SAMOAN PUBLIC TRUSTEE v. MEREDITH

SUPREME COURT. 1967, 1968. 13, 14, 15, 19, December; 21, March.
SPRING C.J.

Death by accident - action by widow and dependent children - motor vehicle collision - negligence of defendant - foreseeability of injuries - assessment and award of damages - Deaths by Accidents Compensation Act 1952 (New Zealand).

This was an action founded on the provisions of the Deaths by Accidents Compensation Act 1952 (New Zealand) and brought by the Samoan Public Trustee as administrator of the estate of the deceased and on behalf of the deceased's widow and dependent children. Following a collision between a vehicle driven by the defendant and that driven by the deceased, the deceased's vehicle had been overturned and had caught fire; the deceased trapped therein and thereby suffered burns from which he died. The Court having concluded from the evidence that the defendant was solely responsible for the accident and having found no fault on the part of the deceased, it then had to decide whether the defendant was liable for the injuries caused to the deceased and, if so, to what extent.

HELD: (1) That it is now settled that in an action for damages for negligence, the effective test is one of foreseeability; that is, whether a reasonable man might have foreseen that an injurious consequence of the kind that did eventuate might result from his act; and it is not necessary that the details or extent of the accident should have been foreseeable with precision but it is sufficient that the kind of injury sustained was reasonably foreseeable. Having regard to the evidence, the defendant, as a reasonable man, should have foreseen the possibility of a vehicle involved in a collision with his own vehicle catching fire and the possibility of injuries by burns being sustained by the occupant or occupants thereof.

Overseas Tank Ships (U.K.) Ltd v. Morts Dock and Engineering Co Ltd /1961/ 1 All E.R. 404, followed.

Wellington City v. Stoyanov /1967/ N.Z.L.R. 794; Wells v. Sainsbury and Hannigan Ltd /1962/ N.Z.L.R. 552; Hughes v. Lord Advocate /1963/ 1 All E.R. 705; and Smith v. Leech Brain and Co Ltd /1961/ 3 All E.R. 1159, referred to.

(2) Damages in Western Samoa are assessed by a Judge alone, and while the assessment cannot be guided solely by arithmetical calculations, it must be in accordance with the pecuniary benefits which it is reasonable to suppose the family would have received had the husband and breadwinner not been killed prematurely, subject always to future probabilities, such as, the husband's reasonable prospects of life, work and remuneration, and the possibility of the widow re-marrying and ceasing to be dependent.

Donaldson v. Waikohu County /1952/ N.Z.L.R. 758, followed.

Daniels v. Jones /1961/ 3 All E.R. 28;

Bishop v. Cunard White Star Ltd /1950/ 2 All E.R. 22; and Attorney-General v. Green /1967/ N.Z.L.R. 888, referred to.

Judgment for plaintiff.

ACTION claiming damages pursuant to the Deaths by Accidents Compensation Act 1952 (New Zealand).

Phillips, for plaintiff.
Metcalfe, for defendant.

Cur. adv. vult.

SPRING C.J.: This action was brought pursuant to the provisions of the Deaths by Accidents Compensation Act 1952 (New Zealand) which is in force in the Independent State of Western Samoa by virtue of section 370 of the Samoa Act 1921. The action was commenced by the Samoan Public Trustee acting as administrator of the Estate of the late George Leslie Mariner of Leulumoega, Clerk, who died intestate on or about the 24th day of January 1964 and brought for the benefit of the Deceased's wife, Turrah Mariner, and the deceased's two infant children, Maureen Mariner born on 6th April 1963 and Georgina Mariner who was born after the death of the deceased namely on the 4th August 1964. The amount claimed by the plaintiff in his amended statement of claim is $8515.00. Application was made to the Court on the 7th February 1967 by way of motion for leave to bring the said action some 3 years after the deceased's death. The defendant consented and acknowledged that he had not been prejudiced by the delay. It seemed just to this Honourable Court to grant such leave and same was granted accordingly. The facts are that the deceased George Leslie Mariner and his wife Turrah Mariner on the morning of the 1st January 1964 at approximately 4.45 a.m. were proceeding in a Landrover owned and driven by the said George Leslie Mariner along Beach Road, Apia in a westerly direction. At the same time a Chevrolet Pick-Up Motor Vehicle owned and driven by the defendant Richard Edward Meredith was proceeding along Beach Road in an easterly direction. The said vehicles which were both left-hand drive came into violent collision on the Beach Road nearby the Vailima Road intersection with Beach Road. As a result of the collision the Landrover overturned and caught fire and finished up lying on the said Beach Road but on its right-hand side with its bonnet facing south and its wheels facing east (that is the direction from which it had travelled) and the hood was facing west. The said Turrah Mariner was thrown from the Landrover at the time of the collision when the right-hand door flew open. The deceased George Leslie Mariner was trapped in the Landrover and suffered burns to his body from which he subsequently died on the 24th January 1964. He was removed from the vehicle and taken, and admitted to the Moto'otua Hospital. There was conflicting evidence as to the position of the Chevrolet Pick-Up after the collision but it was generally in a position on the road with its front wheels on the seaward side of the dashed white line painted on the roadway and its left rear wheel either on the white line or on the seaward side of the white line and the vehicle was at an oblique angle to its line of travel.

It was agreed that Beach Road at the point of probable impact is 47 feet in width between the sealed edges of the road. There was at the time of the accident a dashed white line which (whilst presumably indicating the centre of the roadway) is situated some 29 feet from the inland edge of the sealed road and some 18 feet from the seaward edge of the sealed road. The road at this point takes a gradual, left-hand curve travelling in an easterly direction.

The plaintiff alleges in his amended statement of claim filed on the 11th December 1967 that the collision was due to the negligent driving of the defendant in that -

"3. THE collision aforesaid was due to the negligence of the defendant in all or any of the following respects:

(a) driving without due care and attention;

(b) failing to keep to his correct side of the road;

(c) failing to keep a proper look-out;

(d) failing to stop;

(e) driving at a speed which in the circumstances was excessive."

The defendant in his amended statement of defence (inter alia) denies the allegations of negligence in the statement of claim and alleges that the collision or accident was caused by the negligence of the said George Leslie Mariner in that -

"The accident was caused by the negligence of the above-named George Leslie Mariner in -

(a) driving without due care and attention;

(b) failing to keep a proper look-out;

(c) failing to keep his vehicle under proper control;

(d) failing to keep his vehicle as near as practicable to the right-hand side of the road;

(e) driving an old vehicle which he knew or ought to have known was in such a defective condition that it was a potential source of danger."

The collision occurred as stated at about 4.45 a.m. on New Year's morning 1964.

The plaintiff called evidence from the said Turrah Mariner who described how the Landrover in which she was sitting with her late husband was travelling along Beach Road on its correct side and with its headlights burning. She stated that she saw the defendant's vehicle approaching and when they were near the Vailima road intersection with Beach Road the defendant's vehicle turned towards their vehicle and struck the Landrover near the left side door. Turrah Mariner described how she was thrown out on to the grass on the seaward side of the Beach Road and the Landrover capsized and burst into flames. Turrah Mariner denied that there was any irregularity in the driving of the Landrover by her husband or that it swerved approaching the Vaisigano bridge (which is about 300 yards to the east from the probable point of impact) as alleged by a witness called by the defence.

Siaosi Silva a ship's captain stated that he was sitting in front of Coxon's store, which is about 70 - 80 yards to the west of the alleged point of impact. He described how he saw the headlights of the Landrover approaching from the east. He also stated that he saw the defendant's vehicle approaching from the west with its headlights burning. He also described in some detail how the defendant's vehicle veered from side to side travelling to the east along Beach Road. He said he stood up and moved back on the raised concrete verandah because he thought the vehicle was going to turn into a driveway alongside Coxon's store for petrol. The defendant's vehicle did not turn into the driveway but passed the store and shortly afterwards he heard a bang and looked and saw the two vehicles had collided and that one was on fire. He proceeded to the scene and saw the defendant Meredith who said "I do not know where this other car had come from." Siaosi also described the position of the vehicles on the roadway

after the collision putting the defendant's vehicle at an oblique angle with both its right front wheels on the seaward side of the dashed white line and its right rear wheel on the said white line. I was impressed with the demeanour and the evidence of Siaosi Silva which was not shaken in any way by a lengthy cross-examination.

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Gus August Sheppard who was walking home from the New Year's Eve Ball (which he had been attending at the Tivoli Theatre), gave evidence that after the defendant's Pick-Up had passed him by a couple of yards near the office of the New Zealand High Commission travelling on the inland side of the white line it suddenly swerved across the road and struck the Landrover on the left-hand side whilst it was travelling on its correct side of the road in a westerly direction and with its headlights burning.

Three youths Uilao Afoa, Nanuki Vagai'a, Saipipi Toomalatai, gave evidence that the Landrover passed them some 200 yards to the east of the scene of the accident and that it was then travelling in a normal manner close to the correct edge of the roadway and with its headlights burning.

Sgt. Sini Sesega, Sergeant of Police, gave evidence that he attended the scene of the accident. He produced a plan drawn by him (at the scene from measurements taken at the scene with the aid of a tape in which he was assisted by Sgt. Tinoni) which showed the Landrover lying on its right side with its wheels facing east. The rear of the Landrover protruded beyond the seaward edge of the road, its front faced towards the centre of the road. The defendant's Pick-Up was positioned with the right rear corner of its tray directly above the white dashed line and 24 feet from the inland edge of the roadway -- the right front corner of the right mudguard was 3 feet on the seaward side of the dashed white line and 29' - 6" from the inland edge of the roadway. The left front corner of the left mudguard was 8 feet from the seaward edge of the road. The left rear corner of the Pick-Up was 13' - 6" from the seaward edge of the roadway and 4' - 6" on the seaward side of the white line. The front of the Landrover was about 4 feet from and opposite the left rear corner of the Pick-Up. Sgt. Sesega was cross-examined as to the position of the right rear corner of the Pick-Up and he stated quite definitely that he saw the right rear corner of the Pick-Up directly above the dashed white line. Ani Liaina a fireman employed by the Fire Department at Apia gave evidence of being called to the scene of the accident to attend to the burning vehicle. He gave evidence as to the position of the vehicles on the roadway and confirmed that the positioning of the vehicles as given by Sgt. Sesega was correct. The defendant gave evidence that he attended the said New Year's Ball and left between 4 and 5 a.m. in the morning to return to his residence in his Chevrolet 15cwt Pick-Up. He denies that he veered from side to side as alleged by Siaosi Silva and also denies he swerved across the road in the manner described by Sheppard. His account of the accident, however, I find unconvincing. He was very vague and seemed to me to be very hazy as to what did actually occur. The defence also called Tali Ulu who stated that he saw the Landrover been driven on to the Vaisigano bridge in an erratic manner (about 300 yards to the east of the scene of the collision) but his evidence was of little assistance in my view as to what actually happened at the time when the vehicles collided and their relative positions on the roadway at such time. Mr Wilson, Secretary for O.F. Nelson & Co Ltd was called to give evidence as to the position of the Pick-Up on the roadway. Mr Wilson saw the vehicles at 7 a.m. or thereabouts on the 1st January 1964 (after the Landrover had been removed). Mr Wilson stated that the left rear wheel of the Pick-Up was about 2" on the seaward side of the white line and the right front wheel was on the white line. He also said he saw some rusty dirt on the white line just in front of the left rear wheel and claiming that this was the point of impact and that the pick-up had moved forward about 12' - 15' after impact.

Mr Wilson took no measurements but relied on his observations. Mr Wilson's interest in the position of Meredith's Pick-Up appeared to

sten from the fact that his company held the insurance cover thereon.

The defence also called one Percy Kolhasse but little turned on his evidence.

The defence also attacked the roadworthiness of the Landrover. Evidence was given on behalf of the plaintiff by one Sale Fuifui a mechanic who stated that he had driven the vehicle regularly up to a few days before the accident and that the vehicle appeared to him to be roadworthy.

It is noted also that the Landrover appeared to have been duly registered with the Traffic Authorities and such registration expired on 31st March 1964.

Mr Brighouse, a motor engineer, gave evidence for the defence but he admitted that he had not serviced this particular Landrover at any time although he had seen it on occasions.

I have considered the whole of the evidence adduced by the plaintiff and the defendant and paid due regard to the demeanour of the witnesses and in my view liability for the accident rests solely with the defendant Meredith. I cannot on the evidence conclude that the said George Leslie Mariner, deceased, was at fault. In reaching this conclusion I am satisfied -

(1) That Meredith was not driving his Pick-Up as close as practicable to the right of that part of the road used or reasonably usable for the time being for vehicular traffic in general which was an obligation cast upon him by Regulations 69 of the Road Traffic Regulations 1961. It was clear from the evidence that the defendant had at least 28 feet of usable roadway in his portion of the roadway to the inland side of the white dashed line. The position of the vehicle after the accident as described by Sgt. Sesega and confirmed by Ani Liaina convinces me on the balance of probabilities that the accident took place on the seaward side of the white line.

(2) I am further satisfied that Meredith failed to keep a proper or sufficient look-out. Meredith's statement to Siaosi Silva that he did not know where the other car (which I find had its headlights burning) had come from was indicative of this and further Meredith's own evidence indicated clearly that he had little knowledge as to how the accident occurred.

(3) I am also satisfied that Meredith drove without due care and attention. I accept Siaosi Silva's evidence that Meredith's vehicle veered from side to side on the roadway just prior to the accident. I also accept Turrah Mariner's evidence and Sheppard's evidence that Meredith suddenly swerved to his left and collided with the Landrover.

(4) I accept Sgt. Sesega's evidence as to the position of the vehicles on the roadway after the collision which evidence was supported by that of Ani Liaina the fireman.

(5) I have also considered the evidence relating to the damage to both vehicles and in my view this evidence does not in any way detract from the foregoing conclusions reached by me.

(6) I am not satisfied on the evidence that the Landrover was unroadworthy. This allegation made by the defendant was not established in my view.

Having therefore decided the question of liability I now turn to

a consideration of the further defence raised by the defendant that the injuries received by the said George Leslie Mariner by way of burns were not the natural or probable consequences of the defendant's acts or omissions, and further that the defendant did not know and could not reasonably have been expected to know that the acts of the defendant would have caused the injuries from which the said George Leslie Mariner died. In other words were the injuries suffered by way of burns by the said George Leslie Mariner reasonably foreseeable. The law on this matter can now be taken as being finally settled as a result of the Privy Council's decision in Overseas Tank Ships (U.K.) Ltd. v. Morts Dock and Engineering Co Ltd /1961/ 1 All E.R. 404 where Viscount Simonds said:

> "Their Lordships . . . have been concerned primarily to displace the proposition that unforeseeability is irrelevant if damage is 'direct'. In doing so they have inevitably insisted that the essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen . . . Thus foreseeability is the effective test."

It is not necessary that the details or extent of the accident should have been foreseeable with precision but it is sufficient that the kind of injury sustained was reasonably foreseeable: see Wellington City v. Stoyanov /1967/ N.Z.L.R. at p. 794.

The New Zealand Court of Appeal was called upon to consider the test of foreseeability in an action for damages for negligence in Wells v. Sainsbury & Hannigan Limited and Another /1962/ N.Z.L.R. p. 552 in which case one Carey was engaged in cleaning down an International motor truck preparatory to painting. This operation is colloquially known as "blowing off". The hose with the nozzle attached was brought by Carey into such a position that the stream of air passed through the plaintiff's clothing and into his rectum causing serious internal injuries. Carey was found to be negligent by a jury but resisted the award of damages on the ground that he could not reasonably be expected to foresee that air could enter this man's rectum by a casual, although negligent act. The Court of Appeal held that "the essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen." The headnote to this case in my view correctly defines the law on this subject:

> "The test of foreseeability in an action for damages for negligence is whether a reasonable man might have foreseen that an injurious consequence of the kind that did eventuate might result from his act. The test does not require that all the details of what happened should be foreseeable. It is sufficient if the defendant should reasonably have foreseen the kind of injury which in fact occurred."

In Hughes v. Lord Advocate /1963/ 1 All E.R. 705 Lord Reid stated at p. 706 -

> "I am satisfied that the Post Office workmen were at fault in leaving this open manhole unattended and it is clear that if they had done as they ought to have done this accident would not have happened. It cannot be said that they owed no duty to the appellant. But it has been held that the appellant cannot recover damages.
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> It was argued that the appellant cannot recover because the damage which he suffered was of a kind which was not foreseeable. The appellant's injuries were mainly caused by burns, and it cannot be said that injuries from burns were unforeseeable. As a warning to traffic the workmen had set lighted red lamps round the tent which covered the manhole, and if boys did enter the dark tent it was very

likely that they would take one of these lamps with them. If the lamp fell and broke it was not at all unlikely that the boy would be burned and the burns might well be serious. No doubt it was not to be expected that the injuries would be as serious as those which the appellant in fact sustained. But a defender is liable, although the damage may be a good deal greater in extent than was foreseeable. He can only escape liability if the damage can be regarded as differing in kind from what was foreseeable."

Applying the foregoing law to the facts of this case I am satisfied that the defendant as a reasonable man should have foreseen the possibility of a vehicle involved in a collision with his own vehicle catching fire and the possibility of injuries by burns being sustained by the occupant or occupants thereof. Most motor vehicles in Western Samoa are powered by petrol driven motors and should a collision take place between two vehicles it is always possible that damage may be caused to the petrol tank or the petrol supply system of the vehicle causing the escape of petrol and the resultant risk of fire.

I conclude that most drivers today (and I include the defendant) are aware of the highly inflammable nature of petrol.

It is also true that the tortfeasor takes the victim as he finds him. The test is not whether the defendant could reasonably have foreseen that as a result of burns that the said George Leslie Mariner would die. The question is whether the defendant could reasonably have foreseen that as a result of the collision one or more of the vehicles may catch fire and as a result one or more of the occupants of the vehicle may suffer burns. In my view the burns which the said George Leslie Mariner suffered and from which he died were in the circumstances reasonably foreseeable and accordingly the defendant is liable: see Smith v. Leech Brain & Co Ltd and Another /1961/ 3 All E.R. 1159.

Having decided that the defendant is solely to blame for the accident and that injuries by way of burns (from which the said George Leslie Mariner subsequently died) are within the reasonable foreseeability test, I now pass to a consideration of the assessment of damages.

In this Territory damages are assessed by Judges and the principles to be applied are stated by North J. (as he then was) in Donaldson v. Waikohu County /1952/ N.Z.L.R. at p. 758.

"In this class of case, damages are not "at large", but require to be assessed strictly according to the pecuniary benefits which it is reasonable to suppose the family would have received had the husband and breadwinner not been killed prematurely. In discussing claims of this kind, Lord Wright said in Davies v. Powell Duffryn Associated Collieries, Ltd /1942/ A.C. 601; /1942/ 1 All E.R. 657: "The damages are to be based on the reasonable expectation of pecuniary benefit or benefit reducible to money value. In assessing the damages all circumstances which may be legitimately pleaded in diminution of the damages must be considered . . . It is a hard matter of pounds, shillings and pence, subject to the element of reasonable future probabilities. The starting point is the amount of wages which the deceased was earning . . . 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" (ibid., 611, 612, 617; 662, 665).

In Nance v. British Columbia Electric Railway Co Ltd /1951/

A.C. 601, their Lordships said: "A proper approach to these questions is, in their Lordships' view, one which takes into account and gives due weight to the following factors; the evaluation of some, indeed most, of them can, at least, be but roughly calculated. Under the first head - indeed, for the purposes of both heads - it is necessary first to estimate what was the deceased man's expectation of life if he had not been killed when he was; (let this be 'x' years) and next what sums during these x years he would probably have applied to the support of his wife. In fixing x, regard must be had not only to his age and bodily health, but to the possibility of a premature determination of his life by a later accident. In estimating future provision for his wife, the amounts he usually applied in this way before his death are obviously relevant, and often the best evidence available; though not conclusive, since if he had survived, his means might have expanded or shrunk, and his liberality might have grown or wilted.""

The evidence was that the deceased left him surviving his widow Turrah Mariner and two children; one of these children was still to be born as of the date of the accident. The other child was aged 9 months. The widow was aged 20 years 1 month and the deceased 24 years 10 months at the date of his death. They were legally married on the 22nd January 1964 - 2 days before the deceased died.

At the date of his death the deceased was employed by the Post Office of Western Samoa as a probationer in the Postal Section at a salary of £160 ($320) per annum although he was, according to the evidence, to have received an extra £20 ($40) in February 1964 to which he had become entitled in October 1963 but which was withheld for some irregularity committed by the deceased in the course of his duties. He also received £240 ($480) per annum from his father Edward Sebastian Mariner for supervising the father's omnibus business. It was clear from the evidence that had the deceased lived this payment from his father would not have continued for a lengthy period as the father stated he had reduced the number of buses originally operated by him from 6 to 3 as at the date of the said George Leslie Mariner's death. At the date of hearing he stated that he had again reduced the number of buses operated by him to 2 and that he was going to give up the transport business as it was not proving successful. Further it was conceded that the said George Leslie Mariner should not, as a member of the Public Service in Western Samoa, except with the express permission of the Public Service Commissioner be employed in another paid office (Samoa Amendment Act 1949 section 26(1)). I noted that the said Edward Sebastian Mariner at the date of the hearing was a member of the Public Service Commission of Western Samoa. There was, I conclude, every possibility that the Public Service Commission would require the said George Leslie Mariner to give up his "secondary" employment with the said Edward Sebastian Mariner. On the evidence therefore I considered that in view of all the circumstances the additional payment of £240 ($480) per annum would not have continued longer than say the end of the year 1968.

Had the deceased lived and continued in the Post Office employment he would have been entitled (providing he fulfilled his position satisfactorily) to receive annual increments of £20 - £25 until a maximum salary of £385 ($770) per annum would have been reached in 1973. In addition a 7½% wage increase was granted to all public servants as from 1st January 1965 and this increase would have been added to the deceased's salary as from 1st January 1965. The salary scale applicable to the deceased (without the 7½% increase) is as follows:-

GENERAL DIVISIONS SCALES

COMMON TO MOST DEPARTMENTS
(New Scale - 1.4.1959)

Salary Rates - Yearly Increments

								Max	Remarks
Grade II	100	115	130	145	160	180	200		
	220	240	260	285	310	335	360	385	Efficiency Bar

I also noted that Mr McFall, the Acting Deputy Chief Postmaster, stated that in his opinion the deceased could have advanced beyond £385 ($770) per annum as he appeared to him to be capable of further advancement.

The plaintiff called Mr A.L. Hutchison a qualified accountant and advisory officer to the Treasury who submitted as part of his evidence a calculation as an aid in the assessment of damages. Mr Hutchison in the course of his evidence stated -

> "On the matter of life expectancy in Western Samoa there are no statistics available. Recourse was had to New Zealand Life Tables 1960-62 published by the New Zealand Government Statistician in 1965 which provide that the life expectancy of a 25-year old Non-Maori is 46.86 years, and that of a New Zealand Maori 39.82 years.
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> In New Zealand population statistics a "Maori" is defined as a person with half or more Maori blood providing that the remaining blood is European or Polynesian.
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> For persons of Polynesian blood living in Western Samoa, it is considered that the New Zealand Maori life expectancy is more appropriate with an adjustment decreasing this figure by 6% to allow for a shorter life expectancy in a tropical climate. (A local insurance company makes a similar adjustment of 5% - 7% for those living in the tropics).
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> These calculations would allow the deceased a life expectancy of approximately 37.74 years at date of death. His wife was aged 20 years at this date and her life expectancy was therefore greater and is calculated at 42.5 years."

Mr Hutchison stated that the estimated working life expectancy of the deceased retiring at age 60 was 35.25 years. I accepted Mr Hutchison's approach to the calculation of the life expectancy of a Samoan. I also note that the evidence satisfies me that the deceased enjoyed good health.

The plaintiff does not claim a round sum for damages but claims the sum of £4,257.10.0 ($8,515) which is the exact amount of the calculation made by Mr Hutchison, who stated that it would be necessary to invest this sum at 5% compound interest to produce £5 ($10) a week for 35 years - which was as he said compensation to the dependent for loss of maintenance for 35 years.

The widow testified that the deceased gave her £5 ($10) a week from the moneys received from his father Edward Sebastian Mariner and £2.10.0 ($5) a week from his Post Office pay. These moneys £7.10.0($15) per week were used to provide food clothing and general living expenses for the whole family including the deceased. The deceased kept, she said, approximately 10/- a week from his Post Office pay for himself. The deceased and his family lived rent free in a house provided by the father Edward Sebastian Mariner. Mr Hutchison for the purpose of his calculation took as the "datum" or "basic" figure the sum of $520 per annum ($10 a week). He assessed the deceased's earnings at the date of death at £420 ($840) per annum (£180 + 240) and deducted therefrom the deceased's personal expenses of £156 ($312) per annum leaving a datum or basic figure of £264 ($528) per annum which he called, say $10 or £5 a week, as the "take home" money. Mr Hutchison stated that the estimated

personal expenses were arrived at after discussions with the widow and by calling upon his own knowledge of what he (Hutchison) would expect the costs of feeding and clothing the deceased would be bearing in mind the standard of living these people attained. The widow testified that the deceased expended "about" 10/- a week on personal expenditure but I consider that this figure was too conservative. From the sum of £7.10.0 ($15) per week which the widow testified she received from the deceased would need to be deducted the personal living expenses of the deceased himself to arrive at the datum or basic figure. One cannot, however, in considering claims such as this be guided solely by arithmetical calculations as Holroyd Pearce, L.J. said in Daniels v. Jones /1961/ 3 All E.R. at p. 28 -

> "Since the question is one of actual material loss, some arithmetical calculations are necessarily involved in an assessment of the injury. But they do not provide a substitute for common sense. Much of the calculation must be in the realms of hypothesis, and in that region arithmetic is a good servant, but a bad master."

In my view Mr Hutchison has been too generous in his calculations and has failed to pay due regard to what North J. said in Donaldson v. Waikohu County (supra) at p. 761 -

> "First, it has regarded itself as entitled to work out the loss substantially by applying a statistical test. This approach has at its root the false premises that, because the average working-man in this country will live to work until he is sixty-five years of age, a single individual has the same expectation. The objection to this approach is recognised by Viscount Simon, L.C., in Benham v. Gambling /1941/ A.C. 157; /1941/ 1 All E.R. 7, where he said: "In the first place, I am of opinion that the right conclusion is not to be reached by applying what may be called the statistical or actuarial test. Figures calculated to represent the expectation of human life at various ages are averages arrived at from a vast mass of vital statistics; the figure is not necessarily one which can be properly attributed to a given individual" (ibid., 165, 166, 12). The uncertainties of life are so considerable in the case of a particular individual and his dependents that fair and reasonable compensation for the loss sustained can, I suggest, be arrived at only by heavily taxing down figures obtained from statistics. To be more explicit, the husband might well have died earlier or been incapacitated by reason of accident or illness. The plaintiff might herself have died well within the next twenty-nine years. There were two lives to consider, or several, if the children are to be considered as well. Further, the possibility of the plaintiff's re-marrying cannot wholly be ignored."

(1) He has not taken into account (what I find proved on the evidence) the distinct probability that the deceased would in the near future cease to receive the sum of £240 ($480) per annum from his father from the running of the omnibus business. There is, of course, the other possibility that had the father been able to carry on the business he would not have been able to continue paying the deceased at the rate of £240 ($480) per annum and may well have had to reduce this amount to some lesser figure until such time as he gave up the transport business which he said was not proving profitable.

(2) Mr Hutchison in arriving at his figure of $8,515 made no allowance for the possibility of the widow re-marrying.

In my view this is a matter which the Court is required to take into account although it is, I concede, a difficult matter of evaluation. Certain statistics were put before the Court by Mr Hutchison (when dealing with the alternative basis of calculation made by him) based on the tables of re-marriage and length of widowhood of New Zealand widows. He stated that the expected length of widowhood of a person in New Zealand becoming a widow at age of 20 years is 7.5 years and that her chances of re-marriage are approximately 9 to 1 in her favour. In this case the widow is comparatively young, attractive and the fact of her having two young children is not in my view as great an handicap to re-marriage in Western Samoa as perhaps it may be in New Zealand.

(3) Mr Hutchison did not take into account the chances of the deceased dying prematurely, becoming sick or incapacitated by reason of accident. Further he may not have received the annual increments from the Post Office every year as he failed so to do in the year 1963 when an increment of £20 was withheld from him because of some irregularity over registered mail.

(4) The calculations should also take into account the possibility of the widow dying prematurely and also the chances of the children dying prematurely.

I acknowledge that these may well be countervailing contingencies which could be suggested by way of balancing this matter in some way such as the possibility that the deceased might have earned a greater income. He may also have received double increments from the Post Office from time to time. "The ups and downs of life, its pains and sorrows, as well as its joys and pleasures all that makes up "life's fitful fever" have to be allowed for in the estimate": see Bishop v. Cunard White Star Ltd /1950/ 2 All E.R. 22. It necessarily follows that any figure which one determines or fixes must be highly speculative: that is a disadvantage which must necessarily accompany every effort to put into money that which is not assessable in money.

The defendant called Mr Wilson who produced as part of his evidence a table which appeared to be based on the average income of a Western Samoan taxpayer compared with the average income of a New Zealand taxpayer for the years 1962 and 1963.

I considered, however, that Mr Wilson's calculations were of little value or assistance to me in this matter.

Mr Hutchison submitted an alternative calculation on the basis of maintaining the children until the age of 18 years and providing an annuity for the widow for such period of years as the Court thought fit having regard to the possibility of the widow re-marrying. Mr Hutchison stated that the children should be maintained until they were 18 years of age but I consider overall that 16 years of age would be a more realistic age in Western Samoa at which children would cease to be dependent. Mr Metcalfe for the defendant also submitted that as the older child Maureen had been living with Mr and Mrs Edward Sebastian Mariner since September 1964 that no provision should be made for Maureen. I do not accept this submission. As at the date of death Maureen was dependent upon her father. The action of the grandparents in looking after her albeit for 3 years could cease and determine at any time for a number of reasons. In my view provision should be made for Maureen in the same way as the other child Georgina. I have endeavoured to apply the principles enunciated in Donaldson v. Waikohu County (supra) and Attorney-General v. Green /1967/ N.Z.L.R. 888 in considering the amount of the damages that should be awarded in this case and giving the best consideration that I can I have come to the conclusion that in all the circumstances the proper amount to be awarded under the Deaths by Accidents

Compensation Act is the sum of £2,100 ($4,200).

I accordingly give judgment in favour of the plaintiff for the sum of £2,100 ($4,200) together with costs, witnesses' expenses and disbursements as fixed by the Registrar. It is proper I think that I should apportion the damages awarded in this action as between the dependents of the said George Leslie Mariner deceased. The order will therefore be -

(1) That the widow the said Turrah Mariner and the children the said Maureen Mariner and Georgina Mariner be declared the sole dependents of the deceased George Leslie Mariner.

(2) That the amount of the plaintiff's party and party costs be paid to the plaintiff's solicitor.

(3) That the sum of £1,400 ($2,800) be paid to the Samoan Public Trustee (who is hereby constituted trustee of the fund) to be held in trust as a class fund (pursuant to section 15 of the Deaths by Accidents Compensation Act 1952 (New Zealand)) for the said Maureen Mariner and Georgina Mariner the infant children of the said George Leslie Mariner deceased and the said Turrah Mariner upon the trusts above set out.

(4) That the balance of the said moneys payable under the said judgment, viz., £700 ($1,400) be paid to the said Turrah Mariner subject to the payment by her to her solicitor of such amount by which the solicitor's costs of the action and disbursements expended by him in this action as taxed and allowed by the Registrar of this Honourable Court shall exceed the amount of the party and party costs recovered from the defendant.

(5) That leave will be reserved to the trustee the said Turrah Mariner or either of the two infant children to apply to the Court hereafter for further or other directions pursuant to section 17 of the Deaths by Accidents Compensation Act 1952 (New Zealand).