Dependency and Estate Claims in Queensland

The following is a summary of some of the points made by S C Williams QC in his Litigation at Sunrise address on the above topic on 20 March 1996.

Dependency Claims

As from 17 October 1994 defacto spouses who were living with the deceased as the deceased's husband or wife for at least one year immediately prior the spouse's death are included among the class of persons who are entitled to bring claims for loss of dependency. A child of such relationship who lived with the deceased immediately before the deceased's death or a posthumous child of such a relationship, is also now included.

Some of the issues which arise in the assessment of damages in these types of claims are as follows.

The deceased's earnings

Sources of income and future prospects should be examined as in personal injury action.

Surviving spouse's earnings

Actual and potential earnings of the survivor are relevant. The fact that a survivor was earning a substantial income, perhaps even in excess of the amount of the deceased spouse, does not mean that the family were not dependent upon the deceased to a significant extent. Additional earnings provided by the working spouse in practice go to improving the family's standard of living and the benefits which flow to children.

The family's outgoings

It is useful to separately examine where the earnings of the deceased and the spouse were spent. Perhaps the spouse's income went exclusively in school fees for example. Perhaps they were merely added to the deceased's earnings to improve the standard of living. Account must be taken of the deceased's hobbies, interests and habits (eg. smoking, drinking etc). An amount should be identified for the deceased's personal expenditure upon himself as should any particular item of expenses (eg. school fees) which are attributable to any member of the family.

Level of dependency

Having performed the above assessments, an apportionment of the deceased's income as to the amount which must be regarded as his personal expenditure and the balance should be undertaken. Also, it should be possible to apportion a reasonable percentage of the deceased's shared expenses. A combination of the shared expenses and personal expenses, if deducted from disposable income will provide a balance which broadly indicates the extent to which members of his family were dependent upon the deceased.

Note however that this calculation is always subject to the standard of living argument as two people can always enjoy a combined higher standard of living than they could separately with each receiving half the total income. The arithmetical calculation referred to above is intended therefore to be a base figure capable of upward revision.

Nature of pecuniary losses

The subject matter of dependency claim extends only to the losses arising out of the relationship of dependency. They do not include other commercial losses which flow as a consequence of the deceased's death eg. via a husband and wife partnership.

Accelerated benefits

The court must determine the extent to which any dependants benefit from the early receipt of estate assets which follows from the deceased's tortious demise.

This may occur where a surviving spouse receives the deceased's share of jointly owned property. Careful consideration must however be given as to whether or not such early receipt in fact constitutes a substantial advantage to the spouse. There is virtually no benefit to a surviving spouse in receiving the deceased's share of residential property which would in any event have been occupied by both of them had the deceased's tortious death not occurred.

Remarriage

The statistical prospects of remarriage should be ascertained and factored into an assessment of damages as dependency effectively ends upon a remarriage. Each case must however be judged on its merits. The survivor's intentions as regards remarriage, religious beliefs, the age of her children and her likely resources are all relevant factors. The surviving spouse's reasonable expectations as to future standard of living and the level of financial resources of any actual or potential subsequent spouse must also be considered. It might be arguable in some circumstances that the survivor's remarriage will not grant to her a financial benefit but rather have no financial consequences or may in fact be a financial drain.

Superannuation

Payments received by a surviving spouse under superannuation policy death benefit provisions cannot be taken into account in discounting damages for loss of dependency: Section 15C Common Law Practice Act.

However if the deceased did have such a policy then the surviving spouse has lost an "interest" in an asset represented by the future superannuation payout. It is realistic to say that such interest was in the vicinity of 50% of the total future benefit. Accordingly a loss to the surviving spouse can be calculated on this basis subject to a credit for the benefit of the accelerated receipt of the death benefit portion.

Discount rate

The discount rate to be applied in the assessment of all damages for loss of dependency is 3%, not the 5% rate to be applied in personal injury actions in Queensland. The use of a lower discount rate increases the award of damages and over a long period, will result in a substantial increase in the award.

Period of dependency

For the deceased's spouse, the period is circumscribed by issues such as remarriage, the survivor's age and the ages of dependants and so on. In the case of children the period is determined by reference to their age, duration of likely education and the survivor's intentions for their future education. These days courts readily accept the period of dependency of children to age 17 or 18 in the usual case and subject to evidence establishing the practicalities of proceeding to tertiary education, to age 21.

Non-recoverable losses

One cannot recover losses for loss of consortium, solatium, economic loss, general expenses or pain and suffering in a dependency claim.

Note however that significant damages may be recovered for loss of servitium: *Nguyen* v *Nguyen* (1990) 169 CLR 245; *Sturch* v *Wilmott (1996) Aust Torts Reporter 81-373.*

Refunds

Any amount paid by way of Workers' Compensation payments to the spouse and children must be "refunded". It is usual for the Workers' Compensation Board to apportion its benefit among the widow and children in identified sums so that deduction of those amounts from their respective interests should not cause any problem.

Apportionment among the dependants

It is a realistic rule of thumb to evaluate the dollar amount of the dependency of the surviving spouse as twice that of each infant, and to treat each infant approximately equally. The result for a family of a surviving wife and her two children is that, after the deceased's personal and shared expenses representing 20% of his income are deducted, the remaining 80% of his income is apportioned as to 40% to her, and 20% to each of the children. When the eldest child reaches the age at which he is notionally independent, the interest of Mrs Smith and the one dependant child might be apportioned as to 50% of the deceased's income to her and 30% to that child. Once the second child becomes independent, it is likely Mr Smith's income would be apportioned as to 40% to him and 60% to her.

It is of course possible to calculate the interests of each dependant precisely, but such calculations offer a pretence of mathematical accuracy which is exposed by a consideration of the sometimes broad assumptions upon which those calculations are based, and by the arbitrary discounting which is then employed.

Nevertheless, in each case any specific needs of a particular dependant must be taken into account. Private school fees have already been discussed. Any medical condition suffered by any dependant which is likely to have resulted in a greater expenditure upon that dependant than upon other dependants must also be considered. However, those considerations aside, each of the infant dependants should be treated more or less equally in terms of their level of dependency, though their periods of dependency will differ. The apportionment must also reflect the fact that each of the dependants is likely to have greater expenditures at different stages of their periods of dependency.

Contingencies

Like all actions for damages, contingencies must be taken into account. In a dependency action the contingency issue is magnified as the same issues apply not only to the decease but also the surviving dependants.

Estate Claims

The dependency claim is distinct from other types of viable claims associated with the deceased's death. Any cause of action held by the deceased as at the date of his death survives for the benefit of his estate: Section 66 Succession Act 1981.

The estate, as distinct from the dependants, may also bring an action under Section 66 (4) of the Act arising out of the tortious death of the deceased. A compromise by the deceased's personal representative of a cause of action being prosecuted at the time of death which survives for the benefit of the estate does not preclude a subsequent claim by the dependants for damages for loss of dependency: *Kupke* v *The Corporation of the Sisters of Mercy & Ors* (QLR 24 February 1996).

No damages for pain and suffering or for loss of expectation of life are available, and nor are exemplary damages. No claim for future economic loss is permissible. Further, and other than for funeral expenses, losses or gains to the estate consequent upon the death are not to be taken into account.

In essence, the estate action is limited to funeral expenses, special damages, and, where necessary, testamentary expenses. In that context, special damages include ambulance, medical and hospital treatment undergone between the time of the accident and the time of death. Funeral expenses will be allowed in a moderate sum. Testamentary expenses and costs may be allowed if it was necessary to incur those expenses in order to prosecute the estate action.

An estate action is available at the suit of the deceased's executor or the administrator of his estate. His widow does not necessarily have a cause of action unless she falls into an appropriate class. Unless the estate action is brought by the executor of the deceased's estate or its administrator, it will fail.

Editors Note:

S.C.Williams QC will be presenting a paper on the ***Evolution of and Latest Developments in the Griffiths v Kerkemeyer Principle*** *at the APLA National Conference, 17-20 October 1996*

The Provision of Rehabilitation Services under the Motor Accident Insurance Act (Queensland)

Ian Brown, Carter Capner, Brisbane

Practitioners should be aware of the decision in *McMullen v Suhr & Suncorp* (unreported, Supreme Court, Qld, 02.04.96).

Ms McMullen, a 28 year old single supporting mother, suffered paraplegia as a result of a motor vehicle accident in March 1995.

After service by the plaintiff of a Section 37 Notice upon Suncorp, the CTP insurer, Suncorp wrote to the plaintiff's solicitors:

> We are prepared to settle liability on the basis of 100 per cent apportionment in favour of your client.

Suncorp was originally very obliging in terms of the plaintiff's rehabilitation needs. They arranged to purchase a new motor vehicle for the plaintiff (as her existing vehicle was not suitable given her disability) and to pay rental on a wheelchair accessible house (as her own home was not wheelchair accessible and could not be made so). It also paid for modifications to the plaintiff's rental premises.

Negotiations failed to resolve various issues. Suncorp then notified the plaintiff's solicitors in January 1996 that it was no longer prepared to pay the plaintiff's rental as they did not consider it to be a valid rehabilitation expense.

Consequently, the plaintiff asked the Supreme Court to determine whether the payment of rent was in the nature of *rehabilitative services* within the meaning of s.51 of the Motor Accident Insurance Act 1994 ("the MAIA").

The insurer's first line of argument was that there had been no admission of liability pursuant to s51(3) of the MAIA. Byrne J rejected this argument citing the correspondence from Suncorp to the plaintiff's solicitors after the delivery of the s.37 Notice.

The insurer then argued that the payment of rent was not a *rehabilitation* expense as contemplated by the Act and that in any event the expense was not a *reasonable* one.

The plaintiff argued that s.51 and the reference to rehabilitation services should be read in light of the