[HIGH COURT OF AUSTRALIA.]

WILLIS . . . . . APPELLANT;
PLAINTIFF,

AND

THE COMMONWEALTH . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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MELBOURNE, *May* 29.

SYDNEY, *Aug.* 6.

Latham C.J., Rich, Starke, Dixon, McTiernan and Williams JJ.

Negligence—Fatal accident—Compensation of dependants of deceased—Widow—Remarriage—Right to proceeds of life-insurance policy owned by deceased—Fatal Accidents Act 1846 (9 & 10 *Vict. c.* 93)—*Act* 12 *Vict. No.* 21 (*W.A.*).

For the purposes of the *Fatal Accidents Act* as adopted in Western Australia the fact that the claimant widow has remarried is material to the assessment of her pecuniary loss.

In an action by a widow under the *Fatal Accidents Act* it appeared that the deceased husband was earning £6 a week at the time of his death. Five months after the death the widow married again, and it was found that the second husband had a position and prospects at least equal to those of the first husband. The deceased had a policy of insurance on his life, the proceeds of which, £700, came into his estate and, on distribution of the estate, went, as to some £566, to the widow and, as to the balance, to the two children of the marriage. The trial judge held that, in view of her remarriage and of the benefit the wife received by reason of the insurance policy, she had not suffered any pecuniary loss through the death, but he did not fix any sum as the precise value of the benefit accruing to her through the insurance policy.

Held that the decision was justified on the facts and should not be disturbed. It was proper to have regard to the remarriage and to the fact that the wife had received a benefit through the insurance policy, and in the circumstances of the case no precise definition of that benefit was necessary.

Observations on the method of taking the proceeds of insurance policies into account in the assessment of pecuniary loss for the purposes of the *Fatal Accidents Act.*

Decision of the Supreme Court of Western Australia (*Dwyer* C.J.) affirmed.

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APPEAL from the Supreme Court of Western Australia.

On 18th August 1945, in Western Australia, Cuthbert James Gray Wilson was killed in a motor accident owing to the negligence, so it was admitted, of a member of the naval forces of the United States of America, leaving a widow, Jean Daphne Wilson (subsequently Willis, she having remarried on 10th January 1946—after the commencement, but before the hearing, of the action hereunder mentioned), and two children, a daughter born on 28th February 1943 and a son born on 31st July 1944. On behalf of herself and the children, the widow brought an action in the Supreme Court of Western Australia against the Commonwealth, by virtue of the *National Security* (*Claims against the Commonwealth in relation to Visiting Forces*) *Regulations*, claiming damages under the *Fatal Accidents Act* 1846 (9 & 10 Vict. c. 93), as adopted by the Act 12 Vict. No. 21 (W.A.). Liability was admitted by the defendant at the trial of the action in March 1946 before *Dwyer* C.J., who held that, in the circumstances of the case (which appear sufficiently in the judgments hereunder), the widow had not suffered any pecuniary loss through the death, but gave judgment for the plaintiff for £575, to be allocated, as to £275, to the elder child, and, as to £300, to the younger child.

From this decision the plaintiff appealed to the High Court.

Lappin and *Bidstrup*, for the appellant.

Lappin. In reaching the conclusion that the plaintiff had not suffered any pecuniary loss *Dwyer* C.J. wrongly took into account the fact that she had remarried and also the fact that part of the proceeds of the deceased's life-insurance policy came to her through his estate. *Dwyer* C.J. referred in his judgment to the sum of £700, the whole of the insurance moneys, as having come into the estate of the deceased and, therefore, enuring for the benefit of the claimants, and went on to say that about £566 of it would go to the widow. He appears to have assumed that the whole of this amount was a benefit, accruing to the widow by reason of the death, which could be taken into account for the purposes of the *Fatal Accidents Act*. It is incorrect to take the whole sum, without any deduction, into account in this way. [He referred to *Grand Trunk Railway Co. of Canada* v. *Jennings* (1); *Hicks* v. *Newport, Abergavenny and Hereford Railway Co.* (2); *Baker* v. *Dalgleish Steamship Co.* (3); *Matthew* v. *Flood* (4); *Davies* v. *Powell Duffryn Associated Collieries Ltd.* (5).]

(1) (1888) 13 App. Cas. 800, at p. 804.
(2) (1857) 4 B. & S. 403 (*n*).
(3) (1922) 1 K.B. 361, at pp. 372, 381.
(4) (1939) S.A.S.R. 389, at p. 392.
(5) (1942) A.C. 601, at p. 617.

It would be proper to take into account the surrender value of the policy at the time of the death, or, at the most (if it is a larger sum), the money value of the gain resulting from the acceleration of payment of the policy by reason of the deceased's early death. This is a matter of calculation to which *Dwyer* C.J. does not appear to have directed his mind. At all events, his judgment does not disclose any calculation showing what the gain to the widow was. It is submitted, therefore, that he did not proceed upon a correct principle so far as the insurance moneys were concerned. The fact that the widow had remarried was not a relevant fact, and regard should not have been had to it. The court should have taken the facts as they stood at the time of the death. In the case of a widow who had not remarried, the court could have regard to the possibility of remarriage as it might be taken into account in actuarial calculations, and it should have proceeded on exactly the same basis in the present case. The decision in *Williamson* v. *John I. Thornycroft & Co. Ltd.* (1) was a decision on the particular facts of that case and should not be treated as of general application. The amounts awarded to the children were so small as to be unreasonable. The judge did not give sufficient weight to the future prospects of the children.

Bidstrup referred, in relation to the insurance moneys, to *McPhee* v. *Carlsen* (2).

Dean K.C. (with him *B. J. Dunn*), for the respondent. As to the fact of remarriage, the matter is concluded by the decision in *Williamson* v. *John I. Thornycroft & Co. Ltd.* (1). It is conceded by the appellant, as it must be, that the possibility of remarriage would have been a relevant consideration; in the ordinary case this would of necessity be an uncertain factor which could at best be the subject of estimate. Where the matter is brought into the realm of certainty, the court is relieved of the necessity of making such an estimate. In the present case, where it appears that the second marriage was to a man who was in at least as good a position as the first husband, it was quite properly taken into account. As the widow had only five-months' widowhood, *Dwyer* C.J. was well warranted in deciding, as in effect he did, that it was not necessary to make any precise calculations with regard to the insurance moneys; it was obvious that a substantial portion, if not the whole, of the amount the widow received could properly be taken into account, and it was possible to say in general terms that it was more

(1) (1940) 2 K.B. 658. (2) (1946) V.L.R. 316.

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than sufficient to offset any loss suffered by her. In this connection it should be observed that the policy in this case was taken out by the deceased, not by the widow as in *Grand Trunk Railway Co. of Canada* v. *Jennings* (1); the insurance moneys were not payable to the widow in her own right: See *Beven* on *Negligence*, 4th ed. (1928), vol. 1, p. 263. In estimating pecuniary loss for the purposes of the *Fatal Accidents Act* it is proper to take into account every pecuniary benefit resulting from the death. For instance, in Australia regard could be had, it is submitted, to the fact that the widow is entitled to a pension under the *Widows' Pensions Act* 1942-1945. [He referred to *In re Dodds*; *Ex parte Vaughan's Executors* (2); *In re English Assurance Company* (*Holdich's Case*) (3); *Hall* v. *Wilson* (4); *Weldon* (*Commissioner of Taxes for Victoria*) v. *Union Trustee Co. of Australia Ltd.* (5); *Trustees Executors & Agency Co. Ltd.* v. *Commissioner of Taxes* (*Victoria*) (6); *Johnson* v. *Hill* (7); *Carling* v. *Lebbon* (8).] Accordingly, it does not appear that the trial judge acted on any wrong principle in deciding against the wife, and his judgment should not be disturbed. So also as to the children. The award to them, if it is open to any criticism, was rather too favourable having regard to their circumstances. [He referred to *Price* v. *Glynea and Castle Coal and Brick Co.* (9).]

Cur. adv. vult.

Aug. 6.

The following written judgments were delivered:—

LATHAM C.J. This is an appeal from the Supreme Court of Western Australia (*Dwyer* C.J.) in an action under *Lord Campbell's Act*—the *Fatal Accidents Act* 1846 (9 & 10 Vict. c. 93), adopted in Western Australia by the Act 12 Vict. No. 21. Liability was admitted and the only questions arising relate to the assessment of damages.

The action was brought by the widow of the person whose death was caused by the negligence of the defendant. She sued on behalf of herself and her two children, aged at the time of trial three years and one and a half years respectively.

The learned trial judge was of opinion that the widow had suffered no pecuniary damage by reason of the death of her husband and accordingly made no order in her favour. He awarded £275 for the elder child and £300 for the younger child.

(1) (1888) 13 App. Cas. 800.
(2) (1890) 25 Q.B.D. 529.
(3) (1872) L.R. 14 Eq. 72, at pp. 80, 83.
(4) (1939) 4 All E.R. 85; 56 T.L.R. 15.
(5) (1925) 36 C.L.R. 165, particularly at p. 169.
(6) (1941) 65 C.L.R. 33.
(7) (1945) 2 All E.R. 272.
(8) (1927) 2 K.B. 108.
(9) (1915) 85 L.J. K.B. 1278.

The deceased husband at the time of his death was earning £6 3s. 10d. per week. Out of this he kept 10s. for himself and paid 6s. tax and 11s. for premiums upon an insurance policy upon his own life (payable after 20 years) which he had taken out five months before his death.

The widow remarried five months after the death of her husband and the learned judge found (on evidence which undoubtedly justified the finding) that the second husband had a position and prospects which were at least equal to those of the first husband. Thus five months after the death of the claimant's husband she was as well off as she had ever been from a pecuniary point of view.

The first objection to the judgment is that the learned judge should not have taken into account the fact that the widow had remarried. It is not disputed that the chances of remarriage of a widow are relevant to the assessment of damages under the *Fatal Accidents Act*, but it is said that this matter should be looked at by way of estimate as at the time of the death of the person which is the foundation of the claim, and that the circumstance that the widow has in fact subsequently remarried should not be taken into account. But, where actual facts are known, speculation as to the probability of those facts occurring is surely an unnecessary second-best. Damages are awarded for injury actually suffered and for prospective injury. Prospective injury can only be estimated with more or less probability. But where the extent and character of what would at one time be described as prospective injury depends upon the happening or non-happening of a particular event and that event has in fact happened, it is unnecessary to speculate as to whether or not this event might happen and, if so, when. In such a case prospective damage (or diminution of damage) has become actual. I give a simple illustration of the general principle. A man is injured by accident and his eyes are gravely damaged. Immediately after the accident there is every reason to believe that he will be permanently blind. He sues for damages. Before trial he completely recovers his sight. In such a case he would not be given damages as for permanent blindness. In my opinion the case of *Williamson* v. *John I. Thornycroft & Co. Ltd.* (1) is conclusive upon this point. In that case it was necessary to assess damages under the *Fatal Accidents Act* in the case of a widow. The widow died before the trial. It was held that the court was entitled to take into account the fact that she had only a short tenure of life before her dependence was brought to an end. I am therefore of opinion that the learned judge was right in holding that in respect of support during the period following her second

(1) (1940) 2 K.B. 658.

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marriage the widow had not suffered any pecuniary loss by reason of the death of her first husband.

The next point raised upon the appeal relates to the proper method of taking into account an insurance policy taken out by the deceased upon his own life for £700. This policy was taken out in February 1945 and the accident causing the death of the husband occurred in August 1945. The policy moneys represented practically the only asset in his estate. He died intestate and under the *Administration Act* 1903-1941 (W.A.), s. 14, the wife became entitled to £500 of the policy moneys, together with one-third of the residue, that is, in all to £566. The children each became entitled to £66. The learned Chief Justice held that the widow had not suffered any pecuniary damage, and accordingly made no award in her favour.

The general rule applicable to the assessment of damages under the Act was shortly stated by Lord *Russell of Killowen* 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 into account. Under those Acts the balance of loss and gain to a dependant by the death must be ascertained, the position of each dependant being considered separately."

If moneys are received by a widow as a matter of legal right under an accident insurance policy, the amount of such moneys should be deducted from damages under the Act: See *Hicks* v. *Newport, Abergavenny and Hereford Railway Co.*, quoted in a note to *Pym* v. *Great Northern Railway Co.* (2); *Baker* v. *Dalgleish Steam Shipping Co.* (3). In the case of a life policy on the life of the deceased where the widow is the owner of the policy, the benefit derived by the widow from the death amounts only to the saving of premiums which, if her husband had lived, she (or possibly he) would have had to pay to keep up the policy and to the benefit of acceleration of the payment of the policy moneys by reason of the death of the husband at an early date. In *Grand Trunk Railway Co. of Canada* v. *Jennings* (4) the widow was the owner of the life policy and it was held for the reason stated that it would be wrong to deduct the whole of the policy moneys from damages awarded to her. In such a case the widow as owner would be entitled to the policy moneys in any case upon the death of her husband, an event which is certain in itself though the time of its happening is uncertain.

(1) (1942) A.C. 601, at p. 606.
(2) (1863) 4 B. & S. 396, at p. 403 (n) [122 E.R. 508, at p. 510].
(3) (1922) 1 K.B. 361, at p. 362.
(4) (1888) 13 App. Cas. 800.

In the present case, however, the policy was owned by the deceased husband and not by the widow. The widow had no legal right under the policy. She received the benefit of the policy moneys only because the policy was an asset belonging to her husband. The policy was the only asset and apparently the deceased owed no debts. If there had been other assets and if there had also been debts which were payable out of all the assets, the difference between the two cases of a policy owned by the widow and a policy owned by the deceased would be more obvious. Consideration of such a case shows, I think, that if the policy was owned by the deceased, there are serious difficulties in the way of regarding the widow as taking a benefit under the policy itself. She would receive a benefit consisting of her share (whatever it might be—under a will or upon intestacy) of the balance of the deceased's estate, to which the policy moneys would have contributed some proportion. In my opinion there is a real distinction for the purpose of assessing damages under the Act between the case of a life policy owned by the deceased, the moneys paid under which must go into his estate for distribution in due course of administration, and the case of a policy upon the life of the deceased which is owned by a dependant who claims under the Act.

The learned Chief Justice dealt with the questions affecting the moneys received under the insurance policy in the following way :—

" The question of the effect of the receipt of life insurance monies has frequently been discussed under *Lord Campbell's Act*. In England an Act of Parliament was passed in 1908 removing such monies from account in the assessment of damages, but this legislation has not been followed in W.A. It is obvious, I think, that the receipt of such monies is a factor which must be considered in estimating the pecuniary loss which the death of the insured causes to his dependants. I do not suggest that the total received must be offset against an assessment arrived at on other considerations ; but I do not agree that all that is allowable by way of deduction against the benefit of the payment is a sum calculated as an equivalent to the amount representing continued payment of premiums, nor does it seem to me that the advantage of accelerated payment can be compensated by making such a deduction. If deceased had lived, the liability for premiums would have continued and would have to be met out of his earnings, and the sum of £700 would not have been paid over until a period of over 21 years had elapsed. The policy, it seems to me, had practically no surrender value and the benefit of the accelerated payment was therefore high, even regarded from the point of view only of use or interest of the policy sum and almost all of the sum now belongs to the widow in her own right.

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I content myself by saying that such facts are important for consideration in assessing the claimant's real pecuniary loss. Having regard to these matters I have come to the conclusion that the widow has not actually suffered any such loss, and that in the circumstances which have been supervened, she is actually better placed financially than before the death of her first husband."

In my opinion the learned judge was right in this method of approaching the question. In order to assess damages under the Act it is necessary to compare, on the one hand, what the widow could reasonably have expected to receive by way of pecuniary benefit if her husband had lived with, on the other hand, the benefit (whatever it may be) which she has received by reason of his earlier death. The simple deduction of the whole amount of policy moneys from the damages could be justified only upon an assumption that, if the husband had not met his death as he did, the widow would not have received any benefit from the policy. But it would be wrong to make such an assumption, because it is clear that she might have received some benefit if her husband had predeceased her during the currency of the policy or if the policy had matured during their joint lives.

The question is: What pecuniary benefit has the widow lost by the death of her husband? She has lost what she had a reasonable expectation of receiving if he had lived longer. In the present case that benefit is (1) support out of the available income of the husband—i.e., the income less, *inter alia*, the premiums payable under the policy; and (2) the probability of receiving the whole or a share of his estate when he died—and that estate might include the £700 payable under the policy. As to (1)—the loss of support in the present case is limited to a period of five months. As to (2)—the value of the probability of sharing in whatever estate the husband might leave upon his death at a later date would depend upon whether the husband kept up his payments of premiums, upon whether and to what extent he was in debt when he ultimately died, and upon whether the widow survived him (if he died within 20 years) or lived until the policy matured (if he lived for 20 years). For this probability there has been substituted, by reason of the early death of the husband, an immediate and certain payment of a sum of £566. The excess of this benefit, which has actually been received, over the prospective and uncertain benefit of sharing in his estate at some time in the future if she lived long enough was held to be more than equal to the lost benefit of support for five months. In my opinion it was a reasonable conclusion that, in the circumstances, the widow suffered no pecuniary damage in relation to the period of

five months which elapsed before her second marriage and the learned Chief Justice acted rightly in awarding no damages to her.

It was also contended by the appellant that insufficient damages had been allowed to the two children. The elder child was awarded £275 and is entitled to £66 from the estate. The younger child was awarded £300 and he also is entitled to £66 from the estate. The benefit which the children would have derived from their father if he had lived is essentially a matter of estimate in which judgment and discretion play a large part. I can see no reason for holding that the learned judge has underestimated the benefits in this case.

In my opinion, therefore, the appeal should be dismissed. The Commonwealth does not, in all the circumstances, ask for any order as to the costs of the appeal.

RICH J. I agree that the decision of *Dwyer* C.J. is correct.

In my opinion in determining the damage sustained by the plaintiff by reason of her husband's death the learned Chief Justice was entitled to have regard to her remarrying. This is established by the modern cases.

It is also proper in assessing damages in the instant case to take into account the fact that moneys were recoverable by the administrator of the deceased's estate under a policy of life insurance by reason of his death.

The amount to be awarded to each of the two children of the deceased is purely a question of fact and I see no reason to differ from the learned Chief Justice in this respect.

The appeal should be dismissed.

STARKE J. Appeal from a judgment of the Supreme Court of Western Australia in an action brought by the appellant for the benefit of herself and her two infant children aged three years and one and a half years respectively, pursuant to the Act providing for compensating the families of persons killed by accident, 9 & 10 Vict., c. 93 (*Lord Campbell's Act*) and the *National Security* (*Claims against the Commonwealth in relation to Visiting Forces*) *Regulations*.

The appellant married Cuthbert Wilson, who was killed in a motor accident in August 1945. She married again in January 1946.

The Commonwealth admitted liability. The assessment of damages was therefore the only matter in issue at the trial of the action. The Chief Justice, who tried the action, awarded nothing to the widow but £275 to the elder child and £300 to the younger.

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The damages, it is now well settled, are " the actual pecuniary loss of each individual entitled to sue." But except in the case of express statutory direction to the contrary the damages to be awarded to a dependant of the deceased " must take into account any pecuniary benefit accruing to that dependant in consequence of the death of the deceased." " It is the net loss or balance which constitutes the measure of damages " (*Davies* v. *Powell Duffryn Associated Collieries Ltd.* (1)).

The damages awarded in the present case have been attacked in the case of the widow on the ground that the Chief Justice took into account the capital sum of £700 received by the estate of the deceased under a policy of insurance on his own life taken out by the deceased in February 1945, and also on the ground that the Chief Justice took into consideration the fact of the remarriage of the widow of the deceased within five or six months of this decease. It was not disputed that the moneys received by the estate from the policy moneys must be taken into account, for there is no statutory direction to the contrary as in England, but it was said that the benefit derived by the widow from the policy was not the whole sum payable under it but the accelerated receipt of a sum of money the consideration for which had already been paid by him out of his earnings.

The deceased was twenty-one years of age and the policy apparently was payable upon the deceased attaining the age of 45 years or upon death. The premiums payable under the policy were about eleven shillings per week so he could not have paid more than £20 altogether in premiums on the policy. The deceased left no assets other than the insurance moneys and died intestate.

The law of Western Australia provides that husband and wife shall be entitled, on the death of the other, as to property in which he or she dies intestate, to the following shares only—where the net value of such property exceeds £500, to the sum of £500 absolutely and where issue survives to one third of the share of the residue and the issue to the remaining two thirds (*Administration Act* 1903-1941, s. 14).

The Chief Justice observed that about £566 of the £700 derived from the policy went to the widow and the balance to the children. And it should also be observed that the policy was not payable to the widow as in the *Grand Trunk Case* (2), but was payable to the insured on attaining the prescribed age or to his personal representative in case of his death.

The contention that the surrender value of the policy was the measure of the pecuniary benefits accruing to the dependants of the

(1) (1942) A.C. 601.

(2) (1888) 13 App. Cas. 800, at p. 802.

deceased is, I think, untenable. All life assurance offices agree or are willing to return a sum known as the surrender value based on premiums paid and bonuses declared but that value is less than the total of the premiums paid and bonuses declared because an allowance must be made for current risks and expenses and the present value of the bonuses declared. The amounts vary according to the practice of different offices and the rates of interest used by them.

But the premiums paid in the present case were so small in amount that a surrender value of the policy on the life of the deceased did not exist or was negligible. In any case that value does not represent the pecuniary benefits accruing from the proceeds of the policy to the dependants of the deceased in consequence of his death.

It is contended however that the whole sum derived from the policy should not be taken into account as a pecuniary benefit accruing to the dependants of the deceased in consequence of his death. And this, I think, is true but the Chief Justice did not, as I understand his judgment, so decide.

He certainly took the payment into consideration but he denied that the total sum was a pecuniary benefit accruing to the widow in consequence of the death of her husband and he also denied that the sum allowable by way of deduction in the present case was the present value of the future weekly premiums.

The weekly premiums were not the consideration of assurance for the periods in which they were severally paid for they were equal in amount whereas the risk in the early years of life is much less than in the later (*New York Life Insurance Co.* v. *Statham* (1)).

But in the present case the consideration paid in premiums out of the earnings of the deceased was negligible and apparently the Chief Justice regarded the sum received by the widow from the proceeds of the policy, with some small though unstated deduction, as substantially the pecuniary benefit accruing to her from the proceeds of the policy in consequence of the death of the deceased. In my opinion, the Chief Justice was entitled on the facts established in the case to act upon this view (*Hicks* v. *Newport, Abergavenny and Hereford Railway Co.* (2)).

Again, the Chief Justice was equally entitled to take into consideration the possibility of remarriage of the widow. And, if so, he was entitled to take into consideration the fact that she had remarried within a few months a man whose financial position was as good as, if not better than, that of her former husband, the deceased

(1) (1876) 93 U.S. 24, at p. 34 [23 Law. Ed. 789, at p. 792].

(2) (1857) 4 B. & S., at p. 403 (n) [122 E.R., at p. 510].

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(See *Williamson* v. *John I. Thornycroft & Co. Ltd.* (1); *In re Bradberry*; *National Provincial Bank Ltd.* v. *Bradberry* (2)).

The damages awarded to the children were challenged because it was said that the Chief Justice failed to give sufficient attention to their prospects of future maintenance, education and advancement.

The Chief Justice appears to me to have taken all relevant circumstances into consideration and examining the figures for myself the award he made does not appear to be unreasonable nor insufficient having regard to the facts of the case.

The appeal should be dismissed.

DIXON J. The complaints made by the plaintiff against the judgment of *Dwyer* C.J. fall under three heads.

1. It was said that his Honour ought not to have treated the plaintiff's remarriage, which took place five months after the death of her first husband, Wilson, as showing that, except possibly in that interval, no actual pecuniary loss to her had ensued from his death and that the learned judge should have taken his stand as at the date of such death and considered only the probabilities then existing of the plaintiff's remarrying.

In my opinion the objection is no longer tenable. The decided cases are almost uniformly against it. I refer particularly to *Williamson* v. *John I. Thornycroft & Co. Ltd.* (3), and especially per *du Parcq* L.J. (4), to *In re Bradberry*; *National Provincial Bank Ltd.* v. *Bradberry* (5) and to the authorities discussed by *Uthwatt* J. (6), authorities from which his Lordship said the principle was to be drawn that where facts are available they are to be preferred to prophecies. See further the cases cited by *Williams* J. in *Trustees Executors & Agency Co. Ltd.* v. *Commissioner of Taxes* (*Vict.*) (7) and also his Honour's observations in *McCathie* v. *Federal Commissioner of Taxation* (8) and also *In re North's Settled Estates*; *Public Trustee* v. *Graham* (9).

It is apparent that the fact of the plaintiff's early remarriage to a husband who is as well able to provide for her as was the deceased is the substantial reason why *Dwyer* C.J. made no award for damages in the plaintiff's favour.

2. But it was complained that some amount should have been assessed for the loss of financial support that the plaintiff sustained during her brief widowhood, and that his Honour's failure to allow

(1) (1940) 2 K.B. 658.
(2) (1943) Ch. 35.
(3) (1940) 2 K.B. 658.
(4) (1940) 2 K.B., at pp. 660, 661.
(5) (1943) Ch. 35.
(6) (1943) Ch., at pp. 42-45.
(7) (1941) 65 C.L.R. 33, at p. 41.
(8) (1944) 69 C.L.R. 1, at p. 16.
(9) (1945) 174 L.T. 303, at p. 305.

anything for this period was to be explained by his treating her share of the insurance payable as a result of her first husband's death as involving a countervailing gain to her. This treatment of the insurance moneys was said to be due to a misapplication of principle.

In *Public Trustee* v. *Zoanetti* (1), I took occasion to state the principles which have been applied to the receipt of insurance moneys in assessing compensation under the provisions of *Lord Campbell's Act* in jurisdictions where legislation has not been adopted excluding such moneys from consideration, and I mentioned the relevant authorities. I shall not repeat what I then said, but I should, perhaps, add that I agree in the explanation of the matter given by *Richards* J. in *Butler* v. *McLachlan* (2) to which I then referred. I think I should also add that the view that the receipt of the policy moneys is or may be only an acceleration of a benefit which might have been expected at a future date, had the deceased lived, is, in my opinion, applicable to policy moneys devolving on a relative under a will or intestacy. This is true also of the further view that there should not be a double deduction, one of future premiums from the wages fund and the other of policy moneys received on death. They appear to me to be applicable to such a case because I think that there is only a distinction of degree between insurance moneys to which under the terms of the policy the relative is entitled on the deceased's death and insurance moneys payable to the deceased's estate and devolving on the relative under the deceased's will or upon the intestate distribution of his assets.

In each case, during the deceased's lifetime, the claims of the relative to enjoyment of the insurance moneys are future and expectant upon contingent events. In the first case, however, the relative's claim to future enjoyment has a foundation in legal right; in the second, it has, what may be no less real and sure, a foundation in the just and reasonable expectation of the fulfilment of moral duty on the part of the man ultimately killed. As *Bankes* L.J. points out in *Baker* v. *Dalgleish Steam Shipping Co.* (3), a deduction from the compensation otherwise estimated must be made on account of receipts that were reasonably expected on the deceased's death, no less than benefits to which the relative was legally entitled. But in any case, as in the result the relative does obtain the insurance moneys, it would seem that the reasoning in relation to the premiums should be the same, that is, of course, if they enter into the ascertain-

(1) (1945) 70 C.L.R. 266, at pp. 279-281.

(2) (1936) S.A.S.R. 152, at pp. 157 et seq.

(3) (1922) 1 K.B. 361, at pp. 367, 368.

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ment of the amount that would have been available for the relative, had the deceased's life continued.

In the present case I had some doubt, which I expressed during the argument, whether the passage in the judgment of the learned judge dealing with this matter did not imply a process of assessment that could not be supported. But I do not think this doubt is well founded. At the hearing his Honour used, without objection, some annuity, mortality and other tables. These were not produced before us, but having looked again at similar tables, I can see that his Honour may well have adopted the view that in the particular circumstances of the case, including the nature of the policy, a real financial benefit accrued to the plaintiff from the falling in of the policy. We are after all dealing with a matter of fact, although one depending on general reasoning, and I do not think that the learned judge fell into any error of law in arriving at his conclusion that, having regard to her share of the policy moneys and to her remarriage, the plaintiff in fact sustained no pecuniary loss in consequence of her first husband's death.

3. The third and last complaint against the judgment under appeal was that too small a sum had been awarded to each of the two children.

I have considered the facts affecting this question, which also is one of fact, and I have formed the opinion that his Honour's assessment is not one that an appellate court can disturb.

In my opinion, the appeal should be dismissed. I hope that the Commonwealth will not ask for costs.

McTIERNAN J. I agree that there is no error of principle or mistake in the computation of the damages awarded by *Dwyer* C.J. and I do not wish to add anything to reasons given in this Court for dismissing the appeal.

WILLIAMS J. I agree with the judgment of *Dixon* J.

Appeal dismissed.

Solicitors for the appellant, *Dwyer & Thomas*, Perth, by *Oswald Burt & Co.*

Solicitor for the respondent, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

E. F. H.