dividing the salary or wages by the number of days in the period and multiplying the resultant amount (i) in the case of each week—by seven and (ii) in the case of each part of a week—by the number of days in the part of a week. It is clear from these provisions that if the tilers in question should be regarded as employees who were engaged on piece-work it would be necessary for the prosecution to establish in each instance the period of time taken for the completion of the work for which payment was made. This difficulty was fully appreciated by counsel for the appellant and he sought to meet it by pointing to the fact that more or less regular weekly payments had been made to each of the tilers concerned. But, even if regular weekly payments were made—and this was a matter of some dispute—it by no means follows that any of the payments which are in question in this appeal were made, or should, by reason of the statutory provisions referred to, be deemed to have been made, in respect of a period of one week. It is, we think, impossible to ascertain from the evidence what period of time was occupied by the tilers in performing any of the work for which the payments in question were made and this being so there is an additional reason why the appeal should fail.

We should, perhaps, add that the averment in each case that the respondent was an employer who paid a sum of money as wages in respect of a period of one week does not carry the matter any further for the evidence establishes that the sums in question become payable in respect of particular tasks performed and not in respect of any period of time. Since there is no averment as to the period of time occupied in the performance of each task there is, of course, no room for the operation of the deeming provisions of s. 221c (2).

Appeal dismissed with costs in both cases.

Solicitor for the appellant, *D. D. Bell*, Crown Solicitor for the Commonwealth of Australia.

Solicitors for the respondent, *Corr & Corr*.

R. D. B.

[HIGH COURT OF AUSTRALIA.]

LINCOLN . . . . . APPELLANT;
PLAINTIFF,

AND

GRAVIL . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

H. C. OF A. 1954.

HOBART, *Mar.* 22;

MELBOURNE, *June* 1.

Webb, Fullagar and Kitto JJ.

Damages—Assessment—Lord Campbell's Act—Matters to be considered—Widow's pension—Incidence of income tax—Fatal Accidents Act 1934-1943 (*Tas.*).

In assessing damages in favour of a widow under the *Fatal Accidents Act* 1934-1943 (Tas.), an allowance should be made, by way of deduction from the damages which would otherwise be awarded, for any widow's pension which the widow would be likely to receive under the *Social Services Consolidation Act* 1947-1953 (Cth.) as the widow of the deceased.

So *held*, by *Fullagar* and *Kitto* JJ. (*Webb* J. dissenting).

Payne v. *Railway Executive* (1952) 1 K.B. 26, distinguished.

Per Fullagar and *Kitto* JJ.: The most practical method of assessment in this particular case is first to decide what amount of damages ought to be awarded to the widow for her own benefit without taking account of the widow's pension, and then to consider what deduction (if any) is appropriate in view of the pension she is likely to receive.

In assessing damages under the Act, the benefit which would have been derived from the future earnings of the deceased is to be calculated upon the net earnings of the deceased after income tax has been deducted.

So *held*, by the whole Court.

Decision of the Supreme Court of Tasmania (*Gibson* J.), varied.

APPEAL from the Supreme Court of Tasmania.

On 23rd July 1952, William Frederick Lincoln died as a result of injuries he received in a collision between a bicycle on which he was riding and a motor car driven by Gravil. His widow sued in the Supreme Court of Tasmania under the *Fatal Accidents Act*

1934-1943 (Tas.) (*Lord Campbell's Act*), alleging negligence on the part of Lincoln.

The trial judge (*Gibson* J.) gave a verdict for Mrs. Lincoln for £1,000, of which £750 was for Mrs. Lincoln herself and the remainder was divided between the two step-children of the deceased.

From that judgment Mrs. Lincoln appealed to the High Court on the ground that the damages were inadequate and a cross-appeal by Gravil was lodged upon the grounds that the learned trial judge should have found that he was not negligent and that the deceased was guilty of contributory negligence. The findings of the learned trial judge and the method by which he arrived at his assessment of damages appear sufficiently in the judgment of the Court hereunder.

R. C. Wright (with him *R. M. Clarke*), for the appellant. Firstly, the trial judge was wrong in using as a basis the net wages of the deceased and not the gross wages: *Jordan* v. *Limmer & Trinidad Lake Asphalt Co. Ltd.* (1); *Billingham* v. *Hughes* (2). Secondly, the trial judge has attributed to the appellant a benefit from the deceased's wages of only two pounds above the amount of a widow's pension. In distributing a total wage of thirteen pounds to fourteen pounds a week, the widow should be considered to have had the benefit of more than £5 12s. 6d. a week. Thirdly, the trial judge was wrong in law in taking into account the widow's entitlement to a pension under the *Social Services Consolidation Act* 1947-1953: *Payne* v. *Railway Executive* (3); *Bradburn* v. *Great Western Railway Co.* (4). There is no distinction between the expressions used in s. 5 of the *Fatal Accidents Act* 1934-1943 and the common law position.

[FULLAGAR J. referred to *Attorney-General for New South Wales* v. *Perpetual Trustee Co.* (*Ltd.*) (5).]

Cases such as *Baker* v. *Dalgleish Steam Shipping Co.* (6); *Grand Trunk Railway Co. of Canada* v. *Jennings* (7); *Smith* v. *Hydro-Electric Commission of Tasmania* (8); *Carling* v. *Lebbon* (9); *Lory* v. *Great Western Railway Co.* (10); *Johnson* v. *Hill* (11); *Bishop* v. *Cunard White Star Co. Ltd.* (12); *Smith* v. *British European Airways Corporation* (13) are irreconcilable with *Payne* v. *Railway Executive* (3).

(1) (1946) K.B. 356.
(2) (1949) 1 K.B. 643.
(3) (1952) 1 K.B. 26.
(4) (1874) L.R. 10 Exch. 1.
(5) (1952) 85 C.L.R. 237, at pp. 291, 292.
(6) (1922) 1 K.B. 361.
(7) (1888) 13 App. Cas. 800.
(8) (1937) Tas. L.R. 99, at p. 124.
(9) (1927) 2 K.B. 108.
(10) (1942) 1 All E.R. 230.
(11) (1945) 2 All E.R. 272; 173 L.T. 38.
(12) (1950) P. 240.
(13) (1951) 2 K.B. 893.

H. C. OF A. 1954. LINCOLN v. GRAVIL.

[FULLAGAR J. *Payne* v. *Railway Executive* (1) was not a case under *Lord Campbell's Act*.]

Butler v. *McLachlan* (2), *Salvemini* v. *Australian Barley Board* (3) and *Scott* v. *Heathwood* (4) are in point. The pension in this case arises from the fact of widowhood. The principle of *Payne* v. *Railway Executive* (1) should be adopted. Fourthly, even if it is proper to take the widow's pension into account, the trial judge should have held that because of her assets the appellant was disqualified. Fifthly, in any event the appellant will be disqualified from receiving any widow's pension on 1st February 1956, when her youngest child attains the age of sixteen years. Sixthly, when the appellant reaches the age of fifty years, either she will be totally disqualified from receiving any pension by reason of her property or she will be qualified only as a class B widow. Seventhly, the assessment of the trial judge ignores any possible reduction in the widow's pension because of the appellant's earnings.

M. G. Everett (with him *H. J. Solomon*), for the respondent. The settled principle is that an appellate court will not interfere with an award of damages unless the primary judge proceeded on a wrong principle of law or the damages are so low as manifestly to be a completely wrong estimate (*Flint* v. *Lovell* (5)). That principle was reaffirmed in *Owen* v. *Sykes* (6), culminating in *Nance* v. *British Columbia Electric Railway Co. Ltd.* (7). The courts have not interpreted the second basis for interference as giving them licence to vary an assessment even although, on an arithmetical approach, a large variation appears in the opinions of the appellate court and the tribunal from which the appeal is brought (*The Aizkarai Mendi* (8); *Davies* v. *Powell Duffryn Associated Collieries Ltd.* (9); *Lee Transport Co. Ltd.* v. *Watson* (10); *Campbell* v. *West of Scotland Shipbreaking Co.* (11). [He referred to *Johnson* v. *Hill* (12); *Baker* v. *Dalgleish Steam Shipping Co.* (13).] In an action under *Lord Campbell's Act*, only the net wages of the deceased should be considered. The cases of *Jordan* v. *Limmer & Trinidad Lake Asphalt Co. Ltd.* (14) and *Billingham* v. *Hughes* (15) were concerned only with damages for personal injuries. There is a long line of cases establishing that a pension similar to that to

(1) (1952) 1 K.B. 26.
(2) (1936) S.A.S.R. 152.
(3) (1950) S.A.S.R. 174.
(4) (1953) Q.S.R. 91.
(5) (1935) 1 K.B. 354, at p. 360.
(6) (1936) 1 K.B. 192, at pp. 198, 199, 200.
(7) (1951) A.C. 601.
(8) (1938) P. 263, at p. 272.
(9) (1942) A.C. 601, at pp. 616, 617.
(10) (1940) 64 C.L.R. 1, at p. 13.
(11) (1953) S.C. 173, at p. 175.
(12) (1945) 2 All E.R. 272; 173 L.T. 38.
(13) (1922) 1 K.B. 361, at p. 380.
(14) (1946) K.B. 356.
(15) (1949) 1 K.B. 643.

which the appellant is entitled under the *Commonwealth Social Services Consolidation Act* is a discounting factor in an assessment of damages for a widow, and *Payne* v. *Railway Executive* (1) is distinguishable on the facts.

R. C. Wright, in reply, referred to *Grand Trunk Railway Co. of Canada* v. *Jennings* (2); *Greymouth-Point Elizabeth Railway & Coal Co.* v. *McIvor* (3); *Davies* v. *Powell Duffryn Associated Collieries Ltd.* (4); *Pamment* v. *Pawelski* (5); *Attorney-General for New South Wales* v. *Perpetual Trustee Co. (Ltd.)* (6). The discretionary nature of a pension under s. 62 of the *Social Services Consolidation Act* leaves a mere husk of an obligation (cf. *Baker* v. *Dalgleish Steam Shipping Co.* (7)).

Cur. adv. vult.

June 1.

The following written judgments were delivered :—

WEBB J. This is an appeal from a judgment of the Supreme Court of Tasmania (*Gibson* J.) awarding £1,000 damages to the appellant and her two children, the widow and step-children of one W. F. Lincoln, and apportioning £750 to the appellant. The award of damages was made in an action under the *Fatal Accidents Act* 1934 (Tas.) arising out of the death of the appellant's husband from injuries caused in a collision in a street in Hobart on 17th July 1951 between the respondent's motor car and the deceased's bicycle. *Gibson* J. found that the respondent was solely to blame for the collision. The ground of appeal is that the award of £750 damages to the appellant was inadequate. No question arises as to the damages awarded to the children. A cross-appeal, on the ground that the evidence for the appellant was circumstantial and that, assuming that the evidence for the respondent was rightly rejected by the trial judge, still there was a reasonable hypothesis consistent with the absence of responsibility of the respondent for the accident, was dismissed without reserving judgment. The evidence for the appellant was that there were three long scratches on the bitumen made by the deceased's bicycle as it was pushed or dragged along the street by the motor car. These scratches formed three straight lines of varying length, all parallel with the guttering on the deceased's correct side of the street and within five feet of the guttering. The rear wheel of the bicycle was dented as though struck from behind. The respondent,

(1) (1952) 1 K.B. 26.
(2) (1888) 13 App. Cas. 800.
(3) (1897) 16 N.Z.L.R. 258.
(4) (1942) A.C. 601, at p. 617.
(5) (1949) 79 C.L.R. 406.
(6) (1952) 85 C.L.R., at p. 291.
(7) (1922) 1 K.B. 361.

H. C. OF A. 1954. LINCOLN v. GRAVIL. Webb J.

who was the only eye-witness, admitted that the deceased was riding along on his correct side of the street and within a few feet from the gutter; but said that, while there was still ample room for the motor car to pass the deceased, the bicycle was turned to the right across the path of the car when it was too late for the car to avoid hitting it. The respondent's expert evidence was that the bicycle was struck on the side and not behind on the rear wheel.

It was well open to the learned judge to find on the balance of probabilities that the respondent was solely responsible for the collision. He had the advantage of seeing the witnesses and judging of the credibility, which was an important factor.

As to the appeal it is convenient at this stage to state the law as to (1) the duty of an appellate court in reviewing an assessment of damages by a judge sitting alone; and (2) the duty of a judge in making an assessment under *Lord Campbell's Act*.

As to (1): In *Flint* v. *Lovell* (1) *Greer* L.J. said that the appellate court before interfering with the assessment should be convinced that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely large or so very small as to make it, in the judgment of the appellate court, an entirely erroneous estimate (2). In *Davies* v. *Powell Duffryn Associated Collieries Ltd.* (3) Lord *Wright* referred to that statement as a good general guide. His Lordship added that it was not enough that there should be a balance of opinion or preference: the scale must go down heavily against the figure attacked if the appellate court is to interfere on the ground of excess or insufficiency (4).

As to (2): In *Baker* v. *Dalgleish Steam Shipping Co.* (5), *Scrutton* L.J. said: "The claim is a new right given by *Lord Campbell's Act* on new principles, not the transfer of any existing right of the dead man. The claimant is entitled to damages proportioned to the injury resulting to her from the death, and that injury must be pecuniary injury. She is not entitled to money compensation for mental suffering resulting from the death or for loss of the deceased's society. She is entitled to claim on the one hand any pecuniary benefit which it is reasonably probable she would have received if the deceased had remained alive: per *Erle* C.J. in *Pym* v. *Great Northern Ry. Co.* (6). It is not necessary that she should have a legal right to have received that benefit from the deceased or should have actually received any such benefit before the death:

(1) (1935) 1 K.B. 354.
(2) (1935) 1 K.B., at p. 360.
(3) (1942) A.C. 601.
(4) (1942) A.C., at pp. 616, 617.
(5) (1922) 1 K.B. 361.
(6) (1863) 4 B. & S. 396 [122 E.R. 508].

Taff Vale Ry. Co. v. *Jenkins* (1). It is enough that she had a reasonable expectation of pecuniary advantage in the future had the deceased survived, which pecuniary advantage may be a voluntary contribution from the deceased. On the other hand, as the question is what is her pecuniary loss by the death, any pecuniary advantage she has received from the death must be set off against her probable loss. This is clear if she receives such advantage as of legal right . . . In my view the same principle applies to voluntary benefits conferred in consequence of the death. Just as in assessing the loss by the death the probability of voluntary contribution destroyed by the death of the contributor may be included to swell the claim, so the probability of voluntary contribution bestowed in consequence of the death may be used to reduce the claim by showing what loss the claimant has in fact sustained by the death. Less weight will be given to voluntary contributions than to those made under legal obligation, just because they are voluntary. Still less weight will be given to voluntary contributions in instalments, because they are obviously terminable ; and still less weight if the contributor announces he will reduce his contribution by the amount of compensation obtained from a wrongdoer who causes the death. *Greer* J. . . . would have had to take into account the extreme probability of the Admiralty not continuing a pension if compensation could be obtained from the wrongdoer. For it is difficult to believe that a public department would put upon the taxpayer a burden which should be discharged by the wrongdoer whose act caused the death. The appellants who should have supplied the evidence gave no evidence of any practice of the Admiralty not to consider compensation from the wrongdoer in assessing the pension " (2).

I have quoted from the judgment of *Scrutton* L.J. at length because of the extent to which it is relevant here. In *Davies* v. *Powell Duffryn Associated Collieries Ltd.* (3) Lord *Wright* observed in dealing with the assessment of damages in cases under *Lord Campbell's Act* : " 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,

(1) (1913) A.C. 1.
(2) (1922) 1 K.B., at pp. 371-373.
(3) (1942) A.C. 601.

H. C. OF A. 1954.

LINCOLN v. GRAVIL.

Webb J.

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 " (1).

The effect on the amount of damages to be awarded of the receipt of a pension by a dependant widow has been dealt with in many reported cases, including *Carling* v. *Lebbon* (2), where it was held that contributory pensions to widows and orphans of a man insured under the *Widows' Orphans' and Old Age Contributory Pensions Act* 1925 must be deducted when assessing damages under *Lord Campbell's Act*. In *Johnson* v. *Hill* (3) *du Parcq* L.J. said that the reasonable prospects of a dependant receiving a pension from the Crown by reason of the death must be taken into consideration; that if the Crown could withhold or drastically reduce the pension little or no deduction should be made in respect of so shadowy an expectancy of benefit; that the tribunal would be obliged to make allowance for payment of an amount which itself would vary with the compensation, so that logically the problem seemed insoluble; that there would be no allowance unless the pension had already been paid, or the evidence showed with reasonable certainty that it would be paid; and that the burden of proof of benefit from the death rested on the defendant. In *Bishop* v. *Cunard White Star Co. Ltd.* (4) it was held that the devaluation of the pound could not be taken into account as the damages crystallized at the date of the death of the deceased; that when the number of years purchase on which the calculation was based was ascertained the necessary deductions must be made from it, and the balance apportioned among the family; and that an increase of pension due to the prospective cost of living was not to be taken into account.

Mr. *Wright* of counsel for the appellant submitted that this Court should follow the decision of the Court of Appeal in *Payne* v. *Railway Executive* (5). However that was not a claim under *Lord Campbell's Act* but by the injured party himself. It was held that a pension he had received from the Admiralty for the disability resulting from the injuries he sued for was not to be taken into consideration in assessing the damages, because the pension was paid for his naval services, which were held to be the *causa causans* of the receipt of the pension, and the injuries only the *causa sine qua non*. But the death of the injured person is the *causa causans*

(1) (1942) A.C., at p. 617.
(2) (1927) 2 K.B. 108.
(3) (1945) 2 All E.R. 272; 173 L.T. 38.
(4) (1950) P. 240.
(5) (1952) 1 K.B. 26.

of his widow's pension; at all events where she makes no contribution to the fund from which it is paid. As pointed out in *Smith* v. *British European Airways Corporation* (1) all contributory pension schemes may be said to be contractual; yet the courts have not yet held that the proceeds when received by a widow should be disregarded.

But pensions paid for or in respect of special services to the country, or as a result of contributions to a fund by the recipients or their relatives, do not in any way affect the standing of the recipients. Such pensions are in a very different category from those paid under the *Commonwealth Social Services Consolidation Act* 1947-1953. Pensions under that Act are not paid for or in respect of any special services, or because the particular recipient or someone on his or her behalf has contributed to a pensions fund. They are paid irrespective of such services or contributions. Usually they are sought by those persons, however worthy, who are compelled in more or less straitened circumstances to throw themselves on the benevolence of the Commonwealth. The appellant did so; but for the time being she might have had no alternative. In any event it does not follow that she must now be deemed to be tied indefinitely to a somewhat indigent class to the prejudice of her standing in the community and simply for the relief, at the public expense, of the wrongdoer whose want of care deprived her of her husband and of her means of support. That the standing of any person should be affected by the receipt of the Commonwealth pension is to be regretted: but I think it is undeniable that it is so affected. My duty as I see it requires me to emphasize this, however disagreeable it may be.

Then for the purpose of reducing damages there is in my opinion no difference in principle between the Commonwealth pension and one provided by a private benevolent organization under similar circumstances and conditions. Neither is a "voluntary benefit" within *Baker's Case* (2).

The pensions legislation may yet be altered to remove the element of benevolence; but I do not think it is permissible to base any finding on the prospect of such a change. That would be sheer speculation. If that could be indulged in where would the line be drawn? See *Nelungaloo Pty. Ltd.* v. *The Commonwealth* (3).

I do not overlook the fact that thousands of recipients of the Commonwealth pension have in fact contributed heavily towards Commonwealth social services; and so it is understandable if

(1) (1951) 2 K.B. 893, at p. 905.
(2) (1922) 1 K.B., at p. 371.
(3) (1948) 75 C.L.R. 495, at p. 587.

H. C. OF A. 1954. LINCOLN v. GRAVIL. Webb J.

they do not regard the pension as benevolence. But their claims to the pension are not based on their contributions; they would have the same claims if they had not paid a single penny in contributions. That is the test of the quality of the pension under existing legislation. This pension really serves the same purpose as the benefits in cash and kind formerly provided by benevolent societies.

I think then that there should be no reduction on account of any pension for which the appellant might be eligible under the *Commonwealth Social Services Consolidation Act* under which the applicant becomes a suppliant for government relief. The wrongdoer responsible cannot, I think, successfully invoke that fact—the impaired economic position and standing that his want of care has brought about—in mitigation of the damages he would otherwise have to pay, although any qualification for a pension that results might tend to compensate somewhat for the impairment of status involved. He never had been able to rely in mitigation on benefits in cash and kind provided by benevolent institutions.

Section 10 of the *Fatal Accidents Act* 1934-1943 excludes from consideration in the assessment of damages the amount received by the dependant from the estate of the deceased.

Such being the law, as I understand it, I now proceed to deal briefly with the facts. The deceased at the time of his death was a tram driver aged fifty earning £11 13s. 0d. a week after paying income tax. The appellant was not entitled to have income tax disregarded in the assessment of damages. In *Jordan* v. *Limmer & Trinidad Lake Asphalt Co. Ltd.* (1) and *Billingham* v. *Hughes* (2), to which Mr. *Wright* referred, the income tax was not deducted; but in each case the plaintiff was the injured man. It was not a case under *Lord Campbell's Act*. The deceased gave the whole of his wages less tax to the appellant; but she handed back to him two pounds or £2 10s. 0d. a week. He was in good health and temperate in his habits. He would have retired at the age of sixty-five, but had an expectancy of life beyond that. Out of what she received from the deceased she paid the rent and all the domestic expenses.

I think it is reasonable to take the benefit that the appellant would have derived from the deceased's earnings at an average of just under five pounds a week, or about £250 a year. Turning this into a lump sum by taking say twelve years' purchase, after allowing for the possibility of an earlier determination of his life than is indicated by the mortality tables, but taxing that down by having regard to the uncertainties to which Lord *Wright* refers in *Davies* v. *Powell*

(1) (1946) K.B. 356. (2) (1949) 1 K.B. 643.

Duffryn Associated Collieries Ltd. (1) and to some of which reference is made in *Nance* v. *British Columbia Electric Railway Co. Ltd.* (2), I would assess the damages at £2,500.

Accordingly I would allow the appeal and vary the judgment of the Supreme Court of Tasmania by increasing from £750 to £2,500 the amount to be paid for the benefit of the plaintiff, the appellant.

FULLAGAR AND KITTO JJ. The Court has before it an appeal and cross-appeal from a judgment of the Supreme Court of Tasmania (*Gibson* J.), given in an action under the *Fatal Accidents Act* 1934 (Tas.) as amended by the *Fatal Accidents Act* 1943 (Tas.). These statutes enact for Tasmania the provisions of *Lord Campbell's Act* subject to certain modifications.

The plaintiff was the widow of one William Frederick Lincoln, who died as a result of injuries received in a collision between a bicycle he was riding and a motor car driven by the defendant. The plaintiff sued as the widow of the deceased, her title to sue apparently arising under s. 8 of the Act by reason either that there was no executor or administrator or that no action under the Act had been brought within six months after the death of the deceased. By virtue of an amendment allowed at the trial, she sued not only for her own benefit but also for the benefit of her two dependent children, Beverley Lenna Ball and Darryl Alvin Ball. The children were step-children of the deceased, and were, therefore, by virtue of the 1943 Act, within the class of "members of the family" for whose benefit actions under the principal Act might be brought.

The plaintiff's case was that the death of Lincoln was caused by negligence on the part of the defendant in the management of his car, and the defence was a denial of negligence and an allegation of contributory negligence. The action was tried by *Gibson* J. without a jury, and his Honour gave a verdict for the plaintiff for £1,000 of which £750 was for the plaintiff herself, £150 was for Darryl Alvin Ball and £100 was for Beverley Lenna Ball. The plaintiff now appeals on the ground that the damages awarded were inadequate, and the defendant cross-appeals on the two grounds that the trial judge should have found that there was no negligence on his part and that he should have found contributory negligence on the part of Lincoln. At the conclusion of the argument we expressed a clear opinion that the evidence amply justified the findings of the learned judge on the issues of negligence and con-

(1) (1942) A.C., at p. 617.

(2) (1951) A.C. 601, at p. 615.

H. C. OF A. 1954.

LINCOLN v. GRAVIL.

Fullagar J. Kitto J.

tributory negligence, and we intimated that the cross-appeal would accordingly be dismissed. We reserved for consideration the question of damages raised by the appeal, and we now turn to that.

The deceased died on 23rd July 1952, at the age of fifty years. He was in good health, and was employed as a tram driver by the Hobart City Council, in whose tramway service he had been for about thirty years. During the financial year which ended on 30th June before his death, his gross wages amounted in the aggregate to £694 7s. 1d. but deductions of income tax by the employer in accordance with the *Income Tax and Social Services Contribution Assessment Act* 1936-1952 reduced this amount to £607 7s. 7d. This latter sum represented an average of £11 13s. 0d. per week. The learned judge assumed in the plaintiff's favour that for the future the deceased's net wages, i.e. after deduction of tax, could have been £12 10s. 0d. per week, making this assumption because the deceased and the plaintiff did not marry until 14th February 1952 and consequently it was only from that date that the deceased's wages would have included any element attributable to the fact that his marriage brought him two dependent step-children. Then his Honour assumed (and it was not disputed before us) that the retiring age in the deceased's employment was sixty-five years; and he ascertained from mortality tables that the deceased had an expectation of life beyond that age. The plaintiff, who was only forty-four years of age at the death of the deceased, had a greater expectation of life than he, and the learned judge, recognizing the necessity of allowing for the incalculable contingencies of life, took fifteen years as the period over which the plaintiff might have expected to receive financial benefits from the deceased if he had lived. The selection of fifteen years as an appropriate period is no doubt to be accounted for on the ground that the earning power of the deceased might well have continued for a considerable period after his retirement from the tramways. But his Honour assumed (and he acknowledged that the assumption was arbitrary) that the extent of the plaintiff's financial loss over the period, covering her maintenance and additional gifts, was something of the order of two pounds a week above the current rate of a widow's pension. The plaintiff had given evidence that she was receiving a widow's pension of £7 5s. 0d. a fortnight; so that the learned judge's assumption was that the plaintiff lost by her husband's death £5 12s. 6d. a week for fifteen years. Stating that as far as he could ascertain the widow's pension would not be affected by the damages recovered, his Honour proceeded on the view that the plaintiff could recover only for a loss of two pounds

per week; and having capitalized this sum and made what seemed to him to be appropriate deductions (which he did not specify) on account of the contingencies and uncertainties of the case, he reached the figure of £750 as the amount of damages which the plaintiff ought to recover for her own benefit.

In addition to submitting generally that the amount awarded is *ex facie* too low, the plaintiff challenges on four grounds the correctness of the method of assessment which his Honour pursued. The grounds were: (i) that the initial figure in the calculation should have been the deceased's gross wages, and not his net wages after deduction of income tax; (ii) that the amount which the plaintiff would probably have received for her own benefit out of the deceased's future earnings should have been taken at a higher figure than £5 12s. 6d. a week; (iii) that whatever figure should have been taken, it is wrong in law in such a case to make any deduction in respect of the widow's pension; and (iv) that even if such a deduction may be made as a matter of principle, either there was no amount to be deducted in this case in respect of pension or, at least, the amount in fact deducted was too great.

It is necessary to examine these submissions against the background of the express provision of the Act (in s. 5) that the damages which may be given are such as are thought to be proportioned to the injury resulting from the death of the deceased to the parties respectively for whom and for whose benefit the action is brought. That is to say that the measure of the damages which the plaintiff is to recover for her own benefit is the amount of her net pecuniary loss, ascertained on a balance of the losses and gains accruing to her by reason of the death. "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: *Grand Trunk Railway Co. of Canada* v. *Jennings* (1). The actual pecuniary loss of each individual entitled to sue can only be ascertained by balancing, on the one hand, the loss to him of the future pecuniary benefit, and, on the other, any pecuniary advantage which from whatever source comes to him by reason of the death": *Davies* v. *Powell Duffryn Associated Collieries Ltd.* (2).

(i) The purpose of the calculation was to find how much per week on an average the deceased would have been likely to give to the plaintiff, or to expend for her, for her own personal benefit,

(1) (1888) 13 App. Cas. 800, at p. 804. (2) (1942) A.C. 601, at pp. 611, 612.

H. C. OF A. 1954. LINCOLN v. GRAVIL. Fullagar J. Kitto J.

out of his wages; and it is obvious that the only fund in which she could expect to participate would be what remained of the wages after the deceased's tax liability had been met or provided for. In relation to damages recoverable at common law for personal injuries it has been held in a number of cases that where loss of earnings is to be allowed for the incidence of income tax is not to be considered: *Billingham* v. *Hughes* (1), and cases there cited; *Bowers* v. *Hollinger* (2); *Blackwood* v. *Andre* (3); *Davies* v. *Adelaide Chemical & Fertilizer Co. Ltd.* [*No.* 2] (4); *Ramstad* v. *Union Steamship Co.* (5). The decisions on the point are based partly on the recognition of a settled practice which, it has been considered, ought not to be disturbed, and partly on the view that the loss arising to an injured person from his being incapacitated from earning must be assessed without regard to charges such as income tax which his earnings would have had to bear. These considerations, however, have no application in the assessment of damages under *Lord Campbell's Act*, where the problem is to measure the benefit which one person would have derived from the wages of another if that other had not died. Clearly no possibility of benefit to a relative can be allowed for out of that portion of the deceased's wages which would have been absorbed in the payment of income tax and there is no established practice to be weighed against the logic of this proposition. The learned trial judge was therefore clearly right in basing his calculation upon the net earnings of the deceased after deducting income tax.

(ii) There was not shown to be any likelihood of the deceased's obtaining further advancement in the tramway's service or otherwise improving his position, and no ground appears for disagreeing with the figure of £12 10s. 0d. which the learned trial judge took as the probable amount of the deceased's average net weekly wages. The evidence which his Honour accepted established that the deceased was accustomed to give the whole of his wages to the plaintiff, and that she returned to him two pounds or £2 10s. 0d. a week for himself. The practice would no doubt have continued if the deceased had lived; and out of the remaining ten pounds or £10 10s. 0d. the plaintiff would have had to pay £1 6s. 0d. for rent, the domestic expenses for the family consisting of the deceased, her two dependent children and herself, and clothes for the children and herself. (We leave out of account two older children who were earning, and contributed to the household purse amounts which his Honour thought

(1) (1949) 1 K.B. 643.
(2) (1946) 4 D.L.R. 186.
(3) (1947) S.C. 333.
(4) (1947) S.A.S.R. 67.
(5) (1950) N.Z.L.R. 389.

would not show any profit to the plaintiff, but which presumably would cover what was expended for their benefit.) She might have had to buy clothes for the deceased, but he had not required any new clothes during the five months of the marriage; and, as against that, the learned judge thought that the deceased might have contributed something towards major items of expense from the money handed back to him out of the wages. The plaintiff was receiving child endowment payments, and his Honour thought one pound per week was the amount which in addition to the endowment, would be spent for the benefit of each of the dependent children while under sixteen. After that age the assumption apparently was that the children would go to work and support themselves. After that it might well be that the deceased's wages would in effect be shared equally by the spouses, so that the plaintiff would receive benefits to the extent of £6 5s. 0d. a week. But when all contingencies are borne in mind it would not be possible to say that £5 12s. 6d. a week as an average is so low a figure to take that if there were no other point in the case an award of damages founded upon that figure ought to be interfered with on appeal.

(iii) The question whether, in assessing the net loss resulting to a relative from the death of the deceased in a case under *Lord Campbell's Act*, allowance should be made, by way of deduction from the damages which would be otherwise awarded, in respect of a pension which the relative may receive in consequence of the death of the deceased, has been adverted to in a number of cases. It has been held without exception, so far as we are aware, that unless such a deduction is excluded by special statutory provision there must be taken into account against the items of loss occasioned by the death any right to a pension, and any reasonable expectation (as distinguished from a mere speculative possibility) of a pension, which has arisen in consequence of the death: *Baker* v. *Dalgleish Steam Shipping Co.* (1); *Carling* v. *Lebbon* (2); *Butler* v. *McLachlan* (3); *Johnson* v. *Hill* (4); *Lory* v. *Great Western Railway Co.* (5); *Salvemini* v. *Australian Barley Board* (6); *Bishop* v. *Cunard White Star Co. Ltd.* (7); *Smith* v. *British European Airways Corporation* (8). The plaintiff, however, based an argument to the contrary upon the decision of the Court of Appeal in *Payne* v. *Railway Executive* (9), by which it was held that the probability of a pension being paid under the provisions of an Order in Council to an injured

(1) (1922) 1 K.B. 361.
(2) (1927) 2 K.B. 108.
(3) (1936) S.A.S.R. 152.
(4) (1945) 2 All E.R. 272; 173 L.T. 38.
(5) (1942) 1 All E.R. 230.
(6) (1950) S.A.S.R. 174.
(7) (1950) P. 240.
(8) (1951) 2 K.B. 893.
(9) (1952) 1 K.B. 26.

H. C. OF A. 1954. LINCOLN v. GRAVIL. Fullagar J. Kitto J.

sailor in the Royal Navy could not be taken into consideration in reduction of the damages he was entitled to recover in an action under the common law against a defendant responsible for the negligence which caused the injury. Counsel recognized that the judgments delivered in that case distinguished the decisions under *Lord Campbell's Act*, while accepting them as correct; but he submitted that the distinction taken was ill-founded, and the reasoning which led the Court to exclude pensions from consideration in assessing damages at common law should equally lead to their being excluded in the case of damages under *Lord Campbell's Act*. The validity of the distinction upon which the Court of Appeal insisted, however, is a necessary consequence of defining the damages recoverable under *Lord Campbell's Act*, by reason of the language of the Act itself, not in terms appropriate to the definition of damages recoverable for personal injury at common law, but as being compensation to the relatives of the deceased equivalent to the pecuniary benefits which they might have reasonably expected from the continuance of his life: *Bradburn* v. *Great Western Railway Co.* (1); see also per *Fullagar* J. in *Attorney-General for New South Wales* v. *Perpetual Trustee Co.* (*Ltd.*) (2). The making of a deduction in respect of a pension which will either certainly or probably be paid to the relative whose compensation is being assessed is necessitated by the principles of assessment expounded by the House of Lords in *Davies* v. *Powell Duffryn Associated Collieries Ltd.* (3), and by this Court in *Public Trustee* v. *Zoanetti* (4), and *Willis* v. *The Commonwealth* (5). In some jurisdictions special provision to the contrary has been made by amending legislation, e.g. by s. 40 of the *Widows' Orphans' and Old Age Contributory Pensions Act* 1936 (Imp.) and s. 3 (3) of the *Compensation to Relatives Act* 1897-1953 (N.S.W.); but in Tasmania no such provision has been made. Accordingly the learned trial judge's opinion was correct, that it was necessary to allow in his assessment of the plaintiff's damages for any pension which she would be likely to receive as the widow of the deceased.

(iv) This leads to the question whether his Honour was right in assuming, as he appears to have done, that the plaintiff was likely for the future to receive a pension of £7 5s. 0d. a fortnight, and that this would not be affected by the compensation which he proposed to allow her. The question calls for a consideration of the provisions of Pt. IV of the *Social Services Consolidation Act* 1947-1953 (Cth.). The plaintiff, as matters stood at the time of the

(1) (1874) L.R. 10 Exch. 1, at p. 3.
(2) (1952) 85 C.L.R. 237, at pp. 291, 292.
(3) (1942) A.C. 601.
(4) (1945) 70 C.L.R. 266.
(5) (1946) 73 C.L.R. 105.

trial, was qualified to receive a pension as a class A widow, that is, a widow having the custody, care and control of one or more children (ss. 60 (1) (*a*), 59); and the pension she said she was receiving, which came to £188 10s. 0d. per annum, was the maximum pension payable to such a widow before the amendment of s. 63 (1) (*a*) by the Act No. 51 of 1953. That Act, however, increased the amount to £195 per annum or £7 10s. 0d. a fortnight. The plaintiff's property at the death of the deceased consisted of a sum of £280 in the bank, a car which was subsequently sold for £200, £50 to which she was entitled as a death benefit from a provident fund, and her interest in the deceased's estate worth £638. The total was £1,168. This was not enough to disqualify her from receiving a widow's pension, for s. 62 (1) (*d*) fixes £1,500 as the value of property which a widow may own without being disentitled to a pension. The margin, however, was only £332. There was no evidence that the value of the plaintiff's property had declined since the death of the deceased, so that any damages recovered in excess of £332 would involve the loss of her pension unless some saving provision in the Act should obviate this result. Counsel for the defendant pointed in this regard to sub-pars. (i), (ii) and (iv) of s. 65 (1) (*a*), by which it is provided that in the computation of the value of property for the purposes of Pt. IV there shall be disregarded (i) the value of all property which is owned by the widow and is her permanent home, (ii) the value of any furniture and personal effects, and (iv) the capital value of any annuity. The plaintiff, counsel said, may lay out any damages she receives in the purchase either of a permanent home, furniture and personal effects, or of an annuity, or of both, and thus avoid losing her pension. It must be borne in mind that if she were to buy an annuity, any excess of the annuity payments over £104 per annum would mean a corresponding reduction of the pension: s. 63 (2) (*a*). The Director-General, it may be added, is empowered to direct, for any special reason in any particular case, that the value of the whole or any part of the property of a widow shall be disregarded (s. 65 (1) (*c*)); but this provision should be omitted from consideration in the absence of any evidence to suggest a likelihood of its being acted upon in relation to the plaintiff.

The problem of the pension, however, has still futher complications. The younger of the dependent children will attain sixteen, and cease to be a child within the meaning of the *Social Services Consolidation Act*, on 1st February 1956, when the plaintiff will be only forty-seven and a half years old. The plaintiff will thereupon cease to be a class A widow, and will not yet be a class B widow,

H. C. OF A. 1954. LINCOLN v. GRAVIL. Fullagar J. Kitto J.

that is to say a widow who is not less than fifty years of age and has not the custody, care and control of any child. Thus there will be a period of two and a half years during which she will receive no pension. When she becomes a class B widow at the end of that time she must not have property (other than her home etc.) worth more than £1,000 if she is to be entitled to a pension (s. 62 (1) (*d*) (ii)); the maximum pension will be only £149 10s. 0d. per annum (s. 63 (1) (*b*)); and the annual rate of pension will be reduced, not only by the amount of any excess of her other income over £104 per annum, but also by one pound for every complete ten pounds of that portion of the value of her property (other than her home etc.) which exceeds £150 but does not exceed £450, and by one pound for every complete seven pounds of the remainder of the value of that property (s. 63 (2) (*b*)). It seems fair to assume, as counsel for the plaintiff suggested, that when the plaintiff attains the age of fifty she will have left only about £750 worth of her property. Assuming that none of this were invested in a permanent home or furniture and effects, her pension would be reduced by seventy-three pounds per annum under s. 63 (2) (*b*), with the result that the pension would be only £76 10s. 0d. If the plaintiff should have any non-pension income, e.g. wages from any employment, any excess over two pounds a week would be matched by a still further reduction of the pension.

The final complication to mention is that, since the matter under consideration is the probable pension income of the plaintiff over a considerable period of years, the possibility exists that the legislation at present in force may be altered in many directions, and there is no knowing what future Acts may provide. It is proper, however, to recognize that modern trends in this as in other countries are towards liberalizing pension legislation, and the possibility of widows receiving less favourable treatment in the future is hardly a practical consideration at the present time.

The foregoing discussion of the Act is sufficient to show that it is not as clear as the learned judge seems to have thought that if he awarded the plaintiff £750 she could expect to receive a widow's pension of £3 12s. 6d. a week throughout the fifteen years which he took as the appropriate period to consider. In any case, £750 is equal only to one pound a week on the basis of fifteen years' purchase, and that is a very low figure from any point of view.

The most practical method of approach in this case seems to us to be that which the Court of Appeal pursued in *Johnson* v. *Hill* (1), namely first to decide what amount of damages ought to be awarded

(1) (1945) 2 All E.R. 272 ; 173 L.T. 38.

to the plaintiff for her own benefit without taking account of the widow's pension, and then to consider what deduction (if any) is appropriate in view of the pension she is likely to receive.

The figure which we should think reasonable if there were no pension to be considered would be £3,000. This we arrive at by taking ten years' purchase at a round figure of £300 a year, which is slightly less than six pounds per week. To take as a multiplier a number of years' purchase is a method which was approved in a frequently-quoted passage in Lord *Wright's* judgment in *Davies* v. *Powell Duffryn Associated Collieries Ltd.* (1). In this connection, however, some pertinent observations were made by *Black* L.J. in *Brennan* v. *Gale* (2). He said: "Lord *Wright* speaks as if the annual figure is converted into a lump sum by taking a number of years' purchase, and this lump sum is subsequently reduced to allow for all the various uncertainties and matters of speculation and doubt. In practice, however, I think it is much more usual after settling on the basic annual figure to apply to it as a multiplier such a number of years' purchase as will be thought to take into account all the doubts and uncertainties which point to a reduction in the sum to be awarded. What this appropriate multiplier may be in any individual case must depend on the particular circumstances of that case. But there is no real yardstick by which the number of years' purchase can be measured. One has to take into account the probable duration of the earning life of the deceased and also the probable duration of life of the widow, the possibilities of increased earnings on the one hand and of disablement or unemployment on the other, and all the other probabilities and chances which should be taken into consideration in endeavouring to fix a fair compensation for the pecuniary loss. The amounts which have been allowed in reported cases follow no rigid rule. In *Davies* v. *Powell Duffryn Associated Collieries Ltd.* (3), dealing with the case of a man of forty-two years of age who left a widow and three dependent children, the House of Lords increased an amount of £250 fixed by the trial judge to £750. Lord *Wright* speaks of the £250 as 'based on something like three and a half years' purchase of the basic figure'. The £750 may therefore be regarded as based on ten and a half years' purchase. In the more recent case of *Johnson* v. *Hill* (4), where the deceased was thirty-nine years of age and one of the questions in issue was whether the prospect of his dependants receiving a pension from the Crown by reason of

(1) (1942) A.C., at p. 617.
(2) (1949) N.I. 178.
(3) (1942) A.C. 601.
(4) (1945) 2 All E.R. 272; 173 L.T. 38.

H. C. OF A. 1954. LINCOLN v. GRAVIL. Fullagar J. Kitto J.

his death should be taken into consideration, the English Court of Appeal, in the course of their judgment, first fixed an amount which they considered would have been a fair and reasonable sum to award if no allowance fell to be made in respect of what might be received as pension. On the facts set out in the report this sum appears to have amounted to about sixteen years' purchase of the value of the pecuniary benefit which the dependants would have received from the deceased in the course of a year. I merely refer to these cases as instances of the number of years' purchase which have commended themselves to appellate tribunals. The number adopted by individual judges and juries in particular cases will be found to vary greatly; juries have, no doubt, tended on the whole to be more liberal than judges trying cases without a jury. But I think the figure of sixteen years' purchase, which appears to have been the number fixed by the Court of Appeal in *Johnson* v. *Hill* (1) will approach the upper limit of any calculation of damages which has received the sanction of an appellate court" (2).

If the suggested initial figure of £3,000 were received by the plaintiff, it would bring the value of her assets up to £4,168, on the figures given in evidence; and it would then be possible for her to qualify for a pension by putting £2,668 into property (e.g. a home, furniture and effects, and perhaps an annuity) which by virtue of s. 65 (1) (*a*) would not be regarded in the computation of the value of her property for the purposes of a pension. Accordingly it is necessary to make some reduction in the figure on account of the pension position. We would regard £100 a year for the ten year period as a sufficient reduction to make, and we would therefore increase the damages awarded to the plaintiff for her own benefit from £750 to £2,000. Different minds might well be dissatisfied with these figures, for this is a case to which Lord *Watson's* words in *Grand Trunk Railway Co. of Canada* v. *Jennings* (3) have much force: "the extent of loss depends upon data which cannot be ascertained with certainty, and must necessarily be matter of estimate, and, it may be, partly of conjecture" (4). It is nevertheless a case in which we are satisfied that the amount awarded by the Supreme Court is much too low, and that a decision to increase it to the extent we have mentioned is consonant with the established principles upon which awards of damages by judges sitting without juries may properly be varied by courts of appeal.

No argument was addressed to the Court by way of challenge to the award of damages in respect of the two children.

(1) (1945) 2 All E.R. 272; 173 L.T. 38.
(2) (1949) N.I., at pp. 184, 185.
(3) (1888) 13 App. Cas. 800.
(4) (1888) 13 App. Cas., at p. 804.