HENWOOD v NAOUMOFF (1966) ZR 78 (CA)

COURT OF APPEAL

BLAGDEN CJ, DOYLE JA, PICKETT J

12th JULY 1966

Flynote and Headnote

[1] Civil procedure - Appeal - On damages - When allowed.

On an appeal on the *quantum* of damages an appeal court can only interfere with the award if it is satisfied either that the trial judge applied a wrong principle of law in his assessment, or that the amount awarded was so inordinately high or low that it must be a wholly erroneous estimate of the damage.

[2] Tort - Damages - Basis for under the Fatal Accidents Acts.

Where there is a claim under the Fatal Accidents Act, 1846 s. 2 of that Act allows the dependants of the deceased person to recover by way of damages the value of their dependency, which is limited to the loss of the pecuniary benefit arising from the relationship of the dependants to the deceased, which they would have enjoyed had the deceased continued to live.

Cases cited:

(1) *Nance v British Columbia Electric Railway* [1951] AC 601; [1951] 2 All ER 448.

(2) *Davies v Powell Duffryn Associated Collieries* [1942] AC 601; [1942] 1 All ER 657.

(3) *Daniels v Jones* [1961] 3 All ER 24; [1961] 1 WLR 1103.

(4) *Royal Trust Co. v British Pacific Railway* (1922) 38 TLR 899.

(5) *Charlesworth v Attorney-General,* 1963, R & N 833.

Statute construed:

Fatal Accidents Act, 1846 (9 & 10 Vict., c. 93), s. 2.

Martin, for the appellant

May, for the respondent

Judgment

Blagden CJ: This is an appeal and a cross - appeal from a judgement of Charles, J assessing damages. On the 19th September, 1963, the appellant's husband (whom I shall continue to refer to in this judgment as the deceased) was a passenger in a car driven by the respondent. The car met with an accident and the deceased died as a result of the injuries he received. The appellant and the deceased had only recently been married and the appellant was pregnant at the time of the accident and her child was born approximately three months after the deceased's death.

On the 9th September, 1964, the appellant, as personal representative of the deceased, commenced an action against the respondent as first defendant, and also against a second defendant, as insurers of the first defendant. Her claim against the second defendant was subsequently dismissed by consent without costs.

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The respondent admitted liability for the accident and the only issue remaining to be tried was that of damages. The appellant claimed damages under the Law Reform (Miscellaneous Provisions) Act, 1934, and the Fatal Accident Acts, 1846 to 1908. Charles, J awarded the appellant £500 under the Law Reform Act, and £11,824 12*s*. 0*d*., under the Fatal Accidents Acts, apportioning this latter sum between the parent and the child in the sums of £7,824 12*s*. 0*d*. and £4,000 respectively.

The £500 awarded was not challenged by either party, but the figure awarded under the Fatal Accidents Acts is attacked by both the appeal and the cross - appeal - the appellant maintaining that it is too low and the respondent maintaining that it is too high. One may be pardoned for making the observation that, in such circumstances there is a distinct possibility that the judge's award might be about right.

[1] On an appeal on the *quantum* of damages the principles on which an appeal court works have been stated in a number of authorities. Shortly, it amounts to this, that before the appeal court can properly interfere it must be satisfied, either that the judge, in assessing the damages applied a wrong principle of law, or, if he did not err in law, then that the amount awarded was either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage - see *Nance v British Columbia Electric Railway* [1].

[2] Attempts have been made over the cases to render the assessment of damages a logical process and in some cases formulae have been evolved. In practice the assessment becomes difficult because of the many and varied imponderables which have to be taken into account. Section 2 of the Fatal Accidents Act, 1846 refers to the damages which can be given as such 'as they (meaning the jury) may think proportionate to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought.' (See Mayne and McGregor, *Damages* (12th Edn.) pp. 686, 687.)

These words have been interpreted to mean that what may be recovered by way of damages is 'the value of the dependency' and it has been held that that is limited to the loss of the pecuniary benefit, arising from the relationships of the dependants to the deceased, which they would have enjoyed, had the deceased continued to live.

Various methods have been evolved for calculating the value of the dependency. Perhaps the simplest is that explained by Lord Wright in *Davies v Powell Duffryn Associated Collieries* [2], where he said:

' The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employment. Then there is an estimate of how much was required or expended for his own personal and living expenses. The balance will give a datum or basic figure which will generally be turned into a lump sum by

taking a certain number of years' purchase. That sum, however, has to be taxed down by having due regard to uncertainties, for instance, that the widow might have again married and thus ceased to be dependent, and other like matters of speculation and doubt.'

A good modern example of the approach to the problem and the taking of the necessary steps in the calculation is afforded by the case of *Daniels v Jones* [3], to which the learned trial judge referred in his Judgment.

But in the instant case the judge adopted a somewhat more elaborate method of calculation, the pattern for which was established by two Canadian cases - *Royal Trust Co. v The British Pacific Railway* [4], and *Nance v The British Columbia Electric Railway* [1]. This method involved the calculation of two annual sums, the first in respect of what might be termed the average annual allowances which the dependants would have received and continued to receive from the deceased if he had lived, and the second in respect of the average annual savings which the deceased would have accumulated if he had survived. There then has to be an estimate of the number of years during which the deceased could be expected to provide the allowances and achieve the savings. This figure is known as 'the multiplier'. Multiplied by the two annual sums it will give respectively a gross allowance and a gross savings; and the two together will make up a gross dependency.

The next stage in the process is to make adjustments in respect of two main considerations. First, any benefits which the dependants acquire as the result of the deceased's death which they would not otherwise have acquired, or which, by virtue of their accelerated acquisition confer some extra benefit upon them. Thus, account must be taken of the dependant's expectancy in the deceased's estate as compared with the estate which the dependants have actually inherited, and some form of discount must be made to allow for the fact that the dependants have inherited the estate now instead of some years hence.

Similarly, the figures arrived at for allowances and savings must be subject to some form of discount to compensate for their accelerated acquisition.

The second main consideration calling for adjustments to the calculated gross dependency relates to what might conveniently be described as contingencies. These contingencies are those matters and circumstances which might result in an increase or a reduction or even the premature cutting off of the benefits which the dependants could otherwise expect to receive. Thus, if the deceased's employment prospects were such that he could reasonably have expected promotion with an increased salary, his dependants' benefits could be expected to increase. On the other hand, account must be taken of such contingencies as the possibility that the deceased himself

might have died earlier than his expected span of existence or that his dependants might have pre-deceased him.

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BLAGDEN CJ

Two other considerations of great importance to this case which have to be taken into account are the possibility that more children would have been born to the deceased and his wife if he had lived, thus increasing the number of dependants sharing in the benefits and the possibility of the widow re-marrying in the future and thus, in effect, ceasing to be a dependant.

To account for contingencies of these natures it has been the usual, although not the invariable, practice in the courts to make adjustments not to the lump sums calculated in assessing the value of the dependency, but to the multiplier. An instructive example of this was the case of *Daniels v Jones* to which I have already referred where the judge, arriving at a figure of £3,000 as the annual value of a widow's dependency, calculated that that dependency would be likely to have lasted for 13 years, and then taking into account various contingencies in that case reduced the multiplier from 13 to a figure of 9.9.

Finally, in addition to the adjustments which have to be made for contingencies, there are what I might call the incidentals. For example, to the final figure arrived at there must be added an amount to cover the funeral expenses. Then there must be deducted any award made under the Law Reform Act, 1934. Further, as the damages begin to run from the time of the death, there must be an increase in the final figure arrived at to represent interest on this sum over the period which has elapsed between the date of deceased's death and the date on which the damages are finally assessed by the court.

I do not pretend that the foregoing analysis is exhaustive but it may perhaps prove helpful as covering most of the considerations which arise in cases such as this appeal now before us.

I do not propose to examine the evidence which has been adduced in this case, in any detail, because this has been thoroughly done in the judgment which my brother, the Judge of Appeal, is about to deliver and which I have had the advantage of reading and with which I agree. As we are differing from the learned trial judge in the final figure which we think should be awarded I feel, however, I should say something as to two matters in respect of which I consider the trial judge was in error.

The appellant and her husband, the deceased, were a young and newly married couple. They had been married for only a few months the deceased was thirty - three and the appellant twenty - seven. The appellant was pregnant at the time of the fatal accident and in the light of these particular circumstances the accident could scarcely have been more tragic. But in calculating the damages which have to be awarded, the courts have to put sympathy and sentiment aside and confine themselves solely to the cold calculations of pecuniary loss. The parties here were young and ordinarily could have expected a long life together ahead of them. They were about to have one child and it seems to me that one of the contingencies

which it was essential to take into account, was the very real possibility that they would have had other children in the future. I do not think the learned trial judge gave sufficient consideration to that possibility.

Then, as to the deceased's financial circumstances, the evidence showed that the deceased was a farmer who had been farming since 1958. In 1958 and 1959 he incurred substantial losses, but in the years 1960, 1961 and 1962 he made equally substantial profits, and in 1963 he made a much increased profit. One of the grounds of appeal argued in front of us here by Mr Eric Martin on behalf of the appellant was that the learned trial judge had failed to give due consideration to the fact that the deceased had passed from a period of struggle to one of reward. I think there is substance in this contention. In calculating the allowance element of the dependency, the learned trial judge made a calculation of what he described as the deceased's 'average drawings during the last four years of his life' derived from the balance sheets of those years which were before him; and he used this average as a basic figure on which to calculate the amount that the deceased would have expended *per annum* on the appellant and their child. I think it is here that he made his principal error, for in looking to the future as is necessary in assessing these damages, and having regard to the evidence of the deceased's abilities and prospects as a farmer, it is clear that he had established himself, and could look forward to returns much more in keeping with the results of 1960 to 1963 than with those of 1958 and 1959. It is true that in calculating the deceased's 'average drawings' the learned trial judge excluded the figures for 1958 and 1959, but the drawings which the deceased made in 1960 - 1963 were undoubtedly affected by the results of 1958 and 1959. This is strikingly shown in the figures for 1963 where his profits were up by over 100 *per cent* but his actual drawings were but little increased. The explanation was that the deceased was clearing his liabilities. I do not think that the actual drawings which the deceased made in the years 1960 - 1963 could serve as a reliable criterion in determining the value of the dependency and I think the judge was wrong to use them as such.

Beyond these observations I have only to add that I think that perhaps the learned trial judge adopted an unnecessarily involved method of computation, but he set this out in his judgment so clearly that we have had no difficulty in following it, and - as will appear from my brother Doyle, Justice of Appeal's judgment - using it ourselves, subject to the adjustments we have seen fit to make, to arrive at what we consider is the proper award to make.

The final result is that we allow the appeal to the extent that we increase the figure of damages awarded from £11,824 12*s*. 0*d*., to a figure of £14,704 15*s*. 0d., and we apportion this sum as to £9,504 15*s*. 0*d*., to the appellant and £5,200 to the child.

Judgment

Doyle JA: In relation to the question of damages which forms the basis of this appeal and cross - appeal the judge found the following facts.

DOYLE JA

The deceased at the time of his death was a tobacco and maize farmer of Mkushi. He began farming in 1958, in which year he incurred a loss of £3,421. In 1959 he again incurred a loss, this time of £2,421. In the succeeding years he made a profit of £2,358 in 1960; £2,836 in 1961; £2,573 in 1962; and £5,757 in 1963. During the latter four years he drew from his farming enterprise the following sums - £958 in 1960; £1,439 in 1961; £1,065 in 1962 and £1,314 in 1963. His net estate, excluding insurance policies on his life, has been valued for estate duty at £5,897. (This finding has been agreed by both sides to be erroneous. The actual net estate for estate duties included the value of insurance policies and was £13,292. The figure of £5,897 is the artificial figure which after deduction of the value of insurance policies and administrative expenses represents the net benefit to the estate for the purpose of this action.) Included in the value of the estate was a property which the deceased was holding under a lease for 30 years from the 1st July, 1958. That property was sub-let by the plaintiff shortly after the deceased's death for three years at a rent of £1,000 *per annum*. At the time of his death the deceased was thirty - three years of age and the plaintiff was twenty - seven. She was solely dependent on the deceased. The infant child was born after the deceased's death.

Evidence was given by the deceased's brother who farmed an adjoining farm. He said that the deceased after a few difficult initial years was entering on a profitable period, and could expect to carry on farming for ten, fifteen or twenty years and to produce yearly crops which would produce an income of from eight to ten thousand pounds. Another farmer from Mkushi gave evidence in which he said that the deceased could aspire to an income of even higher amounts. Both witnesses agreed that this income would be received in years where the crops were successful; that farming was subject to hazards and that in some years there could be less or even a loss.

The learned trial judge did not say what credence he gave to this evidence. He adopted a method of determining the amount by fixing the rate of dependency and using a multiplier. This multiplier would be increased by favourable factors or decreased by unfavourable factors. The parties did not take exception to the judge's method but did take exception to the way in which he applied it to the facts. Substantially the appellant says the estimated yearly dependency was too low as was also the multiplier. The cross - appellant took the view that the multiplier was much too high. The appellant also claimed that the yearly amount which the learned trial judge fixed for savings was, if anything, too low while the cross - appellant urged that it was much too high. There were other factors raised in the cross - appeal which will be referred to later.

As has been stated, the learned trial judge did not expressly make any finding as to the actual amount which the deceased might have been expected to make each year. He looked at the drawings which the appellant had taken in the last four years of his life which averaged £1,200 a year. Of that he assigned £800 a year as the amount of the dependency. He does not give any reasons why this should be so but presumably selected two thirds of the appellant's, so to

speak, income. Mr Martin has urged upon the court that this arbitrary figure is much too low as it does not take into account that the appellant was moving from his difficult years to his prosperous years The deceased had in the last four years of his life averaged drawings of £1,200 *per annum* but these were years when his current liabilities were respectively £8,540, £8,874, £8, 728 and £5,036. In the last year of his life when he made a profit of £5,757 he redeemed his current liabilities by nearly £3,700. It is in the highest degree unlikely that in his future prosperous years and when he was free from debts that he would continue to exist on drawings of £1,200 *per annum*. Had the learned judge treated his figure of £800 *per annum* as an arbitrary figure and had offset it by an adjustment of the multiplier by reason of future increased benefits, he might have arrived at a correct result. In fact, however, when taking into account this factor, he completely discounted it as against the hazards of farming and reduced the multiplier instead of increasing it. It is clear therefore that he was using the figure of £800 not as an arbitrary figure but as a genuine estimate of the yearly dependency. It would have been simpler and more helpful to this court had the trial judge estimated the future profits and arrived at an estimated dependency based on these and the other relevant factors. In my opinion in basing the yearly dependency on the average of four years which were likely to be completely untypical the learned trial judge made a completely erroneous estimate.

A court is, as the learned trial judge has pointed out, attempting to calculate the Incalculable. I think that if I take the lowest of the figures which was put forward as being the appellant's likely income, namely £8,000 per year, and adjust that for the hazards of farming life by saying that in each third year no income would be made at all, I will not be discounting the evidence in favour of the appellant upon whom the *onus* lies. This formula is, of course, largely a guess; I hope an enlightened guess. In some years the appellant may actually make loss, in others his income may be well above £8,000. However, on my assumption of net earnings of £16,000 in three years the appellant's average yearly income would be £5,333. On that sum he would have to pay income tax. On the figures given to the trial court this would have been something less than £1,200. Such tax is more likely to rise than to fall however - it has indeed risen since the figures were given - and I deduct the sum of £1,333 to allow for this. That leaves a net sum of £4,000. I do not think that it is necessary to assume that the deceased would have spent two thirds of this upon his family but bearing in mind the cost of, for instance, holidays, and education, it is not unreasonable to assume that he would have spent half this sum on his family. I assess the yearly dependency at £2,000.

The learned trial judge then took as his multiplier the period of fifteen years. This is the mean of the number of years which the deceased's brother said that his farming enterprise would continue. This does seem perhaps on the low side but on the whole I see nothing wrong in taking that as the multiplier, particularly as no actuarial evidence was given to help the judge. The trial judge then, having regard to the fact that farming is subject to seasonal,

economical and social and political hazards, reduced the multiplier from fifteen years to thirteen. Many of these hazards have already been taken into account by me in fixing the income at £2,000 so I would reduce the multiplier by one year only, so arriving at a multiplier of 14. The judge then considered what effect upon the multiplier should be the risk of marriage by the plaintiff or the fact that the plaintiff or the child might have pre-deceased the deceased and he discounted his thirteen years by three, arriving at a multiplier of 10. Mr May has pointed out that the judge omitted to take into account the fact that the deceased might himself have died at an early age. He also pressed upon the court that the appellant's possibility of re-marriage should have weighed more heavily. He urged that the multiplier should have been fixed at something less than 10 as was done in *Charlesworth v Attorney-General* [5], where the multiplier was 7. I agree that the learned trial judge did omit to give consideration to this aspect and indeed I presume one should also take into account the possibility that the marriage might have terminated from causes other than the death of one of the parties. However, the reduction by reason of the possibility of marriage was substantial, nearly 25 per cent. Weighing one thing and another, and again I stress we are not dealing with a mathematical problem, I think that a reduction by a further year would be reasonable. Discounting my fourteen years by four I arrive at the same multiplier as that chosen by the trial judge, namely ten.

The trial judge then stated that the deceased's potential earning capacity would have enabled him to effect considerable savings and he estimated those at £1,200 *per annum*. Mr May has urged that that is much too high, while Mr Martin, although his grounds of appeal suggested the amount was too low, rather abandoned that and supported the finding of the trial judge. It is plain that as I have determined the dependency at a much higher figure than that found by the trial judge this must effect the capacity to save. On the figures adopted by me the deceased would have had £2,000 after paying for his family. Some of his saving would presumably not be represented by cash but by an improved value of his farm. Bearing this in mind and the fact that it is not always possible to sell farming property favourably at any given moment, I think that if I estimate a sum of £800 *per annum* as representing the deceased's probable savings, I will not be far wrong. I have arrived, therefore, at an annual dependency of £2,000, annual savings £800 and multiplier 10.

The steps taken by the learned trial judge in relation to the figures adopted by him were as follows:

1. He ascertained the gross dependency by multiplying the annual dependency by the multiplier.

2. He ascertained the gross savings by multiplying the annual savings by the multiplier.

3. He ascertained the gross taxable estate by adding the gross savings to the actual gross estate.

4. He calculated the estate duty payable on the sum arrived at in step 3.

5. He deducted the estate duty payable from the gross savings.

6. He discounted the sum arrived at in step 5 by 5 *per cent* to offset the chance that the widow or child might not have benefited in whole or in part from the estate.

7. He added the sum arrived at in step 6 to the gross dependency.

8. He discounted the sum arrived at in step 7 by 4 *per cent* interest for ten years to offset the accelerated devolution of the estate.

9. He made certain deductions from the actual estate (excluding the value of insurance policies) as follows:

(a) he discounted the estate by 5 *per cent* to offset the chance that the widow or child might not have benefited in whole or in part from the estate, i.e., a step similar to that taken in respect of the savings in step 6;

(b) he discounted the estate by interest at 4 *per cent* for ten years, i.e., a step similar to that taken in step 8 in respect of the amount of the dependency;

(c) he deducted a sum awarded under the Law Reform (Miscellaneous Provisions) Act, 1934.

10. He arrived at the net amount resulting from the foregoing steps.

11. He added an amount awarded as funeral expenses.

12. He added 4 *per cent* interest for two years on the total sum.

I have already referred to the main objections raised in the application of these steps.

The respondent also mentioned that the learned judge made further errors in discounting the chance of the widow and child succeeding in whole or in part to the estate, he omitted to take into account that further children might have been born and that if further children were born this would have considerably reduced the amount which the child would have received and so reduced the respondent's liability. This it was argued would have resulted in an additional discount of 15 *per cent* or 20 *per cent* in steps 6 and 9 (a). It is plain that this is a factor which the learned judge overlooked and it seems to me that it is a very material factor. I think it very probable that further children would have been born with the result which Mr May mentioned. On the other hand the birth of further children might also have resulted in the deceased spending a greater proportion of his income on his family. Weighing these factors against each other I would agree that in steps 6 and 9 (a) the discount should have been 10 *per cent* instead of 5 per cent. Furthermore the appellant contended that in step 9 (b) the learned trial judge did not sufficiently take into account the benefit received by the fact that the farm had been let at a substantial rent. He considered that by increasing the discount over the total estate from 4 *per cent* to 6 *per cent* this would have been taken into account.

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DOYLE JA

Again I agree with this contention and am content to accept the remedy proposed.

Applying the learned trial judge's method to the figures I have adopted and making the other adjustments to which I have referred and disregarding fractions of a pound, I arrive at the following:

1. £2,000 (annual dependency) x 10 (multiplier)		20,000
2. £800 (annual savings) x 10		8,000
3. Estate £13,292 added to savings £8,000		21,292
4. Estate duty 1/3 of £21,292 at 2½ %	177	
2/3 of £21,292 at 5%	708	
TOTAL	£885	885
5. Deduct estate duty £885 from savings £8,000		7,115
6. Discount £7,115 by 10%		6,404
7. Add £6,404 to gross dependency £20,000		26,404
8. Discount £26,404 by amount included as interest at 4% for 10 years,£26,404 x 100/140		18,860
9. *Deductions:*		
(a) £5,897 (net estate less insurance monies) x 10%	590	

(b) £5,897 x 100/140	4,212	
(c) Amount awarded under 1934 Act	500	
	£5,302	5,302
		13,558
10. *Add* funeral expenses		57
		13,615
Add interest at 4% for two years		1,089
TOTAL		£14,704

This sum is to be shared between widow and child. I would apportion it in the sum of £5,200 to the child and the remainder to the widow. This is an apportionment slightly more favourable to the widow than that made by the trial judge but as has been shown his assessment of damages overlooked matters which might have reduced the child's share.