The appeal should be allowed with costs and the cross-appeal dismissed with costs. The judgment of the Supreme Court should be varied by increasing the amount ordered to be paid by the defendant to the plaintiff to £2,250, and by directing that this amount shall be divided in the following shares, namely, £2,000 for the benefit of the plaintiff, £150 for the benefit of Darryl Alvin Ball, and £100 for the benefit of Beverley Lenna Ball.

Appeal allowed with costs; cross-appeal dismissed with costs. Judgment of the Supreme Court varied by increasing the amount ordered to be paid by the defendant to the plaintiff to £2,250. *Direct that this amount be divided into the following shares, namely* £2,000 *for the benefit of the plaintiff,* £150 *for the benefit of Darryl Alvin Ball, and* £100 *for the benefit of Beverley Lenna Ball.*

Solicitors for the appellant, *Murdoch, Cuthbert, Clarke & Neasey.*
Solicitor for the respondent, *M. G. Everett.*

M. G. E.

[HIGH COURT OF AUSTRALIA.]

WILLIAMS AND OTHERS . . . . . APPELLANTS;
DEFENDANTS,

AND

USHER . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1955.

MELBOURNE, *May* 24, 25;

SYDNEY, *Nov.* 21.

Dixon C.J., McTiernan, Webb, Fullagar and Taylor JJ.

Negligence—Lord Campbell's Act (W.A.)—Damages—Measure—Action by widow—Award of workmen's compensation in New York to widow in respect of death—Compromise of appeal against award—Undertaking by widow to refund to insurer amounts paid under award out of damages (if any) to be recovered in Lord Campbell's Act proceedings—Whether compromise a "release" or "commuting" of workmen's compensation—Whether damages in action subject to diminution by reason of award—Agreement between parties as to New York law to compensation proceedings but no other evidence on subject—Construction of New York law by Australian courts—Fatal Accidents Act 1846 (*Imp.*).

An employee of a company incorporated in the State of New York, U.S.A., was killed in a motor car accident in Western Australia through the negligence of third parties. His widow on behalf of herself and the children of the deceased claimed workers' compensation in New York against his employer under the *Workmen's Compensation Law* (New York). Section 29 (1) of that law provided that if an employee is killed by the negligence of another person not in the same employ in such circumstances that his dependants are entitled to compensation, his dependants need not elect whether to take compensation or to pursue their remedy in damages, but may take compensation and at any time prior thereto or within six months thereafter pursue their remedy in damages. An action for damages must be commenced within six months after the awarding of compensation and in any event within one year from the time when the cause of action arose. If such an action is brought, the person liable to pay compensation has a lien on the amount received in any such action, whether obtained by judgment settlement or otherwise, to the extent of the total amount of compensation awarded, and to such extent such recovery is to be deemed to be for the benefit of the person liable to pay compensation. Section 29 (2) provides that, if the dependants

have taken workmen's compensation but have failed to commence an action against such other person within the time limited, such failure shall operate as an assignment of the cause of action against such other person to the person liable to pay compensation. Section 29 (4) provides that, if the dependants do proceed against such other person, the person liable to pay compensation shall contribute only the deficiency, if any, between the amount of the recovery against such other person actually collected and the workmen's compensation provided or estimated. Section 33 provides that compensation or benefits due under the law shall not be assigned, released or commuted, except as provided by that law. Section 123 gives to the Workmen's Compensation Board power from time to time to make such modification or change with respect to former awards, decisions or orders, as may be just. An award of compensation was made in favour of the widow and children. The employer and the insurance carrier appealed against the award to the Supreme Court of New York but withdrew the appeal on the faith of an undertaking by the widow to make a refund from the damages (if any) recovered in an action, brought by her against the third parties in the Supreme Court of Western Australia under *Lord Campbell's Act* in respect of the death of the deceased, to the extent required to recoup any sums paid by the insurance carrier under the award and recognizing a lien in favour of the employer and the insurance carrier over the proceeds of the action to the necessary extent. In the action in Western Australia it was agreed between the parties that the New York law relevant to the compensation proceedings in New York was the *Workmen's Compensation Law* but no other evidence was called on the subject of the proper law.

Held that the Supreme Court of Western Australia and the High Court were at liberty to look at the relevant provisions of the *Workmen's Compensation Law* (New York) and to consider what was their proper meaning.

Bremer v. *Freeman* (1857) 10 Moo. P.C. 306 [14 E.R. 508]; *Concha* v. *Murrieta* (1889) 40 Ch. D. 543, at p. 550; *Bankers' & Shippers' Insurance Co. of New York* v. *Liverpool Marine Insurance Co. Ltd.* (1925) 24 Ll. L. R. 85, per Lord *Sumner*, at p. 93; *Jabbour* v. *Custodian of Israeli Absentee Property* (1954) 1 W.L.R. 139, at pp. 147, 148, referred to.

Held further that the compromise of the workmen's compensation proceedings in New York did not amount to a release or commuting of compensation under s. 33 of the *Workmen's Compensation Law* (New York) and was valid and, in the circumstances, reasonable.

Held further that, in the circumstances, the damages recoverable against the third parties in the action in Western Australia were not subject to any diminution by reason of the existence of the award in New York.

The question of the measure of damages in an action brought under *Lord Campbell's Act* discussed.

Decision of the Supreme Court of Western Australia (*Wolff* J.), affirmed.

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WILLIAMS v. USHER.

APPEAL from the Supreme Court of Western Australia.

Margaret Patricia Usher, on 24th October 1950, commenced an action in the Supreme Court of Western Australia against Reginald Owen Williams, Albert Arthur Schaffer, Walter James Hartley and Hardie Trading Ltd. The plaintiff on behalf of herself as widow of, and Helen Louise Usher, Roderick MacLeod Usher and Elizabeth Fontaine Anning Usher as children of, Robert Austin Usher claimed damages in respect of the death of the last-named on 4th July 1950 as the result of a collision in Albany Road, Welshpool, Western Australia, between a motor car, in which he was a passenger, which was owned by Hardie Trading Ltd. and driven by its servant Schaffer and a timber jinker owned by Williams and driven by his servant Hartley. The plaintiff alleged that the collision was due to the negligence of the defendants.

The action was heard before *Wolff* J. who, in a written judgment delivered on 24th January 1955 awarded the following sums as damages; to the plaintiff £7,926, to Helen Louise £1,850, to Roderick MacLeod £3,350 and to Elizabeth Fontaine Anning £2,250.

From this decision the defendants appealed to the High Court. The arguments are sufficiently set forth in the judgments hereunder.

Gregory Gowans Q.C. and *G. D. Clarkson*, for the appellants.

R. A. Smithers Q.C. and *R. I. Ainslie*, for the respondent.

Cur. adv. vult.

Nov. 21.

The following written judgments were delivered:—

DIXON C.J., MCTIERNAN, FULLAGAR AND TAYLOR JJ. This is an appeal from the Supreme Court of Western Australia (*Wolff* J.) in an action under the English *Fatal Accidents Act* 1846 (*Lord Campbell's Act*), which was adopted in Western Australia by ordinance 12 Vict. No. 21. The plaintiff, Margaret Patricia Usher, for the benefit of herself and three very young children, sued the defendants in respect of the death of her husband, Robert Austin Usher, in a motor car accident in that State. By their pleading the defendants originally denied negligence, but at the trial negligence was admitted, and the only issue was as to damages. *Wolff* J. gave judgment for a total sum of £15,376, which he apportioned as follows:—To the plaintiff £7,926, to the child Helen Usher £1,850, to the child Roderick Usher £3,350, and to the child Elizabeth Usher £2,250.

The learned judge's assessment of damages is attacked mainly (though other points have been raised) on a ground arising out of a claim made by the plaintiff for workmen's compensation in the State of New York in the United States of America. In order to appreciate the point raised, it is necessary to state the circumstances of the deceased's employment, and then to recount the proceedings taken by the plaintiff.

Usher served during the recent war as a member of the United States Marine Forces in Australia and the South West Pacific, and he met and married the plaintiff in Australia in 1943. After the war he returned with his wife to the United States, and entered the employment of the Hoffman Machinery Co., a corporation constituted under the laws of New York and carrying on the business of manufacturing dry-cleaning machinery on a large scale. In August 1949 he was sent to Australia to negotiate a sales agreement for the company. He returned to New York in November 1949, but before the end of the year he was sent again to Australia to promote sales here for the company's machinery. He was accompanied by his wife and children. He took up temporary residence in Melbourne, but his work necessitated visiting all the States of Australia, and it was while he was travelling on the company's business in Western Australia that he met his death in a collision between two motor vehicles on 4th July 1950. The four defendants are respectively the owner and driver of the car in which Usher was a passenger, and the owner and driver of the car which collided with that car.

The action in the Supreme Court of Western Australia was commenced by the plaintiff widow on 24th October 1950. On 12th December 1950 she filed with the Workmen's Compensation Board of New York, a body set up under New York Laws of 1945 and 1949 to administer the law relating to workmen's compensation, a claim for compensation under the law of that State. The claim was made against the Hoffman Machinery Co. as her husband's employer, and against the New York State Insurance Fund as "insurance carrier" (as the insurer is called in New York). It was disclosed that she had commenced the action in Western Australia in respect of her husband's death, alleging that it had been caused by the negligence of the defendants.

In the Supreme Court of Western Australia the law of New York relating to workmen's compensation was, of course, a matter of fact to be decided on the evidence of experts. No evidence was in fact called on the subject, but it was agreed by the parties that the relevant law was contained in an enactment of the legislature of

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New York, being Chapter 67 of the Consolidated Laws of New York as amended, the short title of which is the *Workmen's Compensation Law*. In such circumstances it seems to be established that *Wolff* J. was at liberty, and this Court is at liberty, to look at the relevant provisions of that enactment and to consider what is their proper meaning: see *Bremer* v. *Freeman* (1); *Concha* v. *Murrieta* (2); *Bankers' & Shippers' Insurance Co. of New York* v. *Liverpool Marine Insurance Co. Ltd.* (3) per Lord *Sumner*; *Jabbour* v. *Custodian of Israeli Absentee Property* (4).

Most workers' compensation schemes contain special provision for the not uncommon case where a worker, or a dependent of a deceased worker, has a claim for compensation under the statute and has also a cause of action at common law against a third party in respect of the injury or death. The general policy of such provisions is to throw the ultimate responsibility for compensating the injured worker on the culpable third party, the employer being, in effect, indemnified out of the proceeds of any action to the extent of his liability to pay compensation under the statute. A provision of this nature is contained in s. 29 of the *Workmen's Compensation Law* of New York. The effect of s. 29 (1), so far as it relates to such a case as the present, may be stated thus:—If an employee is killed by the negligence of another person not in the same employ in such circumstances that his dependants are entitled to compensation, his dependants need not elect whether to take compensation or to pursue their remedy in damages, but may take compensation and at any time prior thereto or within six months thereafter pursue their remedy in damages. An action for damages must be commenced within six months after the awarding of compensation and in any event within one year from the time when the cause of action arose. If such an action is brought, the person liable to pay compensation has a lien on the amount received in any such action, whether obtained by judgment settlement or otherwise, to the extent of the total amount of compensation awarded, and to such extent such recovery is to be deemed to be for the benefit of the person liable to pay compensation. Section 29 (2) provides that, if the dependants have taken workmen's compensation but have failed to commence an action against such other person within the time limited, such failure shall operate as an assignment of the cause of action against such other person to the person liable to pay compensation. Section 29 (4) provides that, if the dependants do proceed against such other person, the person liable to pay

(1) (1857) 10 Moo. P.C. 306 [14 E.R. 508].
(2) (1889) 40 Ch. D. 543, at p. 550.
(3) (1925) 24 Ll. L.R. 85, at p. 93.
(4) (1954) 1 W.L.R. 139, at pp. 147, 148.

compensation shall contribute only the deficiency, if any, between the amount of the recovery against such other person actually collected and the workmen's compensation provided or estimated. It is convenient at this stage to refer also to ss. 33 and 123 of the New York law, since each of these sections was referred to in argument. Section 33 provides that compensation or benefits due under the law shall not be assigned, released or commuted, except as provided by that law. Section 123 gives to the Workmen's Compensation Board power from time to time to make such modification or change with respect to former awards, decisions or orders, as may be just.

The plaintiff's claim for workmen's compensation came before an official referee, who refused to make an award in her favour. It does not appear to have been suggested at any stage in New York that the plaintiff was not entitled to compensation on the ground that the deceased was employed to perform work outside the State of New York and the accident which caused his death occurred outside the State of New York. (As to such cases see *Mynott* v. *Barnard* (1) and cases therein cited.) *Wolff* J. inferred that the reason for the refusal of compensation was that, in the opinion of the official referee, the person liable to pay compensation had no means of effectively enforcing against any proceeds of the action in Western Australia the statutory lien given by s. 29 of the New York law.

The plaintiff appealed from the decision of the official referee to the Workmen's Compensation Board of the State of New York. The appeal was allowed, and an award was made in favour of the plaintiff and each of her three children. This award, which was made on 4th June 1952, gave to her $15.75 per week during widowhood with two years' compensation at that rate in a lump sum in the event of her remarriage. It also gave to each of the children $6.416 per week until the attainment of eighteen years of age: as each child attained the age of eighteen, the children or child still under eighteen became entitled to an increment. Against this award the Hoffman Co. and the insurance carrier appealed to the Supreme Court of the State of New York. On 11th July 1952 the plaintiff gave an undertaking to recognize the lien given by the New York *Workmen's Compensation Law* on the proceeds of the action in Western Australia. The circumstances attending the giving of this undertaking are not made as clear as they might be, but it seems plain that it was given after notice of appeal had been filed by the employer and the insurance carrier and while that appeal was pending. On 29th January 1953 the appeal was

(1) (1939) 62 C.L.R. 68.

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withdrawn. *Wolff* J. said :—" The plaintiff . . . compromised the appeal by agreeing that she would make a refund from any damages recovered in the action to the extent required to recoup any sums paid by the insurance carrier under the award of workmen's compensation." As has been seen, the undertaking was given long before the appeal was withdrawn, but there is no difficulty in inferring that the appeal was withdrawn on the faith of the undertaking. The plaintiff's undertaking was embodied in an affidavit, and was in the following terms :—" That if I am successful in obtaining damages in the said third party action I agree to recognize the compensation lien of United States Hoffman Machinery Corporation, the employer, and of the State Insurance Fund, the compensation (*sic*) carrier, arising under and by virtue of the Workmen's Compensation Law of the State of New York. That I further agree to refund to the said State Insurance Fund out of the proceeds (if any) of such third party action the full amount of such proceeds or the sum covered by the said lien whichever shall be the lesser amount."

In the meantime the action in the Supreme Court of Western Australia had been stayed until further order by order made on 7th November 1952. The action ultimately came on for trial before *Wolff* J. on 2nd July 1954, and his Honour's reserved judgment was delivered on 24th January 1955. Up to this date payments had been made to the plaintiff under the New York award of workmen's compensation. It is agreed between the parties that the capital value of the award is to be taken to be £13,398.

Taking into account the position and prospects of the deceased man and the general circumstances of the case, *Wolff* J. arrived, in assessing damages, at what he called a " primary figure " of £30,260, which he apportioned as follows :—To the plaintiff £16,769, to Helen £3,500, to Roderick £5,500 and to Elizabeth £4,500. From these figures he made certain deductions and thereby arrived at the sum for which judgment was entered. He refused, however, to make any deduction in respect of the New York award of workmen's compensation. It is now argued that the whole amount of the agreed capital value of that award ought to have been deducted from any primary figure arrived at. The view taken by his Honour was, in our opinion, correct.

The central question in the case is a question of the measure of damages in an action under *Lord Campbell's Act*. This is a question of Western Australian law. As to this, it is well settled that the plaintiff may recover only actual pecuniary loss arising from the death, and that any gain arising from the death must be brought

into account in the assessment of damages. This position has been modified by statute in England, notably by the *Fatal Accidents Act* 1908, which provides that no sum payable on the death of the deceased under a policy of insurance shall be taken into account. It has been further modified by statute in some of the States of Australia, all of which have enacted legislation reproducing, or adopting the substance of, the English Act of 1846. In Western Australia there is no relevant statutory modification, and the position is that which was established by Lord *Campbell* himself in *Hicks* v. *Newport Abergavenny & Hereford Railway Co.* (1), where his Lordship directed the jury to take into account the proceeds of an accident policy and a reasonable sum in respect of certain life policies: see *Grand Trunk Railway Co. of Canada* v. *Jennings* (2).

If the plaintiff in the present case had been entitled to workers' compensation under the *Workers' Compensation Act* 1912-1953 (W.A.), the position would have been governed by s. 18 of that Act, the effect of which is similar to that of s. 29 of the New York law. She would have been entitled to full damages assessed without taking into account any compensation paid or payable under the Western Australian Act. It is clear, however, that s. 18 of that Act applies only to cases where workers' compensation is paid or payable under that Act, and does not apply to cases where compensation is paid or payable under the law of any other State or country. If, therefore, it were proved that the plaintiff had received, or was legally entitled to receive, workmen's compensation under the law of New York, it would seem that the amount of that compensation ought prima facie, in accordance with the rule laid down in *Hicks' Case* (1) to be taken into account in assessing her damages in the Western Australian action.

The plaintiff's right to receive workmen's compensation depends, of course, on the law of New York. She has an award in her favour made by a tribunal apparently competent under the law of New York, and she has received certain payments under that award. But the matter does not rest there. The rule laid down in *Hicks' Case* (1) requires only that real gains and benefits arising from the death shall be brought into account. And here we find that the real gain or benefit under the law of New York is not represented by the terms of the award considered alone. The plaintiff has given an undertaking that she will recognize the existence of a lien in favour of the employer and the insurance carrier on the proceeds of the action, and that she will pay to the insurance carrier the

(1) (1857) 4 B. & S. 403 (n. (*a*)) [122 E.R. 510].

(2) (1888) 13 App. Cas. 800.

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amount of the proceeds or the sum covered by the lien, whichever is the less. In these circumstances it seems to us that there is no such real gain or benefit to her under the law of New York as the law of Western Australia requires to be deducted in the assessment of the loss which she has suffered through the tortious acts for which the appellants are responsible. The matter, however, is not free from difficulty, and it is necessary to consider certain arguments which were forcefully put for the appellants.

Mr. *Gowans*' argument divided itself, we think, into two main branches, the first of which was concerned with showing that the plaintiff was entitled, as a matter of law, to the full benefit of the award without any restrictions or conditions. He said that s. 29 of the *Workmen's Compensation Law* of New York was not applicable to cases in which the "negligence or wrong" of the third party occurred outside the State of New York. It followed, he said, that the rights of the plaintiff under the award were absolute and were not subject to the provisions of s. 29. He cited the case of *Royal Indemnity Co.* v. *Atchison Topeka & Santa Fe Railway Co.* (1). We doubt if that case (in which no reasons were given by the Court of Appeals) has any real bearing on the question of construction raised, and in any case we do not think it is necessary for this Court to determine that question of construction. Even if s. 29 be, on its true construction, inapplicable to such a case as the present, the validity of the plaintiff's undertaking seems to us to be in no way affected. Mr. *Gowans* maintained that, if the construction for which he contended were accepted, it would follow that the undertaking was void, because it would amount to a "release" or "commuting" of compensation, and any such release or commuting is prohibited by s. 33 of the New York law. But no such consequence, in our opinion, follows. The evidence regarding the giving of the undertaking is, as we have said, not entirely satisfactory, but we think it clear that what happened in the end was, as *Wolff* J. said, that the appeal of the employer and the insurance carrier was compromised. Mr. *Hamer*, the plaintiff's solicitor in Melbourne, said in evidence :—"I was told that an appeal had been lodged in order to protect the lien. I had that information before I sent forward her affidavit" (i.e. the affidavit containing the undertaking). It cannot be doubted that, when the appeal was withdrawn, it was withdrawn on the faith of the undertaking. The plaintiff had failed on her original application for compensation. On appeal to the board she had obtained an unqualified and unconditional award. An appeal had been lodged against this

(1) (1947) 297 N.Y. 619.

award. In the background were very real questions of law. The appeal might or might not have succeeded. The undertaking was without force or effect if the appeal were wholly successful. The undertaking seems to us to have been an offer to accept a qualified or conditional award, and the withdrawal of the appeal, although it took place some six months later, must, as it seems to us, be regarded as an acceptance of that offer. The undertaking might have been embodied in the award, and the position created appears to us to have been precisely the same as if it had been embodied in the award. A compromise so effected was not, in our opinion, a release or commuting within the meaning of s. 33 of the New York law. We can see no reason for saying that the undertaking was not enforceable. So far as it affected sums payable by way of compensation after recovery of judgment in the action, effect could have been given to it by way of set off, and, so far as it affected sums paid by way of compensation before recovery of judgment, the plaintiff could have been sued for repayment in any jurisdiction in which she might be found.

What we have called the first branch of Mr. *Gowans'* argument rested fundamentally on the law of New York. What we have called the second branch of his argument, though we think that in the end it is really subject to the same answer, rested primarily on the law of Western Australia. He said that the plaintiff could not by her own voluntary act increase the damages assessable under *Lord Campbell's Act*. This argument, unlike the first, assumes that the undertaking is binding and effective as between the plaintiff on the one hand and the employer and insurance carrier on the other hand. But it is said that the position is in effect the same as if the plaintiff, being entitled to the proceeds of an insurance policy on her husband's life, had voluntarily released her rights under the policy, and then asserted that the value of the benefit of the policy ought to be left out of account in assessing damages under *Lord Campbell's Act*. Putting the matter in a slightly different way, it is said that she could not by her own voluntary act determine the extent to which the burden of compensating her for the loss of her husband should rest on the shoulders of the employer or insurance carrier in New York or on the shoulders of the tortfeasors in Western Australia.

There is, in our opinion, neither merit nor substance in this argument. In a very literal sense it may be true that the plaintiff has by her own voluntary act contingently reduced or destroyed the value of the award, and has thereby affected the amount of damages recoverable from the tortfeasors. But to say this is to

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look at the surface of the matter and to ignore the substance. The plaintiff's giving of the undertaking is in no way analogous to the voluntary release of rights under a life policy. The essential fact is that the undertaking was given by way of compromise of an appeal against the award in the plaintiff's favour. It may be assumed (though it is not clear that the assumption is warranted) that the plaintiff was under a duty to do everything reasonable in New York to mitigate damages. But she was certainly under no duty to place the interests of the defendants above her own. At the time when she gave the undertaking by way of offer of a compromise, she could not know whether her action would succeed: negligence had been denied on the pleadings. On the other hand, the appeal against her award of compensation in New York might be successful: we think, as we have said, that difficult questions of law were, or might have been, involved. It was very important to her to preserve the award against the possibility of failure in the action. Her giving of the undertaking in order to effect a compromise and preserve the award appears to us to have been an eminently reasonable course for her to adopt, and we can see no possible ground for saying that the giving of it involved any breach of any duty owed to the tortfeasors.

For the above reasons we are of opinion that *Wolff* J. rightly refused to take into account in assessing damages the amount of the New York award of workmen's compensation.

The remaining grounds on which the assessment of damages was challenged may be dealt with very shortly. The first attack was directed at the manner in which the learned trial judge arrived at his "primary figure". He began by taking the earnings of the deceased at the time of his death, and considered that those represented a benefit to the family of £1,500 per annum. He increased this sum to £1,750 per annum because of the prospects of the deceased, and he then estimated that this benefit would continue for a period of thirty years. It was said that, so far as the children were concerned, any benefit to them should be regarded as terminating about half way through that period, because one after another they would cease to be dependants, and that there was no justification for assuming that, as the children ceased to be dependent, what had been applied for their benefit would be applied for the benefit of the widow. He might, it was said, when freed from the burden of maintaining and educating his children, have spent much more money than before on himself. There is nothing, we think, in this argument to justify this Court in interfering with his Honour's assessment. It would be wrong to regard it as based on any such

assumption as that which is suggested. Usher might, of course, have done all sorts of things. He might, among other things, have saved and invested substantial sums and left his family well provided for at his death. The figure of £1,750 was doubtless taken by the learned judge as a figure which represented a fair estimate of the average benefit which the family might be expected to derive over the years if Usher had lived. It is impossible to say that it was wrong to do this, or that the figure of £1,750 was too high. Usher was a comparatively young man, he was occupying a responsible position with a prosperous company, and his prospects may fairly be said to have been excellent. We are disposed to think ourselves that his Honour took about the right figure. We are quite unable to say that he proceeded on a wrong basis, or that the basic figure which he adopted was unreasonably high.

The next criticism of the assessment of damages was that his Honour had failed to make any allowance for the possibility that the plaintiff might re-marry. His Honour in fact refused to make a special deduction from his primary assessment to allow for the possibility of the plaintiff's re-marriage, but at a later stage he made a general deduction of £2,000 to cover "contingencies", and we see no reason for supposing that he did not intend this allowance to cover (*inter alia*) the possibility of re-marriage. We agree that an allowance should have been made for this possibility, and we are disposed to think that the sum of £2,000 was too small an allowance to make for this and other contingencies. But we do not think that the amount was so unreasonably small as to justify a court of appeal in setting aside the assessment and either remitting the case or substituting some other figure for itself.

The remaining ground of attack on the judgment is this. The parties agreed that the value of the deceased man's nett estate was £1,000, and that the value, as at the date of his death, of £1,000 payable in thirty-five years' time was £250, which left a difference of £750. His Honour in fact assessed the "accelerated" value of the estate not at £750 but at £600. It was said that his Honour had treated the nett estate as being of the value of £750, and had then deducted a sum of £150 in order to arrive at the "accelerated" value. We do not think that this is what his Honour did. His calculation seems to show that he took the "estimated *accelerated* value of nett estate" as being approximately £750, and then decided (as we think he was entitled to do) to take the round figure of £600. He did not make the mistake attributed to him, and we do not think that we should interfere with the figure which he adopted.

The appeal should be dismissed with costs.

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WEBB J. This is an appeal from a judgment of the Supreme Court of Western Australia (*Wolff* J.) in an action under *Lord Campbell's Act*. The appeal is against the assessment of damages. The plaintiff, the respondent, claimed on behalf of herself and her three children in respect of the death of her husband and their father in July 1950 as the result of the negligence of the defendants', the appellants', servants in the control of a car and jinker on a road near Perth. His Honour assessed the total damages at £15,376 and apportioned this amount among the widow and the three children, the widow receiving £7,926.

The deceased at the time of his death was thirty-six years of age with a normal expectation of life of thirty-five years. The widow was twenty-nine with a normal expectation of life of forty-four years. The children were aged six and half, four and half and one and half years. The deceased was a citizen of New York State employed in Australia by a New York company. Under the *Workmen's Compensation Law* of New York State his widow and each of the children applied for and received weekly payments of compensation in respect of the deceased's death. These payments were awarded in June 1952 by the New York Workmen's Compensation Board and were to be made to the widow during widowhood and to each of the children while under eighteen. These Workers' Compensation payments had a capital value of £13,438, the widow's share amounting to £8,453. *Wolff* J. did not take these payments into account as a gain resulting from deceased's death when assessing the damages. Had he done so the widow would not have been awarded any damages, as the compensation payments capitalized exceeded the damages awarded to her for herself; and the share of each child in the damages would have been considerably reduced. His Honour declined to take the compensation payments into account because the widow had undertaken in the proceedings in New York to repay the compensation received out of any damages awarded in the action in Western Australia, although this undertaking was given after the award was made and, the defendants claimed, before any appeal against the award had been instituted, but apparently in anticipation of such an appeal to the New York Supreme Court. In so doing the widow appears to have acted on advice given by her solicitors in New York and in Perth. However the defendants, the appellants here, contended that she was under no obligation to give the undertaking and was entitled to receive and retain the compensation payments without carrying out the undertaking. They denied that the undertaking was in the nature of a compromise having legal effect, and even that it was entered

into as such. They claimed that the widow's and children's rights under the New York law were clear and that a compromise in the true sense was neither called for nor in fact made; that her Melbourne solicitor, Mr. *Hamer*, had so advised her, and that both he and she had admitted, that the undertaking was not to secure workmen's compensation but merely to expedite the payment of it which was already assured. If that had been the true position I think the compensation should have been treated by *Wolff* J. as a gain in assessing the damages. The gains to be allowed for in such an action are to be estimated as at the date of the deceased's death, and, although events occurring thereafter are commonly regarded in making such estimate, still the mere giving up of the compensation or of a claim to it, or the giving of an undertaking to repay the whole or part of the compensation out of any damages awarded in the action, without any justification for so doing, would not deprive the tortfeasor of the right to have the compensation regarded as a gain in assessing damages against him. But I am not satisfied that there was no justification for this undertaking. The widow's and children's claims to the compensation were rejected in the first instance by the official referees appointed under the New York law, but on appeal the New York Workmen's Compensation Board allowed the claims. However there was under the New York law a right of appeal to the Supreme Court of New York against the board's decision, but on questions of law only, and an appeal was instituted by the employer and its insurer. But before it was instituted, and apparently in anticipation of its institution, the widow gave the undertaking and eventually the appeal was withdrawn. I should say here that, although it was said that the undertaking was given before the appeal was instituted, there is a note in the appeal book which indicates that there were two notices of appeal to the Supreme Court, one dated 9th June 1952, i.e. two days before the date of the undertaking, and another dated 4th September 1952.

It was, I think, open to *Wolff* J. to conclude that the withdrawal of the appeal to the Supreme Court was the result of the undertaking given by the widow and the decision of the employer and insurer to accept that undertaking. The appellants here, the defendants, contended that the purpose of the appeal to the New York Supreme Court was merely to delay the weekly payments pending the conclusion of the action in Western Australia and not to defeat the claim for such payments which, they contended, were inevitable, having regard to the facts of the case and the provisions of the New York law. However, I think there was a sufficient doubt

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as to whether the claims for compensation would be successful to warrant the undertaking being regarded, as *Wolff* J. regarded it, as a reasonable compromise having legal effect and reducing the apparent gain to vanishing point, in the case of both widow and children, for the purposes of the assessment of damages. At this point a brief reference may be made to the provisions of the New York law. By s. 10 every employer must pay compensation for the death of an employee arising out of and in the course of his employment. By s. 14 the average weekly wages are to be taken as the basis on which to compute the death benefits. By s. 16 the widow receives during widowhood thirty per centum of the average wages and each child twenty per centum until it reaches eighteen years. On the death or re-marriage of the widow each child receives thirty per centum, but the total is not to exceed sixty-six and two-thirds per centum. When payments to all the children terminate the widow gets forty per centum. On her re-marriage she gets two years' compensation in one sum. By ss. 20 and 23 the Workmen's Compensation Board has power to decide all questions of fact arising on claims but questions of law are subject to appeal to the New York Supreme Court. By s. 22 the board may review its award and terminate, diminish or increase compensation payments. By s. 29 if an employee is killed by the negligence or wrong of another not in the same employ his dependants need not elect whether to take compensation or to pursue their remedy against the wrongdoer but may take compensation and prior thereto or within a specified time thereafter pursue such remedy. *In that case the person liable to pay the compensation shall have a lien on any proceeds recovered by judgment or otherwise to the extent of compensation and to that extent the recovery shall be deemed to be for the benefit of the person liable to pay compensation.* If compensation is taken but the action has not been commenced within the time specified such *failure to take action operates as an assignment of the cause of action to the person so liable.* If the dependants proceed in the action the person liable for the compensation is to pay only the deficiency between the amount recovered and the compensation. If the employer or insurer brings the action against the tortfeasor and recovers damages in excess of the compensation paid two-thirds of this excess is to be for the benefit of the dependants. By s. 33 compensation is not to be assigned. By s. 123 the board's jurisdiction is continuing and *the board may from time to time make modifications of and changes with respect to awards as in its opinion may be just.*

Had the appeal been heard by the New York Supreme Court it might well have been established that the widow's and children's

rights were absolute and that payments of compensation to them could not have been reviewed and ended or diminished by the board in the circumstances of this case. But I hesitate to hold that there was no room for such a doubt as warranted the making of a legally enforceable compromise. One thing is clear in this New York law, i.e. that the legislature intended that the tortfeasor would not be freed from liability to any extent by the payment of compensation; and so it provided for the assignment to the employer and insurer of the cause of action against the tortfeasor or for a lien of damages recovered by the dependants to the extent of the compensation payments. It may be that, while the New York law operated for the benefit of non-residents of New York State, as s. 17 of the law indicated, it applied only to actions against the tortfeasor where the cause of action was justiciable in New York State, and that the provisions for the assignment of the cause of action or for the lien of damages recovered in the action were limited to such a cause of action. Some of the provisions suggest such a limitation. But even if there were no limitation and the widow and children retained full liberty to sue the tortfeasor and to retain all the damages recovered without accounting to the employer or its insurer for any part of the damages, still the New York law contained a provision for review which the board might see fit to exercise for the relief of an employer or insurer not entitled to an assignment of the cause of action or to a lien on the proceeds recovered from the tortfeasor. The board might well think that it was just to prevent the dependants from receiving a double benefit in respect of the deceased's death, from being twice compensated for the same injury. In any event it might well seem to the board that non-residents of New York State being dependents of workmen killed abroad should not be permitted to remain in a more favourable position than residents of that State, being dependants of those killed in that State. That would have been against the spirit if not against the letter of the New York law. At all events if the board did end or reduce compensation payments in these circumstances I would not venture to say that an appeal to the Supreme Court of New York against their action would necessarily succeed. Its success would be at least doubtful.

I think then that *Wolff* J. was right in treating the undertaking as a legally enforceable compromise, which prevented the workmen's compensation payments from being taken into account as a gain from the deceased's death in assessing the damages, provided that the evidence as to the reason for giving the undertaking did not prevent it from being regarded as a compromise based on a genuine

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doubt as to whether the claim for compensation would succeed. As to this the evidence may be summarized as follows: The claim for workmen's compensation was made in December 1950. After the official referee had in March 1952 rejected the claim, presumably on the ground that a lien on the proceeds recovered from the tort-feasor could not be enforced, the board on appeal in June 1952 allowed it. The employer and insurer then appealed to the Supreme Court of New York. This appeal was withdrawn in January 1953. Before applying in New York for compensation the widow on 24th October 1950 had issued the writ in Western Australia under *Lord Campbell's Act*. She disclosed this in the New York proceedings. Defendants in the action brought the New York proceedings to the notice of *Wolff* J. in November 1952 and sought a stay of proceedings pending the determination of the appeal to the New York Supreme Court. Meanwhile on 11th July 1952, two days after notice of appeal to the Supreme Court of New York, the widow stated in an affidavit made in the New York proceedings that if she were successful in obtaining damages in the action in Western Australia she agreed to recognize the compensation lien and to refund out of the proceeds of the action the full amount of the compensation or the sum covered by the lien, whichever was the lesser amount. Explanations of this affidavit were given by the widow and her solicitor, Mr. *Hamer*, before *Wolff* J. She said she was committed to bring the action because of the lien; that she understood that if she did not bring the action it was possible for the insurers to do so; that if she had not given the undertaking she would not have taken action on her own account but that she wanted to do so for the children. *Mr. Hamer said he advised her to make the affidavit because in his opinion the board in New York would not make an award until it had some assurance that the lien under the New York law could be enforced*; he had advice from New York that the insurance carrier objected to any award being made immediately effective because it considered the lien would not be effectively enforced; *he was told an appeal had been lodged in order to protect the lien*; the defendants informed the widow that unless she continued on with the New York proceedings her failure to do so would be raised as a defence in the action; he was convinced that she had a right under the New York law and she desperately needed the money; *the widow's New York attorney, Mr. Soley, told Mr. Hamer he thought the insurance carrier would go on appealing until it had some assurance that the lien would be enforced*; that the carrier was intent on delaying the final decision until the action had been heard; *he, Mr. Hamer, advised the widow to sign the affidavit to end the delay and get some*

money ; Mr. Soley suggested it as a means of removing the obstacle raised by the carrier.

In view of this evidence *Wolff* J. could properly conclude that the affidavit was given to secure the compensation, and not merely to avoid delay in the payments of compensation : that it was prompted by both considerations, by a genuine doubt as to whether the claims could succeed as well as by a desire to secure early payments. The least favourable view for the plaintiff of this evidence is that in explaining the undertaking the emphasis is more on avoiding delay in payments than on securing such payments.

I think then that the appeal fails so far as it is based on these workmen's compensation payments being gains to the widow and children for the purpose of assessing damages.

Before proceeding to deal with other grounds of objection to the assessment it should be pointed out that Mr. *Gowans* for the appellants here submitted, as I understood him, that, admitting the validity of the compromise, still in determining the effect of the compensation payments on the damages such payments should first be deducted from the damages and then an allowance should be made for the cost of getting the compensation. Applying this method to the widow's share of the damages nothing would have been left after her compensation benefits had been deducted and there the calculation would end and judgment be given for the defendants as against the widow. But Mr. *Gowans* submitted a different position would arise as regards the children's shares of the damages. In the case of each child the damages as assessed by *Wolff* J. exceeded the value of the compensation benefits awarded to it and so the calculation would be continued by adding back to the damages what it had cost to secure the compensation. This would not involve the reduction of the damages awarded to the children. The objection to this course would be that the contingent payment to the widow would be treated as absolute up to the time the calculation ended, whereas it was always contingent. I understand the explanation of this method to be that the extent of the liability under the undertaking given by the widow depended on the amount of the damages awarded : that until the damages were assessed it would not be known what the liability was. However it was not necessary to know what the damages would be before the gain was valued : it was already known that to the extent of the damages, whatever they were, it would be diminished or even eliminated. That being so I think the damages were rightly assessed without regard to the assumed gain.

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Other grounds of objection to the assessment are that *Wolff* J. treated the family loss of income, i.e. £1,750, as continuing for thirty years at the same rate, although the children would, in ordinary circumstances, cease to be dependants about half way through that period; that he made no allowance for the possibility of the widow's re-marriage; and that in determining the gain from the acceleration of benefits from the deceased's estate he disregarded the voluntary payment of wages made to the widow by the employer in respect of a period of two months after his death, and so took the gain to her under this head as being £600 instead of £750, the figure agreed upon by the parties.

In making the assessment of damages *Wolff* J. appears to have followed to some extent the method indicated by the Privy Council in *Nance* v. *British Columbia Electric Railway Co. Ltd.* (1), except that his Honour took the possibility of the widow's re-marriage into consideration before arriving at the lump sum, and did not up to that stage estimate the widow's and the children's shares separately. However the allowance for this possibility, like the gains and the allowance for the possible death of the wife before the husband had he not been killed, should have been deducted from the lump sum arrived at in her case. There was no obligation on his Honour to adopt the years' purchase method applied by this Court in *Lincoln* v. *Gravil* (2) following certain English cases, although if he had done so a result substantially more favourable to the widow might have been reached. This gives rise to the question whether damages in these actions should depend on what would seem to be the arbitrary choice of method by the trial judge. There appears to be no reason why the same method should not always be employed without any exception. If so the method indicated in *Nance's Case* (3) is the obvious choice.

Then applying that method the widow's share would be assessed separately. It is fair to assume that from the beginning her share of the £1,750 would have extended to at least one-half, but it may have been reduced as the children grew older and their demands increased and have been increased again as the children secured occupations, or married in the case of the girls, even after making allowance for the likelihood that the husband would have kept more for himself as the dependency of the children diminished. It would I think be fair to take £900 as the average amount that the widow would have received during the thirty years that his Honour estimated would be the period for which the deceased would have

(1) (1951) A.C. 601, at p. 615.
(2) (1954) 94 C.L.R. 430.
(3) (1951) A.C. 601.