ORIGINAL (10

IN THE HIGH COURT OF AUSTRALIA

THE PUBLIC TRUSTEE FOR VICTORIA

V.

THE COMMONWEALTH OF AUSTRALIA

ORIGINAL

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Thursday, 19th December 1957

W. M. HOUSTON, Govt. Print., Melb.

C.1978/55

THE PUBLIC TRUSTEE FOR VICTORIA

v.

THE COMMONWEALTH OF AUSTRALIA

ORDER

Appeal allowed with costs. Judgment of the Chief Justice of Tasmania varied by substituting the figures £3000 for the figures £2750.

THE PUBLIC TRUSTEE FOR THE STATE OF VICTORIA

v.

THE COMMONWEALTH

JUDGMENT

DIXON C.J.
WILLIAMS J.
WEBB J.

THE PUBLIC TRUSTEE FOR THE STATE OF VICTORIA

v.

THE COMMONWEALTH

These are an appeal and a cross appeal from a judgment of Burbury C.J. in an action brought under the Fatal Accidents Act 1934 (Tas.) by a legal personal representative.

The action was brought for the benefit of the only surviving child of Robert William Stephens who was killed on 20th January 1956. His death was the result of a collision on the Midlands Highway between the car he was driving and a military vehicle of the Commonwealth, which is the defendant in the action and the respondent and cross appellant in this Court. In the car driven by Stephens besides the child who survives, a son, there were his wife, two infant daughters and another son. He himself, his wife and these three children were killed in the accident. The boy who survived is the only remaining member of the family. At the time of the accident he was three years of age.

The Commonwealth admitted liability and the question before the Chief Justice was the assessment of damages.

At the time of his death the deceased was 39 years of age. He was employed in a subsidiary company of Australian National Airways Pty. Ltd. at Essendon, Victoria, and was receiving a salary of £1067. 8. 0 per annum. He might have reasonably expected increments of £100 a year until in five years time he reached a maximum salary of £1750.

The deceased and his family resided at Pascoe Vale, Victoria, on a piece of land sufficiently large to enable him to conduct a poultry farm. He seems to have been able to live from this and to use the whole of his salary to pay off the mortgage debt. How he managed this did not appear. For such figures as to the returns from his poultry as appeared made it look no easy task.

Owing to the death of both the deceased and his wife, doubtless there were difficulties in proving all the facts that bear on the assessment of damages. Whether or not it be for that reason, the materials upon which the learned Chief Justice was left to make his assessment were anything but full. His Honour in his judgment examined the circumstances so far as they appeared and arrived at his assessment on a basis which may be summarised as follows.

As an hypothesis on which to estimate benefits which would have accrued to the surviving boy had his father lived his Honour assumed that the deceased's wife and other children did not survive, that is to say, he assumed that they had died when in fact they did. But as against that he took into account the chance of the deceased's having remarried, but for reasons he gave he considered that was not really a reason for reducing the estimate of the benefits that the boy would have received from the continuance of his father's life. But his Honour thought that he ought not to assume that the father, had he lived, would have contributed any substantial sum for the boy's benefit after he reached the age of eighteen. He estimated that until the boy reached seven or eight years of age his father would have applied for his benefit something like £150 to £200 per annum. After that (if he did not remarry) he might have sent him to boarding school or day school. He took the amount expended on the son's maintenance as increasing year by year up to about £400 to £500 per annum in the last few years of his school life. His Honour assumed, in accordance with some evidence given of an intention which the deceased had asserted, that he would have sent his sons to a public school and that the boy would have been educated at a public school at the expense of his father. The deceased had indeed stated to his own father that he would send his sons to a well-known public school where they would be boarders.

Unfortunately, no evidence was given of what this would cost. Perhaps his Honour's estimate is too low; but it may be that if evidence had been given of the cost his Honour would have considered it to be beyond the deceased's reach.

On the foregoing basis the learned judge estimated the total amount the deceased would have applied for the benefit of the boy over the assumed period of fifteen years at £4,500. His Honour then said: "The present cash equivalent of the sums making up this total amount (assuming a rate of discount of 4½%) spread out over the period would be in the order of £3,000. There should be a small reduction to take into account the contingency of the death of the father or the son."

The learned judge went on to award £2,750. The figures of £4,500 reduced to £3,000 strike the mind as low, but after considering the evidence it is difficult to see what fault can be found with his Honour's process of estimation up to that point. The result expressed in these figures represents a careful endeavour to obtain from the evidence, such as it was, a fair estimate of the monetary equivalent of the material advantages that would have accrued to the boy from a continuance of his father's life. No doubt the percentage taken by his Honour of 4½% for obtaining the present value of future monetary benefits is perhaps a point higher than the 4% which might have been adopted had his Honour thought fit. But that is a matter with which the evidence did not deal and it was within the discretionary judgment which it was necessary to exercise to take 4½%.

The cross appeal was originally based on grounds questioning the hypothesis that the other children did not survive but these were not pursued and for the rest the claim that the assessment was too high certainly fails.

The only matter upon which the assessment of damages seems really to be open to review is in the reduction of the residual or penultimate sum of £3,000 to £2,750 on

account of the contingency of the father (had he not been killed in the accident) or the son dying before the son reached eighteen years of age. This contingency of course exists, but it seems logical to deal with it simply as part of the expectation of life of each of the two persons, or perhaps one should say of their joint expectation of life. In each case the expectation of life far exceeded fifteen years. The contingency is only one of the many that are reflected in the tables (to which his Honour had referred). If it has a monetary value or equivalent it would be found in insurance tables. It was not dealt with in evidence. The proper course appears to be to leave the figure of £3,000 standing.

The appeal should be allowed and the judgment varied by substituting £3,000 for £2,750.