of such domestic services to the claimant's dependants.

(9) Damages may not be awarded to a claimant under this section in respect of any loss of the claimant's capacity to provide gratuitous domestic services to the claimant's dependants if (and to the extent that):

(a) the loss resulted from an injury caused by a motor accident (within the meaning of the *Motor Accidents Compensation Act 1999*), and

(b) an insurer has made, or is liable to make, payments to or on behalf of the claimant for such services under section 83 (Duty of insurer to make hospital, medical and other payments) of that Act.

(10) **Damages may not be awarded if they can be recovered as damages for attendant care services**

Damages may not be awarded to a claimant under this section in respect of any loss of the claimant's capacity to provide gratuitous domestic services to the claimant's dependants if (and to the extent that):

(a) the claimant could recover damages for gratuitous attendant care services (within the meaning of section 15) in respect of the same injury that caused the loss, and

(b) the provision of such attendant care services to the claimant also resulted (or would also result) in the claimant's dependants being provided with the domestic services that the claimant has lost the capacity to provide.

(11) **Determining value of gratuitous domestic services**

In determining the value of any gratuitous domestic services that a claimant has lost the capacity to provide, the court must take into account:

(a) the extent of the claimant's capacity to provide the services before the claimant sustained the injury that is the subject of the claim, and

(b) the extent to which provision of the services would, but for the injury sustained by the claimant, have also benefited persons in respect of whom damages could not be awarded under subsection (2), and

(c) the vicissitudes or contingencies of life for which allowance is ordinarily made in the assessment of damages.

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Dependency percentages for two-parent and one-parent families

Hugh Sarjeant and Paul Thomson

(The authors are directors of Cumpston Sarjeant Pty Ltd, consulting actuaries, Melbourne)

Summary

This publication uses 2003-04 Household Expenditure Survey data to suggest dependency percentages for survivors in different types of two-parent family, where one of the parents dies, and for one-parent families, where the parent dies These percentages may provide a starting point for assessment of damages for economic loss by survivors of a deceased earner The dependency estimates for two-parent families are very similar to those in an earlier publication, based on the Household Expenditure Survey 1998-99

Table 1 : Dependencies when all survivors are claimants

Our estimated dependency percentages for the surviving parent and children, and for the surviving family as a whole, are:

Income of spouse as % of income of deceased	Number children	Parent	Child	Total family
0%	0	66 0%		66 0%
0%	1	43 8%	28 4%	72 2%
0%	2	34 4%	21 0%	76 4%
0%	3	28 7%	16 8%	79 1%
0%	4	24 9%	14 1%	81 3%
0%	5	22 1%	12 2%	83 1%
100%	0	32 1%		32 1%
100%	1	24 3%	20 2%	44 5%
100%	2	21 0%	15 8%	52 6%
100%	3	18 6%	13 3%	58 5%
100%	4	16 7%	11 6%	63 1%
100%	5	15 2%	10 2%	66 2%

The dependency percentages are estimates of the percentages of the deceased's after-tax income needed to restore the survivors to their former financial positions Dependencies for parents are derived in table 6, and those for children in table 7. There is little difference between the dependency estimates for each quintile, and we have adopted percentages for all households The percentages for each survivor add to the dependency for the whole family, For example, in a sole-earner family with three children, 28,7% for the surviving parent plus 16 8% for each of the three children gives a total of 79,1%,

Cases where the income of the surviving spouse was not equal to that of the deceased can be dealt with by linear interpolation For example, if the survivor of a family with three children had net income equal to 70% of the deceased, the dependency of the surviving family could be estimated as

70% of 58 5% (the dependency of a family with equal incomes)	41.0%
plus 30% of 79.1% (the dependency of a one-earner family)	23.7%
dependency of a family with spouse income of 70% of deceased	64 7%

%

Table 3 : Dependency percentages for one-parent families

Estimated dependency percentages when no other adult was dependent on the deceased are:

Number children	Child	All children
1	52.7%	52 7%
2	31.5%	63.0%
3	23.1%	69.2%
4	18 3%	73 3%
5	15 2%	76 2%

Dependency percentages for each income quintile are estimated in table 9,. As before, there is little difference between the dependency estimates for each quintile, and we have adopted the estimates for all households

These dependency percentages are estimates of the percentages of the deceased's after-tax income needed to restore the children to their former financial positions, assuming that there was no dependent aduft in the household prior to the death of the deceased,

EXAMPLE OF BASIC COMPENSATION TO RELATIVES ACT ASSESSMENT UTILISING CUMPSTON SERGEANT TABLES

Background Facts

(i) Working wife killed on 30/7/05 when aged 40 years
(ii) Average income at death $1,000 00 npw and would now be $1,250 00 npw
(iii) Husband looked after children and did not work outside the house
(iv) Children aged 5 and 8 as at 30/7/05 and now aged 9 and 12
(v) O/T has assessed deceased's contribution at 28 hours per week as at date of death

Assessment

(a) Past Loss of Support

(i) Relevant percentage dependency 76 4%
(ii) Average likely net weekly income since death $1,125 00
(iii) 76 4% of $1125 00 is $859 50
(iv) $859 50 x 4 years equals $178,776 00

(b) **Past Household and Parental Assistance *(Nguyen v Nguyen*)**

(i) Aveiage statutory rate since death is approximately $22 50 per hour
(ii) $22 50 x 28 hours per week x 4 years equals $131,040 00

(c) **Future Loss of Support**

(i) Allow 76 4% of $1,250 00 npw or $955 00 npw for 9 years (until eldest child is 21)
(ii) 9 year 5% multiplier is 380 1
(iii) 380 1 x $955 00 npw equals $362,995 50
(iv) Allow 72 2% (as per Cumpston Sergeant) of $1,250 00 npw or $902 50 for further 3 years delayed 9 years (until youngest child is 21)
(v) 3 years 5% multiplier is 145 6 and 9 years 5% deferral factor is 645
(vi) 145 6 x $902 50 x 645 equals $84,756 00
(vii) Allow 66% (as per Cumpston Sergeant) of $1,250 00 npw or $825 00 for a further 9 years (until deceased would have been 65) delayed 12 years
(viii) 9 years 5% multiplier is 380 1 and 12 years 5% defenal factor is 557
(ix) 380 1 x $825 00 x 557 equals $174,665 00
(x) Before any further discount (iii) plus (vi) plus (ix) equals $622,416 50

(d) Future Household and Parental Assistance

(i) Deceased's contribution would have decreased as children got older (but probably not below approx 14 hours per week),

(ii) Numerous possible approaches.

(iii) Simplest approach - allow average over 10 year (5% multiplier 412,9) period of approximately 21 hours per week at $22.62 (current statutory rate)

(iv) 21 x $22,62 x 412,9 equals $196,136.00.

[HIGH COURT OF AUSTRALIA]

PUBLIC TRUSTEE (WESTERN AUSTRALIA) APPELLANT
PLAINTIFF

v.

NICKISSON RESPONDENT
DEFENDANT

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA

H. C. OF A. 1964 PERTH Sept. 15 MELBOURNE Oct. 21 Barwick C.J. Kitto J. Menzies J.

(Compensation) Relatives—Fatal accident—Action on behalf of infant child in respect of father's death—Assessment of damages—Deduction in respect of inheritance from father—Fatal Accidents Act, 1959 (W.A.).

A husband, his wife and one of his infant sons were killed in a motor vehicle accident. Another infant son, aged seven years, survived. At the time of his death the husband was aged forty and his wife thirty-three. He was earning approximately £1,603 per annum. His salary could have risen to £2,144 per annum in the course of a few years if he remained in the same position. His future in his employment was good. He had prospects of promotion in not less than five years' time to the position of office manager, the office manager at the date of his death earning £2,700 per annum. The husband was a good father who would have done what he could for the advancement of his sons. His net estate, which passed to his surviving son, amounted to £7,100 including insurance moneys amounting to £4,400 which were not to be taken into account in the assessment of damages under the *Fatal Accidents Act*, 1959 (W.A.). In an action brought under the *Fatal Accidents Act*, 1959 (W.A.) to recover damages on behalf of the surviving son, the trial judge declined to make any award in respect of the death of the father upon the ground that the infant had not suffered any pecuniary loss, therein.

Held, that, in so holding the trial judge had fallen into error and a proper amount to award in the circumstances was the sum of £4,000.

Decision of the Supreme Court of Western Australia (*Negus J.*) reversed.

APPEAL from the Supreme Court of Western Australia.

The Public Trustee in and for the State of Western Australia as administrator of the estates of Derek Nigel Williams deceased and his wife Charlotte Christina Williams deceased and as the person entitled to administer the estate of their son Rory William Morris Williams deceased brought an action against Colin Walter Nickisson on behalf of Gregory David Morris Williams the infant son of Derek Nigel Williams and Charlotte Christina Williams for damages under the *Fatal Accidents Act*, 1959 (W.A.) arising out of the death of his parents and of his brother in a motor vehicle accident.

H. C. OF A. 1964 PUBLIC TRUSTEE (W.A.) v. NICKISSON

The action came on for hearing before *Negus J.* who found that the infant had suffered no pecuniary loss from the death of his father and awarded £1,500 for his loss arising from the death of his mother in addition to funeral expenses.

The Public Trustee appealed against the former finding.

The facts sufficiently appear in the judgments of the Court hereunder.

J. T. P. Jitnt Q.C. (with him *P. L. Sharp*) for the appellant. The admission of evidence of a declaration by the deceased father as to what he intended to do for his children is supported by *Ramsay v. Watson* (1). [He referred to *Barnett v. Cohen* (2).] The trial judge overlooked the value to the boy of a home. [He referred to *Carroll v. Purcell* (3).] The fallacy of the global cost of maintaining a home and the difficulties it creates are refeired to in *Peart v. Bolckow Vaughan & Co. Ltd.* (4). When assessments are made of damages in these cases the good prospects should be looked at as well as the prospects of ill. [He referred to *Daniels v. Jones* (5).] There was a very real and immediate prospect of the estate increasing had the husband continued to live.

A. C. Gibson, for the respondent. The correct approach is to consider what the position of the child would have been had the whole family lived. Some part of the compensation for losing his home was given in the verdict relating to the mother.

F. T. P. Burt Q.C., in reply.

Cur. adv. vult.

The following written judgments were delivered —

BARWICK C.J. I agree with the reasons which my brother *Menzies* expresses, and which I have had the opportunity of reading, for setting aside so much of the order of the trial judge in this case as assessed as general damages the sum of £1,500 and ordered the payment of any costs to the defendant and for substituting therefor orders assessing the special damages in the total sum of

(1) (1961) 108 C.L.R. 642.
(2) [1921] 2 K.B. 461.
(3) (1961) 107 C.L.R. 73, at p. 77.
(4) [1925] 1 K.B. 399.
(5) [1961] 1 W.L.R. 1103, at p. 1109.

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£5,500, £4 000 in right of the estate of Derek Nigel Williams and £1,500 in right of the estate of Charlotte Christina Williams, and an order that the defendant pay the costs of the action The appeal should be allowed

KITTO J The appellant sued the respondent in the Supreme Court of Western Australia for damages in respect of a collision in which three persons were killed The three persons were a husband (Derek Williams) and his wife (Charlotte Williams) and one of their two children (Rory Williams) The appellant sued in three different capacities as administrator of the husband s estate, as administrator of the wife's estate and as the person entitled to administer the deceased child Rory s estate In all three capacities he claimed funeral expenses and in each of the fir&t two he claimed under s 4 of the *Fatal Accidents Act*, 1959 (W A) damages for the benefit of the surviving child of Derek and Charlotte, a boy named Gregory who was seven years of age at the time of the accident After trial a formal judgment was drawn up It is hardly a satisfactory document, being distinguished by an odd disregard of technical distinctions and even of conventional gram mar In terms it awards to the appellant m all his capacities, *inter aha*, a sum of £1,500 which it describes as general damages and orders to be held for the benefit of Gregory The reasons for judgment of the learned trial judge *(Negus* J) show that he intended the £1,500 as damages for the injury resulting to Gregory from the death of his mother only His Honour held that on a balance of financial losses and gams no injury resulted to the boy from the death of his father It seems to be implied from a provision in the formal judgment as to costs, but it is not expressed, that the claim for the death of the father is dismissed The notice of appeal to this Court describes the appellant as claiming in his three capacities that the whole judgment should be set aside and the amount of the general damages increased The grounds stated, however, show that no more is intended than an appeal against the dismissal of the claim that was made for the benefit of Gregory m respect of the death of his father The appeal has been argued on the footing that the appeal is limited in this way, and I proceed to consider it accordingly

Before the accident Gregory had substantial prospects of receiving financial benefits from both his mother and his father, who were respectively thirty-three and forty years of age and were in good health Both were in employment, and, since Rory either predeceased them or was mortally injured when they died,

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Gregory was the only child they had to provide for They had been ambitious for him and for themselves and though their means were not great their expenditures had been mainly centred upon maintaining and improving their family life His Honour con sidered that the mother if she had lived would have contributed for Gregory s benefit during the fourteen years that remained of his minority after the date of the accident about £104 a year for board lodging, clothing and other necessaries, together with her personal services worth about £52 a year and that she would have provided for him an additional £26 a year for the six years during which he might be receiving a college education Spread over the fourteen years her contribution may be taken roughly at £170 a year This is what is compensated for by the £1,500 which the judgment awarded for the benefit of Gregory

In order to consider whether the judge was right in thinking that no injury resulted to Gregory from the death of his father, it is necessary to start by fixing a figure which may reasonably be taken as the probable weekly amount of financial benefit the boy would have derived from his father on the assumption that the mother s contribution would have continued until he turned twenty one, since the boy is being compensated for the loss of it This figure must be fixed in the light of the fact that at the time the father died the mother and the other chdd, Rory, were either dead or moribund, and that therefore the father, if he had not been injured, would have had no wife or child other than Gregory to provide for, unless he should remarry

The judge concluded from the evidence that to provide for Gregory at the standard his parents might have been expected to maintain for him until the age of twenty-one if both had so long lived would cost on the average £364 a year for board, lodging, clothing and other necessaries, plus £52 a year for the extra personal services of a mother, and m addition about £182 for the cost of his attending college from about the age of eleven to about the age of sixteen (college fees, fares, books, etc)

This comes to something like £500 a year over the whole period As I have said, it must be taken that the mother would have supplied about £170 a year It may well have been by some such calculation that the judge worked it out that Gregory's loss due to his father's death was about £260 a year for the fourteen years and £156 for the six years—roughly £330 or so a year over the whole period But his Honour proceeded to reduce to an unspecified extent the amount he had arrived at, m order to allow for pay- ments that he thought Gregory would probably have received in

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respect of board etc , under a Commonwealth scholarship and for a variety of contingencies including the possible death of one or both of the parents or of Gregory himself, the possible ill health or unemployment of one parent or the other, and possible earnings by Gregory in vacations On the other hand he took into account the possibility of unexpected prosperity for the family After mentioning other minor considerations for which he thought it right to make allowance, his Honour reached, but did not specify, a final figure as the present value (as at the father s death) of the annual value of the benefits Gregory might have expected from his father His Honour indicated only that the figure was less than £2,750, which was the amount that Gregory was likely to receive from his father s estate, insurance moneys being left out of account by reason of s 5 (2) (a) of the *Fatal Accidents Act*

The father was earning at the time of his death about £1,600 a year (including bonus) as cost accountant on the staff of a well established company There was evidence as to his prospects in the employment of that company, including evidence that at the time of the hearing his successor was earning about £2 100 (including bonus), and it seems to me reasonable to take it that during the fourteen years before Gregory's attaining twenty one the father would probably have received, if he had lived, an average salary (including bonus) of about £2,500 a year Remembering on the one hand that when he died he had no dependent but Gregory, and, on the other hand, that if he had survived he might have remarried and might have had other children before Gregory was off his hands, I think with great respect to the learned primary judge that he under estimated the average annual value of the financial benefits Gregory was likely to derive from his father

It was proper, no doubt, to work out an approximate figure on the assumption that Gregory would have been given a college education, though of course the calculation must be treated as only one of several methods by which some guidance may be sought on the more general question Gregory might have developed ideas or aptitudes leading m other directions Conversely, he might have wanted and been given not only a college education but a university education He was not a dull boy by any means, and his parents had hopes that he might take a university course He might have eased the burden on his father by winning scholarships or taking early employment, or, conversely, his father, having no one else to support, might have heaped upon him every advantage his means could supply But I am bound to say that even accepting the learned judge's views as to what ought to be taken to be the

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most probable course of events I should have considered that substantially higher figures than his Honour s ought to have been adopted in order to cover the fathers reasonably probable expenditure on Gregory while under twenty one and I should have thought also that some not insignificant allowance ought to have been made for the likelihood of his father s helping him in the earlier stages of his career after that age

I have come to the conclusion that if Gregory had received nothing from his father's estate a reasonable assessment of what s 6 (2) of the *Fated Accidents Act* describes as damages proportioned to the injury resulting from the death ' (of the father) would have been not less than £5,000 Needless to say I have not arrived at that figure by any mathematical calculation, but by considering figures so far as they seemed to give one a lead and then endeavouring to give due weight to all the factors which, though not expressible in figures with any approach to precision, yet should not be denied an effect upon judgment

Finally there is the question of allowing for the fact that Gregory is entitled to receive from his father's estate a sum of £2,750 or thereabouts, over and above insurance moneys Once again it is to be remembered that the extent of the injury resulting to Gregory from his father s death must be assessed on the footing that, because of the deaths or impending deaths of his mother and brother, Gregory was the only member of the family in a position to inherit anything from his father Some judges have felt serious doubt as to the propriety of making any deduction at all in these cases m respect of moneys inherited from the deceased person It has been said that this is because "although the widow and children may have got the moneys from the estate earlier in time, these moneys in the cases before them (the judges) were probably substantially less than they would have been had the husband and father died m the normal course of events, by reason of savings that he would have made out of his future earnings The strictly proper approach would be to make a deduction for the acceleration and then make an addition for the future savings lost, and this two-stage calculation was employed in the two Privy Council cases of *Royal Trust Co* v *Canadian Pacific Railway* (1) and *Nance* v *British Columbia Electric Railway* (2)" See *Mayne and McGregor on Damages*, 12th ed (1961), p 716, par 844

The matter is obviously speculative in the highest degree In the present case the father might never have left Gregory anything,

(1) (1922) 38 T L R 899 (2) [1951] A C 601

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even if at his death "in the normal course of events ' he had left a considerable estate He might not have acquired more assets in the interval he might have lost or spent even the little that he had What the learned authors call the strictly proper approach seems to me of very doubtful general application But at least in a case like the present, where there is no special reason to take account of a particular expected increase in the father s assets and it is hardly possible to hazard a guess as to whether the years of life that the father might have enjoyed if the accident had not occurred would or would not have seen the dissipation of the £2,750 that he in fact possessed when he was killed, it seems to me that it cannot be right to deduct the whole of the amount inherited from the damages which would have been awarded if there had been no inheritance I therefore think, with respect, that in the present case his Honour should not have treated the whole £2,750 as a benefit resulting to Gregory from his father s death Doing the best I can to make a reasonable allowance on this aspect of the case, I think that no more than £1,000 should be deducted from the damages otherwise allowable

In the result I am of opinion that a reasonable amount of damages to allow in this case is not less than the £4,000 which the other members of the Court think should be awarded I therefore agree that the appeal should be allowed and the judgment of the Supreme Court varied to include judgment for the plaintiff as administrator of the father's estate for £4,000 for the benefit of Gregory It must follow that the plaintiff should recover the whole costs of the action

MENZIES J This appeal arises in proceedings that were curiously framed Derek Williams (aged forty years), his wife Charlotte Williams (aged thirty three years) and then* infant son Rory were all killed in a motor-car accident which happened on 20th April 1962 The only member of the family that survived the catastrophe was another son Gregory who was born on 20th September 1954 The Public Trustee, as administrator of the intestate estates of Derek and Charlotte and as the person entitled to administer the estate of Rory, brought an action against the present respondent, the person whose negligence caused the accident, to recover £296 15s 3d , the expenses of burying the three deceased, and to obtain damages under the *Fatal Accidents Act* on behalf of Gregory There was but one claim for damages and it was alleged that Gregory was totally supported by the earnings of

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his father and his mother and that by the death of both his parents he lost benefits they would have conferred upon him The defendant paid £296 15s 3d into court in respect of the claim for funeral expenses and a further sum of £1,500 which the defendant said was sufficient to satisfy in full the whole of the claim on behalf of Gregory When the case came on for trial negligence was admitted, as was liability to pay the funeral expenses claimed, and the only issue for determination was the damages to be awarded under the *Fatal Accidents Act* *Negus* J , in his consideration of the matter, quite properly treated the action as making two claims for damages, one for pecuniary loss resulting from the death of Derek and the other for pecuniary loss resulting from the death of Charlotte In respect of the first claim he found that Gregory had suffered no pecuniary loss , in respect of the second claim he awarded £1,500 damages His Honour's reasons for judgment concluded as follows "I assess the total damages as £1 500 plus funeral expenses £296 15s 3d namely £1,796 15s 3d , and enter judgment accordingly" Judgment was thereupon entered as follows "1 That judgment be entered for the plaintiff The Public Trustee m and for the State of Western Australia as administrator of the estate of the late Derek Nigel Williams deceased and Charlotte Christina Williams deceased and as the person entitled to administer the estate of the late Rory William Morris Williams deceased for the sum of £1,796 15s 3d consisting of funeral expenses of £296 15s 3d and £1,500 general damages" It was also ordered that the plaintiff should have the costs of the action up to the date of the payment into court by the defendant and as from that date the defendant s costs should be paid by the plaintiff

The appellant accepts as correct the award of £1,500 damages m respect of the death of Charlotte and appeals to this Court only against so much of the judgment as decided that the appellant, as the administrator of the estate of Derek, was not entitled to any damages because Gregory did not sustain any pecuniary loss by reason of the death of his father Notwithstanding the state of the pleadings and the form of the order, it is, I think, possible for us to deal with this appeal upon its merits

Derek Williams was, at the time of his death, employed by James Hardie & Co Pty Ltd as a cost accountant His Honour found " He had a responsible position and the desire and determination to do better His future with the company was quite bright He was earning approximately £1,425 gross a year and normally, as

he did his work properly, received a bonus of 12½% of that salary every year His salary in the same position could have risen to £1 950 gross a year plus the same bonus in the course of a few years if all had gone well He might have been promoted in which case he would have earned more, but it is unlikely he would have been promoted higher than the position of office manager or have received even that promotion in less than 5 years after the date of the accident if he received it that early The present office manager earns £2,400 gross a year plus the bonus of 12½%. It also appears that the deceased was a good father who would do what he could for the advancement of his sons He and his wife, who was also working planned to build a family home upon a block of land which they had already purchased He had assurance policies worth £4 400 approximately in force upon his life His net estate was £7,100 approximately, which included the insurance moneys as aforesaid which were not to be taken into account in the assessment of damages under the Act See fa 4 (2) (a)

The very statement that a boy of seven, who had a forty years old father careful for his son s welfare who was earning about £1,500 a year and who could be expected to be earning at least £2,200 in a few years, suffered no financial loss by reason of his father's death because he inherited about £2,700 sounds incredible and, notwithstanding the meticulously careful assessment of the learned judge leading to that conclusion, I am satisfied with respect, that it was wrong

It seems that a good deal of attention was given at the trial to Gregory's prospects of being given a university education after some years at a public school Gregory s chances of obtaining a Commonwealth Scholarship were also canvassed For my part, I do not think it of much importance whether or not his father would have given him such an education Had he done so, Gregory would probably have had to help himself substantially by scholar ships and holiday earnings and, had he not, he would, I am satisfied, have made some different yet adequate provision for his son's welfare and advancement The difficult question, to which of course it is not possible to give a precise answer, is not so much the particular way in which his father would have looked after and helped him but the extent to which the father would in all probability have used what he had for the maintenance, welfare and advancement of his son in one way or another There are, of course, all sorts of imponderables to be taken into account but as here the brother Rory was either dead or about to die when the

father died (*Wallis* v *The Commonwealth* (1)), Gregory could properly be looked at as an only child subject to the possibility that, if his father had not died when he did, he may have had more children The father was well employed, with good prospects of earning over £2 500 a year before Gregory would reach the age of seventeen years In these circumstances and leaving inheritance out of account I consider that to award anything less than the present value of £400 a year for ten years (viz £3 080) would clearly be too little In saying this I am not of course assuming that in each of the ten years from Gregory s seventh to seventeenth year his father would have spent £400 upon him During these years, however it is probable that Gregory would have been well provided for by his father and although in the earlier years that provision would no doubt have required less than £400 per annum, in later years it might well have required more Furthermore it is unlikely that all assistance from his father would have ceased when the boy reached the age of seventeen years The figures I have taken are, therefore, but a rough overall estimate of the least that probably would have been expended before Gregory was independent of parental assistance I think, however, that in all the circumstances of this case the award should be somewhat higher than the minimum figure I have mentioned because Gregory is entitled to the same sort of security as he would have had while living in his father s home while preparing with his father's assistance for the kind of vocation open to the bright son of a good father in moderate circumstances In arriving at the figure of £4,000, which I regard as the proper award, I have made a deduction of £500 by reason of Gregory's inheritance at the age of seven of the whole of his father's estate of £2,700 Had the father not died when he did, Gregory might never have inherited the whole of his estate and, furthermore, it is probable that any inheritance would have had to wait for a long time An estate of about £2,700 will produce about £3 a week, leaving the capital intact, and this is of sufficient significance, even having regard to Gregory s pro spects while his father was alive of getting more later, to warrant some deduction from what would have been the appropriate award if theTe had been no inheritance

For the foregoing reasons I consider that the appeal should be allowed and the judgment varied by increasing it by £4,000 for damages for injury resulting to Gregory by reason of the death of his father The order as to costs should also be set aside and the costs of the trial given to the plaintiff

(1) (1946) 73 C L R 100

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1964
PUBLIC TRUSTEE (W A)

Appeal allowed with costs

Judgment of the Supreme Court of Western Australia varied as follows —

1 *By omitting from par* 1 *thereof* ' £1 796 15s 3d *consisting of funeral expenses* o/£296 15s 3d! *and* £1 500 *general damages* ' *and substituting therefor* ' £296 15s 3d *for funeral expenses* '

2 *By adding immediately after par* 1 *thereof the following new paragraphs*

1A *That judgment be entered for the plaintiff as administrator of the estate of Derek Nigel Williams deceased for the sum of* £4,000 *for the benefit of Gregory David Morris Williams an infant son of the deceased*

1B *That judgment be entered for the plaintiff as administrator of the estate of Charlotte Christina Williams deceased for the sum of* £1,500 *for the benefit of the said Gregory David* Morns \\ illiams

3 *By omitting par* 2 *thereof and substituting the following new paragraph*

2 *That the defendant pay the costs of the plaintiff of this action*

4 *By omitting par* 4 *thereof and substituting the following new paragraph*

4 *That all moneys now or at any time in Court to the credit of this action be paid out to the plaintiff to be applied by him in accordance with this order*

Solicitors for the appellant, *Sharp & Rodgers*
Solicitors for the respondent, *Gibson & Gibson*

G A K

[HIGH COURT OP AUSTRALIA]

CARROLL APPELLANT,
PLAINTIFF,

AND

PURCELL RESPONDENT
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES

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1961
SYDNEY
Aug 30 31,
Dec 7
Dixon C J
McTiernan
Kitto
Taylor and
Windeyer JJ

Damages—Assessment—Action by widow in respect of death of husband—Matters to be taken into account—Rent received for former matrimonial home—Earnings of widow—Compensation to Relatives Act 1897 1953 (N S W)

In assessing damages in an action by a widow under the *Compensation to Relatives Act* 1897 1953 (N S W) the following matters should not be taken into account (a) Rent received by the widow for the former matrimonial home to which she succeeded on her husband s death and thereafter let by her (b) Wages earned by her in employment undertaken after her husband s death

Dictum in *Horton* v *Byrne* (1956) 30 A L J 583 at p 584 that in the case of a widow claiming damages in respect of the death of her husband No doubt if she had no child she might have been regarded as liberated from the task of housekeeping and thus enabled freely to earn her living and that might be considered not followed

Decision of the Supreme Court of New South Wales (Full Court) *Carroll* v *Purcell* [1961] S R (N S W) 932 78 W N 750 reversed

APPEAL from the Supreme Court of New South Wales

A widow brought an action in the Supreme Court of New South Wales under the *Compensation to Relatives Act*, 1897 1953 (N S W) for the benefit of herself and her two children claiming damages in respect of the death of her husband and their father which was alleged to have been caused by the negligence of the defendant A jury returned a verdict in favour of the plaintiff for £6 770 apportioned as to £4,520 for the widow and as to £1 000 and £1 250 respectively for the children The plaintiff thereupon appealed to the Full Court of the Supreme Court seeking a new trial upon the

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ground that the damages awarded were inadequate The appeal was dismissed *Carroll* v *Purcell* (1)

From this decision the plaintiff appealed to the High Court

The relevant facts appear sufficiently from the judgments of the Court hereunder

A R Moffitt Q C (with him *C R Allen*), for the appellant The ability of the widow to resume employment does not result from the death of her husband [He referred to *Jamieson* v *Green* (2)] There is no case under the *Compensation to Relatives Act* where it has been suggested that the widow's earnings are relevant in assessing damages There must be a causal connexion between the death and the loss or gain following on death *Davies* v *Powell Duffryn Associated Collieries Ltd* (3) Although the prospect of re marriage has been held to be a relevant factor it is so only for the purpose of defining the duration and extent of the dependency [He referred to *Peacock* v *Amusement Equipment Co Ltd* (4) *Mead* v *Clarke Chapman & Co Ltd* (5)] There is no causal connexion between the death and the widow working nor between the death and the receipt by the widow of wages The opportunity to work following the death of the husband cannot be valued She has no duty to mitigate her loss by going to work Even if it could be said that the earnings of a widow after her husband s death resulted from such death the benefit does not arise from the matrimonial relationship and the rights given by the Act are limited to losses or gains which arise from the relationship of the parties *Burgess* v *Florence Nightingale Hospital for Gentlewomen* (6) As far as the matrimonial home is concerned the only pecuniary benefit accruing to the widow to be taken into account in reduction of damages is the value of her accelerated succession to the property *Heatley* v *Steel Company of Wales Ltd* (7)

Dr *F Louat* Q C (with him *R Ollerenshaw*), for the respondent There is no settled interpretation of the *Compensation to Relatives Act*, 1897 1953 (N S W) or similar legislation but there has been a developing conception which has been applied to changing conditions It is not necessary to find a rigid causal connexion between the death in respect of which the action is brought and those matters to which regard can be had in assessing damages [He referred

(1)[1961] S R (N S W) 932 78 W N 750
(2) [1957] N Z L R 1154
(3) [1942] AC 601
(4) [1954] 2 Q B 347
(5) [1956] 1 W L R 76
(6) [1955] 1 Q B 349
(7) [1953] 1 All E R 489

to *Pym* v *Great Northern Railway Co* (1), *Davies* v *Powell Duffryn Associated Collieries Ltd* (2), *Grand Trunk Railway Co of Canada* v *Jennings* (3)] The contingency of the widow remarrying must be taken into account *(Horton* v *Byrne* (4)) and the financial position of the widow after her husband's death is a relevant consideration whether she in fact remarries or not [He referred to *Dolbey* v *Goodwin* (5)] It is not a question of any duty on the widow to mitigate her damage, but a question of what are really the resulting damages arising from the death Events after the death may indicate the nature and extent of the loss caused by the death

4 R Moffitt Q C , in reply

Cur adv vult

The following written judgments were dehvered —

DIXON C J , KITTO, TAYLOR AND WINDEYER J J The appellant's husband, who was a fitter and turner employed m Newcastle, was killed in a road accident on 16th October 1955 There were two children of the marriage—Valerie and Jeanette—who were, respec tively, eleven and six years of age at the time of their father's death The plaintiff herself, was then nearly thirty three years of age In an action subsequently brought pursuant to the *Com pensation to Relatives Act* (N S W) for the benefit of herself and the two children the jury returned a verdict of £6,770 This sum w as apportioned, as to £4 520 thereof, to the widow and as to £1,000 and £1 250, respectively, to the children Upon appeal to the Full Court of the Supreme Court of New South Wales it was urged that the amount of the verdict was inadequate that certain evidence relating (1) to the earnings of the appellant after the death of her husband and, (2) to certain rents which she had thereafter received, had been wrongly admitted and that, in relation to these matters, the jury had been misdirected The appeal was dismissed and this appeal is now brought from the order of the Full Court

It appears, though the evidence on the point is far from satis factory that upon the death of her husband the appellant succeeded to the cottage at Lambton near Newcastle m which the family had lived up to the time of his death This cottage, it seems, had been purchased by the deceased with the assistance of a loan from a Starr Bowkett Society and the deceased was obliged to make monthly repayments to this Society According to the plaintiff she had finished the payments " at the time of trial but how much

(1) (1863) 4 B & S 396 [122 E R 508]
(2) [1942] AC 601
(3) (1888) 13 A C 800
(4) (1956) 30 A L J 583
(5) [1955] 2 All E R 166

was owing at and paid after the death of the deceased does not appear The unencumbered value of the cottage was said to be about £2,500 But after the death of her husband the appellant let the cottage at a rental of £8 a week and came to Sydney There she arranged for her two chddren to be admitted to the Masonic School at Baulkham Hdls and took up residence with her father and mother in their flat Then she obtamed a situation at the Masonic Hospital at Ashfield where she worked for about 14 months Since then she has worked as a telephonist She says that she has undertaken these activities in order "to make ends meet" Cross examination of the plaintiff elicited, first of all, that her wages whilst she was employed were about £12 per week and, secondly, that she has paid approximately £4 a week for the accommodation provided for her m her father's flat This evidence was admitted m spite of objection and the submission is now made that its admis sion was erroneous Further, it is said, the learned trial judge misdirected the jury m relation to these matters It should be added that although the general ground was taken that the damages awarded were inadequate it is not contended that this ground can be made out mdependently of the two particular objections which have been raised

Apparently, it was the contention of the respondent at the trial that the jury were entitled to conclude that the difference (£4 per week) between the rental at which the appellant's cottage was let and the amount which she paid to her father for accommodation in his flat was a profit which resulted to her from her husband's death Having instructed the jury as to the manner in which they should assess the total family loss his Honour went on to say that the defendant was entitled to a deduction in respect of any benefit which had accrued or might accrue to the plaintiff and the children as the result of the death of the deceased They were required, he said, as a matter of law, to ' deduct from what would be their award of damages ", the value of any benefits gamed or received by her or the children as a result of the death of the deceased Then his Honour proceeded ' In the first instance, evidence has been given by the plaintiff that the home which has come to her under her husband's will is now let at an amount of £8 per week She is not living in it but is paying for board and lodging an amount of £4 per week plus some additional provision that she makes by way of occasional expenses in her mother's and father's home To that extent you may think that she is making a profit and has for some period smce the death of the deceased made a profit by reason of the letting of her house For the period up to date that is so, and

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Kitto J
Taylor J
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if you are satisfied that there has been such a profit on the evidence, then you should properly deduct that amount from any award of damages that you make, for to that extent the plamtiff has gamed by her husband's death and not lost If you thought that that was a permanent arrangement, then it would be open to you to say that that profit would continue into the future and might even be permanent, and insofar as you came to such a conclusion, you would total up m the same way— not merely multiply a number of weeks by the weekly profit, and treat that as a deduction from the figure you would otherwise be awarding to the plamtiff" This was an erroneous direction for there was no ground upon which the " profit " so obtamed by the plaintiff could be taken into account in assessing her damages First of all, it was not a profit in any real sense , if the plaintiff chose to let her cottage and live with her parents it by no means followed that the difference between what she paid her parents for accommodation and what she received m rent was a profit in any sense of the word Secondly, the rent which she received for the cottage was not a profit which resulted from the death of her husband , as a result of his death she succeeded to his mterest m the cottage and the benefit which thereby accrued to her was her accelerated succession to that mterest The value of this was, of course, precisely the same whether she lived m the cottage herself, or whether she let it or sold it and invested the proceeds The rent was no more than a *quid pro quo* for the letting of her own property and was quite irrelevant m assessing damages It may, of course, be that the rental value of premises may afford some clue to their capital value but the evidence was not used for this purpose Indeed m the present case it could not have been so used for the critical question was the value of the deceased's mterest in it at the time of his death and, having regard to that, the benefit which accrued to the plamtiff by her succession to that interest when her husband died

These observations make it impossible to pass by earlier passages in the summing up Earlier the learned trial judge had instructed the jury how they should assess what may be called a gross lump sum by way of damages They were to take into account the deceased's wages at the time of his death, his prospects of advancement, to what extent his contributions to the family purse exclusively conferred a benefit on the family and they were suitably instructed how they might arrive at a gross lump sum We have not attempted to mention all of the factors to which his Honour referred, but it is noticeable that no mention was made of the fact that the deceased in his lifetime also provided the family with a

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home in which to live This was a most material omission in detailed directions concerning the plaintiff's losses and gains and particularly so when the issue concerning the extent to which the appellant had benefited by succeeding to her husband's mterest in the cottage had assumed some prominence m the case No point, however, was made of this omission but that is of no consequence since, in our view, the direction on the issue m question was erroneous

The matter of the appellant's earnings subsequently to the death of her husband was dealt with m the summing up m the following manner "Secondly, it has been said that by reason of the fact that the plamtiff was a working girl at the time that she met the deceased and married him, and has returned to work smce his death, in that sense, being freed from the responsibility of maintaining a domestic establishment, she has made some gain from her own working capacity If you think that being relieved of the obligations of running a household by the death of her husband was m the nature of an advantage which enabled her to earn money in this fashion, then it would be open to you to treat that amount also as a deduction from the damages you would otherwise award to the plamtiff You may, of course as to these items—that is, the profits from renting the house and the income from her own efforts—take the view that the plaintiff let the house and went to work only as an interim arrangement to maintain herself and her children until this case could be disposed of, and that in normal circumstances she would not have left the Newcastle district, let the house and gone to work—the onus is on the defendant to satisfy you that the position is otherwise, and to show that the plaintiff, as a result of her husband's death, has really gamed some advantage or benefit m the respects I have mentioned Insofar as you think that to be the position, then it would be proper for you to make deductions from the award of damages you would otherwise give to the plamtiff " It may be open to argument that this passage indicated to the jury that they were entitled to deduct from any gross assessment of damages the wages which the plamtiff had, m fact, received since the death of her husband and any wages which it was probable she might earn m the future That notion might be thought to be implicit in the direction that "it would be open to you to treat that amount also as a deduction from the damages you would otherwise award the plamtiff " Such a direction would clearly have been erroneous and could not be supported for the wages which the plamtiff earned and received were no more and no less than the reward for her labour But it may not be unreasonable—and it is sufficient for the purposes of the case—to

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treat the passage as meaning, on the whole, that the jury might think it proper to place a value upon the plaintiff's newly found freedom to Beek gainful employment This they could do if they thought "that being relieved of the obligations of running a household by the death of her husband was in the nature of an advantage which enabled her to earn money" A majority of the Full Court were of the opinion that this issue was properly left to the jury and they declined to intervene They found it "difficult to appreciate how it can be said logically that the death of her husband will free the wife from her marital obligations and thus enable her to marry again yet the fact that she is freed from the obligation of managing her late husband's domestic establishment (if, in fact, she be freed from this task) may not be taken into account " In our view there is a clear distinction between the two propositions The death of one spouse inevitably results m a revived capacity m the other to marry This, for what it is worth m any particular case, has so long been regarded as having some value m the assessment of damages m fatal accident cases that it is profitless to debate how far the established rule is justified But the death of one spouse does not result m a revived capacity m the other to undertake gainful employment As *Wolff* J said in *Usher* v *Williams* (1) * the plaintiff's ability to earn is not a gam resulting from the death of her husband within the principle established by *Dames* v *Powell Duffryn* (2) The widow's ability to work was always there and she could perhaps, as many women do—particularly in professions—have preferred to work after marriage (3) " But the respondent contends that, m the case of a widow who is capable of engaging m gainful employment, widowhood brings with it an advantage of pecuniary value m as much as it affords an mcreased opportunity to engage in such employment This may be of some mterest as a theoretical proposition but of what importance or relevance is it in everyday affairs ? Many wives, either with or without children, engage in employment during the subsistence of the marriage Is no deduction to be made where the plamtiff widow is to be found m this category and yet a deduction is to be made where the plamtiff, during her marriage, chooses to do no more than attend to the requirements of her household ? The proposition is that some deduction should be made m the latter case because the death of her husband has placed the plamtiff m a position m which she is free to seek employment It assumes, of course, that, m such

(1) (1955) 60 W A L R 69
(2) [1942] AC 601
(3) (1955) 60 W A L R, at p 81

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a case, she was not free during the marriage to engage in employment But this is to confuse choice with lack of freedom On the other hand it may, perhaps, be thought that the demands of a young fanuly may constitute an obstacle in the way of a mother seeking employment for herself But if this be so, how can it be said that the death of ther husband relieves her from the obUgations of running the household ? An attempt to assert that this may be said was made in *Horton* v *Byrne* (1) but the contention was rejected But in rejecting it the Court observed that No doubt if she had no child she might have been regarded as liberated from the task of housekeeping and thus enabled freely to earn her living, and that might be considered" (2) The view suggested in this passage had not been debated m that case, and upon consideration, we do not adhere to it It is, perhaps, possible that some exceptional cases may arise m which the proposition contended for will assume some materiality but it is difficult, at the very least, to see how and we forbear to anticipate them, they may be safely left till they arise So far as the present case is concerned it is obvious that nothing more appeared than, that "m order to make ends meet", the plamtiff placed her children in a boardmg school and then sought and obtamed employment These things might have been done during her married life and there was no basis upon which it was legitimate to submit to the jury the question whether the plamtiff obtamed any advantage of the character in question as the result of her husband's death

For these reasons the appeal should be allowed, the order of the Supreme Court discharged and a new trial directed on the issue of

McTIERNAN J The appellant brought an action under the *Compensation to Relatives Act,* 1897-1953 (N S W) to recover damages from the respondent m respect of the death of her husband whom she alleged was killed m consequence of the negligence of the respondent The appellant brought the action for the benefit of herself and two children her husband was their father In an action under the Act to recover damages m respect of death caused by a tortious act, the rule as to the assessment of damages is expressed by s 4 This section provides that" the jury may give such damages as they may think proportioned to the injury resultmg from such death to the parties respectively for whom and for whose benefit such action is brought" Injury in this section means material injury only, that is pecuniary damage Speaking of the assessment

(1) (1956) 30 A L J 583
(2) (1956) 30 A L J, at p 584

of damages under similar provisions, Lord *Russell of Killowen* said in *Davies* v *Powell Duffryn Associated Collieries Ltd* (1) " The general rule which has always prevailed in regard to the assessment of damages under the *Fatal Accidents Acts* is well settled, namely, that any benefit accruing to a dependant *by* reason of the relevant death must be taken mto account Under those Acts the balance of loss and gam to a dependant by the death must be ascertained, the position of each dependant being considered separately " (2) In the present case the appellant recovered by the verdict of the jury £6,770 which pursuant to s 4 was divided as follows £4,520 to the appellant and £1,000 to the elder child and £1,250 to the younger The appellant complains of the inadequacy of the verdict m her favour

The evidence upon which the appellant relied at the trial to prove the amount of pecuniary loss resultmg from the death of her husband consisted of proof of payments which her husband regularly made to her out of his earnings and of the prospect of his wages being increased m the future with the consequence that as his earnings increased so would the amounts which he would pay to the appellant from week to week Evidence was given by the appellant that the family lived in a home which her husband was buildmg and paying for through his membership of a Starr Bowkett Society but it was not finished when he died that under his will, the appellant succeeded to his mterest m the Society and she completed the home and finished payment for it

It was proved by questions which the appellant was asked m cross examination that after her husband's death she let the house at £8 per week and received the rent Counsel for the appellant objected to the reception of this evidence as being irrelevant to the issue of damages It was admitted by the trial judge It appears from the appellant's evidence that after her husband's death she sent the two children to a boarding school where they were mam tamed and educated free of charge and she went to live with her parents to whom she paid £4 per week for her board and lodging and occasionally bought commodities for them and herself It was proved by other questions which the appellant was asked in cross examination that after her husband's death she took a position as a nurse for which she received remuneration and later changed her employment to that of a telephonist for which the wages were £12 per week Counsel for the appellant also objected to these questions on the ground that they were irrelevant to the issue of damages They also were allowed by the trial judge

(1) [1942] A C 601 (2) [1942] A C , at p 606

It appears from the evidence that the appellant framed before marriage to be a nurse and that during her marriage she did not engage m any employment for wages She said that economic necessity caused her to let the home, put the children in the boarding school, and to go out to work The trial judge directed the jury on the basis that the letting of the house and the employment mto which the appellant entered could be taken into account as pecuniary benefits accruing to the appellant from her husband's death by which it would be correct to dimmish the damages assessed in respect of the loss of the payments which she could expect to receive from her husband in the future

The first question is whether the receipt of rent from the lettmg of the house was relevant to the question whether by reason of the death of the appellant's husband a gam accrued to her The house became the property of the appellant under the will as from the tune of his death It may be that because the untimely death of the appellant's husband by the accident made her succession to the house certain and accelerated it, there was some financial improvement resultmg to her from the death There is no evidence here upon which the jury could estimate what that was worth to her m cash However, this appeal is concerned with the question whether the appellant should suffer a diminution of damages for pecuniary loss because she began using the house as an income-producing asset It is clear that if she put the house to an unprofit able use any loss sustained could not be said to be a result of her husband's death By parity of reasoning a gain derived from the letting is not one accruing from the death and is not therefore a legitimate deduction which the jury could take in account in assessmg the amount of damages m accordance with the rule prescribed by s 4

The next question is whether the remunerative employment of the appellant since her husband's death afforded a gam by which the jury could diminish damages It would be a harsh result if a tortfeasor whose fault caused the fatal accident was entitled to have the widow's earmngs taken into account in his favour in assessmg damages for the loss of support resultmg from the death of the breadwinner However m every case the simple issue is whether the remuneration which the widow earns is a benefit accruing to her by reason of the death of her husband

On this question there is a conflict of judicial opinion The cases are cited in the judgments given m this case by the judges of the Supreme Court One of these cases is *Horton* v *Byrne* (1) The

(1) (1956) 30 A L J 583

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judgment of this Court contains this passage "She (the widow) has resumed her employment as a machinist and, of course, her earnings are substantial But that fact does not operate to reduce *pro tanto* the damages which should be awarded For it means that because she has lost her husband's support she is forced again to become a wage earner No doubt if she had no child she might have been regarded as liberated from the task of housekeepmg and thus enabled freely to earn her living, and that might be considered But it is a consideration outweighed by the care of the child and the need later of keeping house for him" (1) This statement appears to accept by implication that the earnings of a widow after the death of her husband may be set off against damages assessed for the pecuniary loss she sustains by reason of his death In my opinion that proposition is not based upon satisfactory grounds On reconsideration I think it is not correct to regard the result of the death of a husband as mvolvmg financial benefit to his wife because she is thereby free, if circumstances permit, to engage in remunerative employment The question which has to be considered is whether a widow gets a pecuniary gam from her husband's death because she thereafter takes a position and earns money thereby It is true, of course, that the death does not actualize a widow's earning capacity her earning capacity is the same as it was before her husband's death Nor is it a distinction between a wife and a widow that the former has not freedom to earn whereas the latter has Each class mcludes both women who earn and those who do not do so Surely it is not a distinction contemplated by s 4 of the Act that if a widow earns after her husband's death, although her only occupation beforehand was domestic work m the household, that should be taken mto account as a pecuniary gam accruing from his death. The view that what she earns accrues from the death of her husband is one that I feel unable to accept

I agree with the reasoning of *Kmsella* J in the Supreme Court on this question He said " In the present case the evidence of the plaintiff widow, which was not challenged, is that wh.de she would not have gone to work and separated herself from her chddren if her husband had not been killed, she had done so m order to make ends meet In the light of this evidence and, indeed, independently of it, I am quite unable to accept the contention of the defendant that the widow's wages result from the husband's death Her going to work did not arise from the relationship of husband and wife, and the severance of that relationship by death did not create for her a right or obligation to work Her employment followed after

(1) (1956) 30 A L J , at pp 584, 585

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her husband's death but did not follow from it The source of her wage income is not the death of her husband, but the contract of employment by which she exchanges her labour and services for wages She went to work entirely of her own volition, even though her will was forced—as she herself said—by pressure of economic necessity which arose by reason of his death She clearly had, among other possible courses, the alternatives of throwing herself and her children upon public charity and awaiting the provision by a jury of proper compensation for the financial loss resulting to the family from the death of her husband It is not to the point to say that if her husband had lived she would not have gone to work The essential question is whether her employment was the result of his death " (1) His Honour went on to refer to a number of cases including *Goodger* v *Knapman* (2) and *Usher* v *Williams* (3) from which he quotes passages to support his reasoning I think that what is said in these passages is to be preferred to what is said in the other cases in which the conclusion was reached that a widow's earnings after her husband's death accrue to her by reason of his death It follows, m my opinion, that the jury should not have been directed to take mto account either that the appellant received rent from letting the house or engaged m remunerative employment after her husband's death

As regards the question whether a widow who is a claimant in such a case as the present is likely to remarry, it is settled law that the jury might be invited to consider this probability That direction, as I understand it, is not given on the basis that the wife is made free by the death of her husband to remarry and that might be for her pecuniary advantage The direction is rationalized because the period of the expectation by the wife of the financial support of her husband, adopted as the basis upon which damages for pecuniary loss resulting from his death are assessed, would be shortened if the probability of remarriage is taken mto account Therefore the considerations upon which a direction regarding remarriage is justified do not apply to the question whether earnings by a widow after her husband's death, or the probability of her earning her own living, should be taken into account by the jury *Kmsella* J aptly said "Remarriage, generally speaking, terminates the widow's dependency on her first husband's support and is relevant on the footing that if and when it takes place there comes a substitution of the second husband's financial support for that which she would have received from the first had he lived, so that

(1) [1961] S.R (N S W), at pp 937, 938, 78 W N , at p 754
(2) [1924] S A L.R 347
(3) (1955) 60 W A L R 69

she is no longer losing that support It is on the same footing as evidence of ill health and short expectation of life of a plaintiff is admissible—that it is relevant to the span of time for which she is left without the financial contribution of the husband But in respect of employment, though the widow is earning wages by her labour, she is still left without the financial support which her husband afforded her while he lived " (1)

In view of the evidence of the amount of moneys which the appellant had received from her husband, and of the prospects of this amount being increased in the future, the jury's verdict in her favour appears to be much less than generous and there is ground for believing that they were influenced by the directions which have been discussed I think therefore that there should be a new trial of the issue of damages I would allow the appeal

Appeal allowed with costs Order of the Full Court of the Supreme Court discharged In lieu thereof order that the appeal to that Court be allowed with costs Order that a new trial be had limited to the question of damages

Solicitors for the appellant, *H V Hams Wheeler & Williams*, Newcastle, by *Kevin Ellis & Price*

Solicitor for the respondent, *A J White*

G H S

(1) [1961] S R (N S W), at p 942 , 78 W N , at p 757

DE SALES APPELLANT,
PLAINTIFF,

v

INGRILLI RESPONDENT
DEFENDANT,

[2002] HCA 52, [2003] HCA 16

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA

HC OF A
2002 2003

April 17
Nov 14
2002

Kirby
Callinan JJ

Damages — *Assessment — Lord Campbell's Act — Action by widow in respect of death of husband — Matters to be taken into account — Possibility of financially beneficial remarriage or relationship — General contingencies of life — Fatal Accidents Act* 1959 *(WA) ss* 4,6

A widow brought an action for damages under the *Fatal Accidents Act* 1959 (WA) following the death of her husband as the result of an accident She was aged twenty seven at the time of the husband's death The trial judge discounted the damages by 5 per cent on account of the prospect that the plaintiff would obtain a future financial benefit from remarriage and he allowed no discount for the general vicissitudes of life On appeal, the Full Court of the Supreme Court held that the damages should be discounted by 20 per cent for the prospects of an advantageous remarriage or relationship and by 5 per cent for general contingencies

Held, by Gleeson CJ, Gaudron, Gummow, Kirby, Hayne and Calhnan JJ, McHugh J dissenting, that the Full Court had erred in allowing a discount of 20 per cent for the widow's prospects of remarriage or forming an advantageous relationship

Per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ, McHugh and Calhnan JJ *contra* In the ordinary case, the contingency of a financially beneficial remarriage or relationship should be treated as part of the general vicissitudes of life

Per Gaudron, Gummow, Kirby and Hayne JJ, Gleeson CJ *contra* That contingency should not enlarge the discount which would otherwise be made from the present value of the benefits which the deceased was providing at death because it cannot be said whether, having regard to the whole of the penod that must be considered, the relationship would be to the financial advantage or disadvantage of the relatives of the deceased for whose benefit the action is brought

Per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ, and, *semble*, Calhnan J A separate and substantial assessment of discount for remarriage or relationship will be warranted where there is evidence that a new relationship has been formed or is proposed and that it will bring financial advantage to the dependant claimant But it would be wrong to assume that the financial consequences revealed in evidence will inevitably continue

Held, further, that there had been no error by the Full Court in allowing the discount for general contingencies

Per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ The discount of 5 per cent for general contingencies was within the standard range adopted by courts in Western Australia

Parker v *The Commonwealth* (1965) 112 CLR 295, considered

Decision of the Supreme Court of Western Australia (Full Court) *De Sales* v *Ingrilli* (2000) 23 WAR 417, reversed

APPEAL from the Supreme Court of Western Australia

Teresa Margaret De Sales sued Albert Ingrilli in the District Court of Western Australia for damages for herself and her dependent children under the *Fatal Accidents Act* 1959 (WA) following the death of her husband in an accident while he was working on the defendant's property The defendant having been found to be negligent, the trial judge (Judge H H Jackson) assessed damages, making no deduction for the general "vicissitudes of life", but applying a discount of 5 per cent to the widow's damages to reflect the chance of her obtaining financial benefit from remarriage There was an appeal, and cross-appeal, to the Full Court of the Supreme Court of Western Australia By a majority, that Court (Miller and Parker JJ, Wallwork J dissenting) allowed the cross-appeal (1) In relation to the widow's damages, an overall deduction was made of 20 per cent for the possibility of remarriage and a further 5 per cent for general contingencies A discount of 5 per cent for general contingencies was also applied to the children's damages The widow appealed to the High Court by special leave granted by Gaudron, Kirby and Hayne JJ, limited to the grounds that the Full Court had erred in increasing the discount for "prospects for remarriage", that it had erred in allowing any discount for the prospects for remarriage, and that it had erred in allowing a further discount for the "usual contingencies" or vicissitudes of life

B L Nugawella, for the appellant The trial judge's assessment of damages was made with the advantage of seeing the appellant give her evidence An appellate court should be slow to reverse it (2) The Full Court did not receive any further evidence In overriding the reduction in damages for the prospects of a financially beneficial remarriage, the majority of the Full Court must have assumed an invisible benchmark for the discount There was no evidentiary foundation for it and contemporary research is to the contrary (3) The Court should revisit the question of a separate discount for remarriage or the formation of any other financially supportive permanent cohabitative relation-

(1) *De Sales v Ingrilli* (2000) 23 WAR 417
(2) *Miller* v *Jennings* (1954) 92 CLR 190 at 196
(3) Austen, Jefferson and Thein, *How Much Further? Women s Progress Goals and Status in WA* (2001), cf *Knight v Anderson* (1997) 17 WAR 85