ORIGINAL

IN THE HIGH COURT OF AUSTRALIA

BATTY & ANOR.

V.

EVANS

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Friday, 10th September, 1954.

J. J. Gourley, Govt. Print., Melb.

C.7163/51

BATTY & ANOR.

v.

EVANS

ORDER

Appeal dismissed with costs.

BATTY & ANOR. v. EVANS

JUDGMENT.

DIXON C.J.
McTIERNAN J.
WEBB J.
TAYLOR J.

BATTY & ANOR. v. EVANS.

This is an appeal from an order of the Supreme Court of New South Wales refusing a new trial in an action brought under the Compensation to Relatives Act 1897 as amended. The plaintiff is the executor of Beresford Brown Bishop, who died on 8th December 1951 as a result of the defendants' negligence in the management of a motor car. The plaintiff as executor sued on behalf of the deceased's widow and two children. Liability was not denied on the part of the defendant and the only question submitted to the jury was that of the assessment of damages. The jury awarded the sum of £13,500 to the plaintiff, including an amount of £1500 to be divided equally between the two children on their attaining twenty-one. That appears to have been the form of their verdict. The defendant applied to the Full Court of the Supreme Court of New South Wales for a new trial on the ground that the damages were excessive. The application was refused on the ground that, although the verdict was a large one, it was not such as to be out of all proportion to the circumstances of the case and one that could not be arrived at reasonably. The defendant now appeals as of right to this Court.

It appears that the deceased was 36 years of age at the time of his death. His wife was about the same age. They were married on 18th December 1937. The children of the marriage consisted of a boy aged a little more than nine years at the time of his father's death and a girl of a little more than six years of age. The deceased had enlisted in the A.I.F. as a private in 1942 and served with the A.I.F. until some time in 1947, attaining the rank of lieutenant. He joined the Commonwealth Military Forces with the same rank in 1949 and was in that service at the time of his death. He had passed the examination for captain and was about to be promoted to that rank. In civil life he was an accountant. In 1949 he joined Australian Trade Publications Pty. Ltd. as secretary. Later he became business manager of the company.

His salary was £20:6:0 per week. His military pay as a lieutenant worked out at about £1 a week. As captain it would have been somewhat higher. Taking his earnings as £21:6:0 a week, income tax would amount to £2:0:9. The family lived in a weatherboard cottage in Como bought in the joint names of husband and wife. At the time of the deceased's death £696 remained unpaid of the purchase money which was payable at about the rate of £2 a week. It would seem that £786 had been paid, so that the half interest which the wife obtained by survivorship would be equivalent to about £398. Personal expenses by the deceased on his own account were not great. They were detailed in the evidence and amount to an estimated £285:10:0 a year, or £5:10:0 a week. This amount covered clothing, tobacco, fares, luncheons and incidental expenses. Food for the household cost £7 a week. Other expenses were paid by cheque, including clothing for deceased's wife and children, instalments of purchase money for the house, rates, taxes and other outgoings. The chairman of directors of Australian Trade Publications Pty. Ltd. was called as a witness. His evidence showed that the deceased was regarded by the company as possessing excellent capabilities and as having promoted the business of the company rapidly. His work was said to cover the whole field of the company's operations, the opening of accounts, publications, production, sales, advertising and general managership. He had a special knowledge of plastics, which apparently was an added advantage to the business of the company, and he was chairman of "The Informative Plastics Industry in New South Wales". The chairman of directors said that in March 1952 the deceased's salary would have been increased by £3 odd and that had deceased been still living at the time of the trial the witness estimated that he would have been earning a total income from the business of approximately £30 a week. He considered that the deceased's future was a good one, his work had been promising and the company's activities had been expanding. He was not a man whose earnings

would have remained at what he described as the £30 mark. He would have gone over that and, although the witness thought it was very hard to state a figure with any accuracy, he was sure that he would have improved his financial position. The officer commanding his unit in the Commonwealth Military Forces was called as a witness and spoke highly of the deceased as one of the most promising officers. He said that he was on the point of being gazetted as captain and it was anticipated that he would have a promising military career. An actuary was called who stated in effect that an annuity of £1 a week calculated from the time of the deceased's death until the date when he would have become 70 years of age, terminating, however, on the death before that date either of the deceased or of his wife would, if calculated at $3\frac{3}{4}$ per cent. interest amount to £854. If calculated at $4\frac{1}{2}$ per cent. interest it would amount to £786. The actuary's evidence is, of course, useful only as supplying a calculation by which the actual estimate of damage may be checked.

It is apparent that if the deceased's rate of earnings at the time of his death were the only basis for calculating the loss suffered by his widow and children the jury's verdict would be hard to justify. On this basis it was urged that the amount was so excessive that the verdict must be set aside as unreasonable. The case is, however, one in which the prospects of the deceased must be taken into account as a very important element in assessing the loss of the deceased's widow and children. This is not the case of a man completely established in an occupation which he is likely to pursue until his death or retirement remunerated at a recognised wage standard. The fact that the deceased served in the A.I.F. for five years meant that he did not begin his effective business career until he was at least thirty-two years of age. But he then advanced rapidly and it is quite plain that a promising business career was opening before him when he was unfortunately killed. The evidence says that he was highly

thought of, both as an officer and as a business man. It was open to the jury to take the view that he was the kind of man who was likely to succeed in life and that his actual earnings at the time of his death formed but a poor standard upon which to estimate the loss which his wife and children had suffered through his early death. No doubt it was necessary that the jury must be satisfied that this was so. They were not at liberty to make wild conjectures, but it is essentially within the province of the jury to estimate damages of the kind which the evidence of this case discloses. We agree in the observation made by Street C.J. in the Full Court of the Supreme Court that the damages were large. But it is one thing to say that the damages were large and another that they were so unreasonable that the verdict must be set aside. We think upon the whole of the facts that it was open to reasonable men to estimate the damages at the amount which the jury adopted.

For these reasons the appeal should be dismissed with costs.

BATTY & ANOR.

v.

EVANS

JUDGMENT.

FULLAGAR J.

BATTY & ANOR.

v.

EVANS.

The wife and children in this case have commanded sympathy, and received generosity, from the jury. I do not think that the sympathy was misplaced, but I do think that the generosity has been excessive.

Under Lord Campbell's Act, as it stands in New South Wales, the damages recoverable are limited to actual financial loss incurred by reason of the death. So many probabilities and possibilities have to be taken into account in the estimation of the financial loss in any particular case that the task of arriving at a lump sum which will provide fair and reasonable compensation is, more often than not, a task of great difficulty. Differences of opinion - sometimes within fairly wide limits - may,and do, legitimately occur. Courts, therefore, ought not to interfere, and have repeatedly said that they will not interfere, with a discretion entrusted by the statute to the jury, unless the amount awarded is either so high or so low that it is seen to be "out of all proportion" to the probable loss sustained. It has been put in a variety of different ways, but that expression, I think, conveys what is meant as well as any other. Applying that test, I do not think that the verdict in the present case ought to be allowed to stand.

The amount of the verdict was £13,500, and this sum was apportioned by the jury by awarding £12,000 to the wife, and £750 to each of the two children. We were told that the amounts awarded to the children were not specifically challenged. They could hardly have been specifically challenged. But they are part of the amount of the verdict, and the amount to be considered is the total sum of £13,500.

The evidence showed that the deceased man was, at the time of his death, in receipt of a net income of about £19:6:0. After making allowance for his own personal expenses, there would be about £13:16:0 left. He was 36 years of age, and his wife was almost exactly the same age. A house was in course of purchase on extended terms, but, apart from this, he appears (naturally enough) to have been able to save little or nothing. The two children were a boy aged 9 years and a girl aged 6 years.

Evidence was given by Mr. A.T. Traversi, an actuary, as to certain annuity values. He was asked by counsel for the plaintiffs to give the actuarial value on a certain basis of an annuity of £15:16:0 per week, but the learned trial judge intervened, and required the value of an annuity of £1 per week to be given, observing that, if that figure were given, "anything the jury decides can be arrived at by a simple process of multiplication." Mr. Traversi then gave two values of £1 per week calculated at 3¾% and 4½% respectively. The former figure was £854, and the latter £786. He was not asked which interest rate he thought it preferable to take. The figures given were for an annuity calculated from the date of death to the date when the deceased man would have attained 70 years of age, but subject to termination on the death before that date of either the deceased man or his wife. When his Honour came to charge the jury, he told them that they were at liberty - I think indeed that he really invited them - to take the sum of £13:6:0, or some other weekly sum which they regarded as representing "the prospects over the years", and then to apply Mr. Traversi's figures after determining an appropriate rate of interest. If they arrived at £X per week as "their average expectation", then they would multiply £X "by either 786 or 854 or some figure between." He then reminded them that Mr. Traversi's figures made no allowance for "the various ills that afflict us", which he had already listed as "the possibilities of sickness, industrial upheavals, wars, depressions, accidents, divorce". He then directed them (not, I think, on

altogether sound lines) to consider the possibility of the widow's re-marrying at some time in the future.

No attack was made on his Honour's charge to the jury, and I mention these matters only because it seems to me that they make plain the manner in which the jury arrived at their verdict. If we take the figure of £15:16:0, which was the figure put by counsel for the plaintiffs to Mr. Traversi before his Honour's intervention, and multiply it by the higher of Mr. Traversi's two figures (85¼), we get a sum of £13,49¼, which is almost exactly the amount of the verdict. It does not seem to me to be possible that this is mere coincidence. I am not prepared to say that the jury were taking too high a figure when they took the sum of £15:16:0 as representing the relevant weekly sum. But, if they proceeded by this method, they were clearly, in my opinion, bound to discount by a very substantial percentage indeed the result at which they arrived. Not only are there the "thousand natural shocks That flesh is heir to" - sickness, accident, commercial depression, and so on - but, however unlikely the event may seem to a woman who has been happily married and recently widowed, a second marriage in the case of a quite young woman is by no means a remote or fanciful contingency. A verdict which takes none of these matters into consideration cannot be supported.

It may be said that there is no absolute certainty that the jury arrived at their verdict on the basis I have postulated. There is, in my opinion, a very high degree of probability that they did arrive at their verdict on that basis - a sufficiently high degree of probability to justify a court of appeal in acting on the assumption that they did so arrive at their verdict. It is true, however, that there is no absolute certainty about it. But I do not think that this affects the proper ultimate conclusion. As soon as it is seen that the verdict could have been arrived at in that way, it becomes apparent, I think, that the verdict is too high to be justifiable.

The jury, in my opinion, could not, on the evidence, properly take a weekly figure much larger than £15:16:0, and any figure within reason above that must have led to a result which ought to be so heavily discounted as to bring the amount of the verdict very considerably below £13,500.

The case seems to me to illustrate the danger of putting annuity calculations before a jury without a very clear and emphatic warning. Broadly speaking I think that such calculations should only be used as a check by which to test an estimate arrived at on more general considerations and in the light of that practical commonsense which is supposed to be the prerogative of juries.

It is legitimate to test the verdict in this case in another way, by supposing a capital sum of £13,500 invested in gilt-edged securities. At the present time the rate of interest on Commonwealth bonds and stock is 4½%. At the date of the death it was lower. It is reasonable to take 4%. A sum of £13,500, invested at 4%. will produce £540 per annum. That will be subject to income tax. The net income will be about £500 per annum. A somewhat larger income could be obtained by quite reasonably safe investment. With that income and that capital sum, the family of the deceased man appears to me to be placed in a much stronger and better financial position than it enjoyed in his life-time. Financial considerations are the only relevant considerations.

I have not overlooked the fact that the deceased man appears to have been a man of excellent character and some business ability. The jury could quite properly proceed on the footing that he had some prospect of bettering his position in the years that lay ahead. But a highly optimistic view would not be justified by the evidence. The deceased man was 36 years of age. The business in which he was engaged was one which is

(as the learned judge observed) dependent on general business prosperity and sensitive to commercial "ups and downs". It declined after his death, and the evidence does not, to my mind, warrant the inference that the decline was wholly due to his death.

On the whole case I am of opinion that the verdict places the deceased man's family in a very substantially better position than they had any reasonable prospect of occupying if he had lived. I think that it is "out of all proportion" and that this appeal should be allowed.