Lassiter Ann Masters (suing as the widow and dependant of Lassiter Henry Adolphus, deceased) v To Keng Lam (alias Toh Jeanette) (No 2)
[2005] SGHC 4

Case Number : Suit 870/1997, RA 600066/2002, 600067/2002

Decision Date : 10 January 2005

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Michael Hwang SC and Ernest Wee (Michael Hwang) and Siva Murugaiyan (Sant Singh Partnership) for the plaintiff; Quentin Loh SC, Anthony Wee and Teo Guan Kee (Rajah and Tann) for the defendant

Parties : Lassiter Ann Masters (suing as the widow and dependant of Lassiter Henry Adolphus, deceased) — To Keng Lam (alias Toh Jeanette)

Damages – Assessment – Defendant partially liable for fatal accident – Plaintiff dependant entitled to damages – Plaintiff's claims for loss of inheritance and professional fees for post-mortem estate planning dismissed in assessment of damages hearing before registrar – Whether claim for loss of inheritance maintainable in dependency claim in Singapore – Whether plaintiff entitled to claim for professional fees for post-mortem estate planning

Damages – Assessment – Defendant partially liable for fatal accident – Plaintiff dependant entitled to damages – Plaintiff's claim for loss of support allowed in assessment of damages hearing before registrar – Defendant appealing against decision of registrar – Whether plaintiff entitled to claim for loss of support

Damages – Assessment – Defendant partially liable for fatal accident – Plaintiff dependant entitled to damages – Plaintiff's claim for loss of support allowed in assessment of damages hearing before registrar – Plaintiff appealing against quantum of damages for loss of support – Whether multiplicand and multiplier for calculation of quantum of loss of support fair – Whether deduction for interest earned on capital applicable to quantum

10 January 2005 *Judgment reserved.*

Woo Bih Li J:

Introduction

1 On 9 May 1994 at about 6.30am, Henry Adolphus Lassiter ("HAL") was crossing the junction of Stevens Road/Scotts Road from Draycott Drive when a motor vehicle driven by the defendant, To Keng Lam (alias Jeanette Toh) ("the Driver"), collided with him. As a result, HAL was killed. He was 48 years old then. He left behind his widow, Ann Masters Lassiter ("AML"), who was also 48 years old then and four daughters. On 5 May 1997, AML filed an action in the High Court for her own benefit and the benefit of other dependants of HAL. Consent judgment was subsequently entered against the Driver on the basis of 45% liability, with 55% liability attributed to HAL.

2 AML claimed the following:

(a) Loss of inheritance;

(b) Loss of support;

(c) Professional fees for post-mortem estate planning;

(d) Various other items as special damages; and

(e) Damages for loss of bereavement.

3 The assessment of damages was heard before an assistant registrar ("AR") between 28 February to 28 June 2002. The claims for loss of inheritance and loss of support were restricted by AML to claims for AML alone, *ie* excluding the daughters. On 29 June 2002, the AR delivered a written judgment. The AR decided as follows:

(a) The claim for loss of inheritance was dismissed;

(b) The claim for loss of support (which the AR referred to as a claim for loss of dependency) was assessed at US$130,000 per annum x eight years = US$1,040,000;

(c) The claim for professional fees for post-mortem estate planning was dismissed;

(d) Most of the various items claimed as special damages were allowed;

(e) The damages for bereavement were allowed at $10,000.

4 The AR also made an award on costs although counsel for both sides had asked him to defer his decision on costs for the time being.

5 The Driver filed an appeal, being Registrar's Appeal No 600066 of 2002, against the AR's decision in respect of the loss of support and on costs. AML also filed an appeal, being Registrar's Appeal No 600067 of 2002 against the AR's decision in respect of the following:

(a) Loss of inheritance;

(b) Loss of support;

(c) Professional fees for post-mortem estate planning; and

(d) Damages which were not allowed.

6 Both appeals were heard by me and I now set out my decision and reasons. I would also mention that at the outset, Mr Michael Hwang SC, counsel for AML, said that there was no claim for dependency for the daughters under AML's appeal.

Loss of inheritance

7 As I mentioned, AML made a claim for loss of inheritance. She was the main beneficiary under HAL's will. HAL was an entrepreneur who, it was alleged, preferred to put most of the profits he made back into his businesses rather than have a higher earned income. Mr Hwang used the term "loss of inheritance" and "loss of savings" interchangeably and Mr Quentin Loh SC, counsel for the Driver, proceeded along those lines as well. It seems to me that "loss of inheritance" is not necessarily the same as "loss of savings" and I shall elaborate on this later. The claim for loss of inheritance was the largest head of claim. It was also the most contentious both on the law and on the facts. I will deal with the law first.

The law

8 Mr Loh submitted that the claim for loss of inheritance was part of a claim for lost years by an estate and that the estate's claim for lost years was abolished in Singapore in 1987. That was why AML made the claim for loss of inheritance under a dependency claim. Mr Loh also submitted that a claim for loss of inheritance was not maintainable under a dependency claim.

9 Mr Hwang accepted that an estate's claim for lost years was abolished in Singapore in 1987. However, he submitted that a claim for loss of inheritance was maintainable under a dependency claim in any event.

10 As HAL died on 9 May 1994, the applicable legislation is the Civil Law Act (Cap 43, 1994 Rev Ed) and not the 1999 Revised Edition. The relevant sections are ss 7, 12 and 14, and I set out below the relevant provisions thereof:

> 7.—(1) Subject to this section, on the death of any person, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of his estate:
>
> Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to any claim for damages on the ground of adultery.
>
> (2) Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person –
>
> (a) shall not include –
>
> (i) any exemplary damages; and
>
> (ii) any damages for loss of income in respect of any period after that person's death;
>
> (b) …
>
> (c) where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death except that a sum in respect of funeral expenses may be included.
>
> (3) …
>
> (4) The rights conferred by this section for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by section 12 and so much of this section as relates to causes of action against the estates of deceased persons shall apply in relation to causes of action under that section as applies in relation to other causes of action not expressly excepted from the operation of subsection (1).
>
> (5) …
>
> 12.—(1) If death is caused by any wrongful act, neglect or default which is such as would (if

death has not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured.

(2) Subject to section 13(2), every such action shall be for the benefit of the dependants of the person (referred to in this section and in sections 13 and 14 as the deceased) whose death has been so caused.

…

(8) In this section, "dependant" means –

(a) the wife or husband of the deceased;

(b) any parent, grandparent or great-grandparent of the deceased;

(c) any child, grandchild or great-grandchild of the deceased;

(d) any person (not being a child of the deceased) who, in the case of any marriage to which the deceased was at any time a party, was treated by the deceased as a child of the family in relation to that marriage;

(e) any person who is, or is the issue of, a brother, sister, uncle or aunt of the deceased.

14.—(1) In every action brought under section 12, the court may award such damages as are proportioned to the losses resulting from the death to the dependants respectively except that in assessing the damages there shall not be taken into account –

(a) any sum paid or payable on the death of the deceased under any contract of assurance or insurance;

(b) any sum payable as a result of the death under the Central Provident Fund Act; or

(c) any pension or gratuity which has been or will or may be paid as a result of the death.

(2) …

(3) In an action brought under section 12 where there fall to be assessed damages payable to a widow in respect of the death of her husband, there shall not be taken into account the remarriage of the widow or her prospect of remarriage.

(4) If the dependants have incurred funeral expenses in respect of the deceased, damages may be awarded in respect of those expenses.

11 As can be seen, s 7(2)(a)(ii) excludes an estate's claim for damages for loss of income in respect of any period after the death of the victim. For completeness, I would add that s 8 abolished the right to damages for loss of expectation of life except for one qualification which is unnecessary for me to mention.

12 It is necessary to go into some detail of the history of the legislation and cases of fatal

accidents. I will focus first on the English position as Singapore legislation on fatal accidents has followed English legislation closely most of the time.

13 Under the common law, a personal action did not survive a person's death. This was considered to be unsatisfactory with the industrial revolution and the use of trains and later, motor vehicles. In England in 1846, Lord Campbell's Act (the Fatal Accidents Act) was passed to allow claims to be made for the death of the victim for the benefit of the wife, husband, parent and child of the victim. Although there was no reference to dependants, Lord Campbell's Act was considered to be for the benefit of dependants and not the estate. Since then, there have been various legislation affecting such claims, for example, the Fatal Accidents Act 1864, the Fatal Accidents Act 1959 and the Fatal Accidents Act 1976.

14 In the meantime, the Law Reform (Miscellaneous Provisions) Act 1934 was passed in England. It provided that a cause of action survived a person's death for the benefit of his estate, subject to some exceptions which are immaterial for present purposes.

15 Prior to 1978, where a person's death was caused by the negligence of another person, the wrongdoer was liable to compensate the deceased's estate for loss of expectation of life but not for loss of future earnings. Secondly, the wrongdoer was also liable to compensate the dependants of the deceased for their loss of support which was known as a dependency claim or a loss of dependency. This claim would be derived from but was not equivalent to the deceased's loss of future earnings. Thirdly, the wrongdoer was liable to compensate any person or the deceased's estate for any additional disbursements incurred on account of the accident. However, the law on this began to change in 1978.

16 In *Pickett v British Rail Engineering Ltd* [1979] 1 All ER 774 ("*Pickett*"), a healthy 53-year-old man could have worked all the way until the retirement age of 65. However, due to exposure to asbestos, his life expectancy was cut short to just one year. He sued for the loss of expectation of his life and for the loss of future earnings for that one year. Liability was not denied. The defendants only challenged the claim on the question of quantum. The trial judge allowed the claim for loss of expectation of life but only awarded him damages for loss of earnings during the one-year period that he was expected to survive. The plaintiff appealed. He died before the matter reached the Court of Appeal. His widow took over the action as the administratrix of his estate.

17 The Court of Appeal did not award any sum for loss of earnings beyond the actual survival period. The administratrix appealed to the House of Lords contending that a much larger amount ought to have been awarded in respect of loss of future earnings.

18 A majority of the House of Lords allowed her appeal. They allowed the claim for loss of earnings during the deceased's lifetime rather than the shortened span of his life. What weighed heavily on the minds of the Law Lords there was the fact that had they not allowed the appeal, the widow would be left with no recourse or claim for her loss of dependency.

19 Lord Wilberforce said at 778:

> This creates a difficulty. It is assumed in the present case, and the assumption is supported by authority, that if an action for damages is brought by the victim during his lifetime, and either proceeds to judgment or is settled, further proceedings cannot be brought after his death under the Fatal Accidents Acts. If this assumption is correct, it provides a basis, in logic and justice, for allowing the victim to recover for earnings lost during his lost years.

This assumption is based on the wording of s 1 of the 1846 Act (now s 1 of the Fatal Accidents Act 1976) and is not supported by any decision of this House. It cannot however be challenged in this appeal, since there is before us no claim under the Fatal Accident Acts. I think, therefore, that we must for present purposes act on the basis that it is well founded, and that if the present claim, in respect of earnings during the lost years, fails it will not be possible for a fresh action to be brought by the deceased's dependants in relation to them.

20 He continued at 781:

My Lords, in the case of the adult wage earner with or without dependants who sues for damages during his lifetime, I am convinced that a rule which enables the 'lost years' to be taken account of comes closer to the ordinary man's expectations than one which limits his interest to his shortened span of life. The interest which such a man has in the earnings he might hope to make over a normal life, if not saleable in a market, has a value which can be assessed. A man who receives that assessed value would surely consider himself and be considered compensated; a man denied it would not. And I do not think that to act in this way creates insoluble problems of assessment in other cases. In that of a young child (cf *Benham v Gambling*) neither present nor future earnings could enter into the matter; in the more difficult case of adolescents just embarking on the process of earning (cf *Skelton v Collins*) the value of 'lost' earnings might be real but would probably be assessable as small.

There will remain some difficulties. In cases, probably the normal, where a man's actual dependants coincide with those for whom he provides out of the damages he receives, whatever they obtain by inheritance will simply be set off against their own claim. If on the other hand this coincidence is lacking, there might be duplication of recovery. To that extent injustice may be caused to the wrongdoer. But if there is a choice between taking a view of the law which mitigates a clear and recognised injustice in cases of normal occurrence, at the cost of the possibility in fewer cases of excess payments being made, or leaving the law as it is, I think that our duty is clear. We should carry the judicial process of seeking a just principle as far as we can, confident that a wise legislator will correct resultant anomalies.

21 In *Pickett*, the victim himself had commenced action and obtained judgment before he died. However, in *Gammell v Wilson* [1981] 1 All ER 578 ("*Gammell*"), two claims for loss of future earnings were allowed in cases where the plaintiffs, in two separate actions, were the parents of two young men who had been killed in accidents as a result of the negligence of the respective defendants. The claims were made under the Fatal Accidents Act 1976 in the first case, and the Fatal Accidents Acts 1846 to 1959 in the second case, by the plaintiffs on behalf of themselves as dependants and on behalf of the estate of the deceased under the Law Reform (Miscellaneous Provisions) Act 1934 (the "1934 Act").

22 At the hearing of the appeals before the House of Lords, the defendants contended that under the 1934 Act, a deceased's estate was not entitled to recover damages for loss of future earnings because the cause of action for such earnings was a "gain to the estate" while the loss of earnings was a "loss to the estate", and that in accordance with s 1(2)(c) of the 1934 Act, damages under the 1934 Act were to be calculated without reference to any loss or gain to the estate consequent on the victim's death. The appeals were dismissed by a majority of the House of Lords on the basis that the right to recover damages for loss of future earnings vested in the deceased immediately before his death, and not on his death, and the right passed to his beneficiaries whether they were his dependants or not. Section 1(2)(c) of the 1934 Act is *in pari materia* with s 7(2)(c) of the Civil Law Act. Paragraph (1) of the headnote of the report states, *inter alia*:

Accordingly, even though it produced a result which was neither sensible nor just, the House was constrained to hold that the plaintiffs were entitled to the damages awarded for the lost years despite the fact that those damages far exceeded the amount to which they were entitled under the 1976 Act as dependants.

23 Lord Diplock said at 583:

If the deceased [in *Pickett*] had died before judgment in his action had been entered his widow would have had her cause of action under the Fatal Accidents Acts. This would have enabled her to recover the value of the provision that he would have made for her needs out of his earnings during those 11 'lost years'. But because he died after the judgment his dependent widow was deprived of that cause of action, and the general damages for pain and suffering recoverable on behalf of his estate, of which she was the sole beneficiary, fell considerably short of the sum that she would have been likely to recover under the Fatal Accidents Acts as the amount of the dependency if that cause of action had remained open to her.

Here was an obvious injustice which this House remedied by overruling *Oliver v Ashman* and holding that a living plaintiff could recover damages for loss of earnings during the lost years, but that in assessing the measure of such damages there should be deducted from the total earnings the amount that he would have spent out of those earnings on his own living expenses and pleasures since these would represent an expense that would be saved in consequence of his death. In the case of a married man of middle age and of a settled pattern of life, which was the case of Mr Pickett, the effect of this deduction is to leave a net figure which represents the amount which he would have spent on providing for his wife and any other dependants, *together with any savings* that he might have set aside out of his income. *If one ignores the savings element, which in most cases would be likely to be small, this net figure is substantially the same as the damages that would have been recoverable by the widow under the Fatal Accidents Acts: it represents the dependency*. So, in the particular case of Mr Pickett's widow the result was to do substantial justice.

My Lords, if the only victims of fatal accidents were middle-aged married men in steady employment living their lives according to a well-settled pattern that would have been unlikely to change if they had lived on uninjured, the assessment of damages for loss of earnings during the lost years may not involve what can only be matters of purest speculation. But, as the instant appeals demonstrates and so do other unreported cases which have been drawn to the attention of this House, in cases where there is no such settled pattern (and this must be so in a high proportion of cases of fatal injuries) the judge is faced with a task that is so purely one of guesswork that it is not susceptible of solution by the judicial process. Guesses by different judges are likely to differ widely, yet no one can say that one is right and another wrong.

Where Parliament has intervened by passing the Fatal Accidents Acts, the law relating to damages for death recoverable by dependants is sensible and just with the possible exception of the case of widows who have remarried or become engaged to do so by the time the action is heard. I join with your Lordships in thinking that it is too late for anything short of legislation to bring the like sense and justice to the law relating to damages for death recoverable by the estate of the deceased.

[emphasis added]

24 Lord Fraser of Tullybelton said at 588:

> It is, no doubt, just and sensible that, where the death of the family breadwinner is caused by the negligence of some other person, that person should be liable to compensate the deceased's dependants for the injury which they have suffered from the death. The main element of injury *will normally be loss of support. Such compensation is provided for by the Fatal Accidents Act 1976*. But it seems to me difficult to justify a law whereby the deceased's estate, which may pass to persons or institutions in no way dependent on him for support, can recover damages for loss of earnings, or other income, which he would probably have received during the 'lost years'. [emphasis added]

25 I have cited the above judgments not only to emphasise the point about the injustice of double recovery but because the judgments indicated that in England, loss of savings is not part of a dependency claim. I will come back to this point again.

26 After the decision in *Gammell*, the UK Parliament passed the Administration of Justice Act 1982 ("the 1982 Act") which took away the cause of action by the estate of a deceased person for loss of income in the lost years. Section 4 of the 1982 Act amended s 2(a) of the 1934 Act. Section 4(2) of the 1982 Act states:

> The following paragraph shall be substituted for subsection 2(a) –
>
> (a) shall not include –
>
> (i) any exemplary damages;
>
> (ii) *any damages for loss of income in respect of any period after that person's death*
>
> [emphasis added]

27 *Gammell* was followed reluctantly by the Singapore Court of Appeal in *Low Kok Tong v Teo Chan Pan* [1982–1983] SLR 346 ("*Low Kok Tong*") where the claim was made under s 8 of the Civil Law Act (Cap 30, 1970 Rev Ed) before the amendments in 1987. Lai Kew Chai J, delivering the judgment of the Court of Appeal, said at 350, [14]‖[15]:

> We have, however, considered it necessary to state at the end of this judgment that the effect of our decision, reluctantly arrived at, could give rise to some undesirable consequences. It could be questioned with some justification why persons other than the actual dependants of a deceased should be unjustly enriched by an award to the estate for the 'lost years'. …
>
> … It is the province of our legislature to reform the law.

28 Following the amendments in England by the 1982 Act and *Low Kok Tong*, Singapore similarly amended its legislation in 1987 so that an estate of a deceased person was disallowed from claiming damages for loss of income for the lost years.

29 In Parliament, the then Second Minister for Law, Prof S Jayakumar, said on 4 March 1987 (*Singapore Parliamentary Debates, Official Report* vol 49 at cols 66–69):

> This Bill will make certain reforms to the law relating to damages payable in cases of fatal accidents. This is necessary because of a change in the law brought about by a judicial decision in the United Kingdom House of Lords in 1981. Similar amendments have been made to the laws of other countries such as the United Kingdom and Hong Kong.

Before 1981, when a person died in a fatal accident caused by the negligent act of another person, the wrongdoer was liable to compensate –

First, the deceased's estate for the deceased's loss of expectation of life;

Secondly, to compensate the dependants of the deceased for the loss sustained by them on account of his death, what is known as "loss of dependency" claim; and

Thirdly, any additional disbursements incurred by any person or the deceased's estate on account of the accident.

The income which the deceased would have earned had he not died was not a part of the damages payable by the wrongdoer. In other words, damages for what is known in the legal jargon as the "lost years" could not be claimed by the deceased's estate.

However, the law on this was changed in 1981 when the United Kingdom House of Lords decided the case known as *Gammell v Wilson*. The House of Lords in that case decided that damages for the "lost years" could be claimed by the estate of a person killed in a fatal accident.

That case was followed by our Court of Appeal in 1982 because it was based on the interpretation of a United Kingdom statutory provision which is similar in all respects to section 8(2) of our Civil Law Act.

Certain undesirable consequences may arise from this changed state of the law:

First, double compensation may be payable in cases where the deceased's dependants are not also beneficiaries of the deceased's estate. The wrongdoer may have to pay damages to both the deceased's estate for "lost years" and to his dependants for their "loss of dependency", a result which surely cannot be acceptable.

Secondly, where the deceased has no dependants, other persons, eg, distant relatives, may receive a "windfall" and be unjustly enriched by such an award.

Thirdly, the estate claim for the "lost years" is often higher than the "loss of dependency" claim. In some cases, dependants may obtain damages which are more than their actual loss of dependency. Such cases include cases where the dependants are already elderly and are likely to have died before the deceased person had he not met with a premature death in an accident.

Sir, the need to reform this unsatisfactory state of the law was recognized by the House of Lords in the case of Gammell itself. Nearly all the judges in Gammell's case called for legislative intervention. So too in our own Court of Appeal, quote Mr Justice Lai who called for reform, "It is in the province of our legislature to reform the law."

…

The third amendment, as mentioned, Sir, the dependants of the deceased person can always claim for loss of dependency. However, at present the law recognizes only a few categories of persons as dependants for this purpose. Only the spouse, parent, grandparent, child, stepchild and grandchild of the deceased are eligible to claim for loss of dependency. Under our existing law, other relatives who are actually dependent on the deceased but who do not fall within these narrow categories cannot claim for loss of dependency, eg brothers and sisters, nephews and

nieces. In order to prevent undue hardship or injustice, the Bill seeks to extend the categories of dependants to also include –

(a) brother, sister, uncle, aunt, nephew, niece and first cousin of the deceased.

(b) child treated by the deceased and his wife as a child of their family;

(c) great-grandchildren or great-grandparent of the deceased.

I need to add, Sir, that to succeed in any such claim for dependency a person must not only fall within the categories of dependency which we have now enlarged, but must also be able to prove to the court that he was actually financially dependent on the deceased person.

30 Mr Hwang submitted that allowing AML to claim for loss of inheritance under a dependency claim would not cause any of the three undesirable consequences mentioned by Prof Jayakumar. Firstly, there would be no double compensation. Secondly, there would be no unjust enrichment as a person like AML would have to qualify as a dependant first. Thirdly, since the estate claim for lost years was abolished, there was no question of aged dependants getting more than their actual dependency. They would not be entitled to claim for loss of savings even on a dependency claim as they would in the ordinary course of events have passed away before the deceased.

31 While it is true that a dependant's claim for loss of inheritance was not one of the stated consequences to be avoided, this does not necessarily mean that such a claim should be allowed. I still have to consider what the law in Singapore before the 1987 amendments was. Accordingly, when Mr Hwang cited *Ho Yeow Kim v Lai Hai Kuen* [1999] 2 SLR 246 for the proposition that the 1987 amendments did not alter the law on dependency claims, I had no difficulty accepting that proposition. However, that proposition still did not answer the question whether a claim for loss of inheritance was maintainable in a dependency claim in Singapore.

32 Mr Hwang submitted numerous authorities for the proposition that both in England and in Singapore, a dependant could claim for loss of inheritance. Indeed, Mr Hwang submitted that so long as a claimant came within the definition of a dependant and had a reasonable expectation of benefit from the deceased, then it would not matter whether the expectation was *qua* dependant or *qua* estate. He argued that the process of succession, whether on intestacy or otherwise, was merely the mechanics of transmitting the money to a dependant.

33 Mr Hwang relied on *Franklin v The South Eastern Railway Company* (1858) 3 H&N 211 at 213–214; 157 ER 448 at 449 where Pollock CB said:

> The statute does not in terms say on what principle the action it gives is to be maintainable, nor on what principle the damages are to be assessed; and the only way to ascertain what it does, is to shew what it does not, mean. Now it is clear that damage must be shewn, for the jury are to "give such damages as they think proportioned to the injury." It has been held that these damages are not to be given as a solatium; but are to be given in reference to a pecuniary loss. … It is also clear that the damages are not to be given merely in reference to the loss of a legal right, for they are to be distributed among relations only, and not to all individuals sustaining such a loss; and accordingly the practice has not been to ascertain what benefit could have been enforced by the claimants, had the deceased lived, and give damages limited thereby. If then the damages are not to be calculated on either of these principles, nothing remains except they should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life.

34 In *Dalton v The South-Eastern Railway Company* (1858) 4 CB (NS) 296 at 305; 140 ER 1098 at 1102, Willes J said that "legal liability alone is not the test of injury in respect of which damages may be recovered under Lord Campbell's Act … but … the reasonable expectation of pecuniary advantage by the relation remaining alive may be taken into account by the jury".

35 Although the judgments in these two cases appeared wide enough to include a claim for loss of savings by a dependant, they did not actually deal with such a claim.

36 In *Pym v The Great Northern Railway Company* (1862) 2 B&S 759; 121 ER 1254, an action was brought by a plaintiff as widow and administratrix of a gentleman of fortune on behalf of herself and eight children to recover compensation under Lord Campbell's Act. She claimed, *inter alia*, the savings which the deceased would have set aside for the benefit of his wife and children. Cockburn CJ was of the view that such a claim was sustainable in principle although he was aware of the serious consequences which would ensue in the event of a fatal accident happening from negligence to an individual of a very large fortune. However, he thought that that was a matter for the Legislature, *ie* as to whether any limit should be put on the liability. Although this decision showed that savings may be taken into account in a dependency claim, it should be borne in mind that at that time there was no legislation to allow a claim by the estate.

37 The test of a reasonable expectation of pecuniary benefit was reiterated in *Taff Vale Railway Company v Jenkins* [1913] AC 1 but this case did not expressly deal with the question of savings.

38 *Nance v British Columbia Electric Railway Company Ld* [1951] AC 601 ("*Nance*") was an appeal from the Court of Appeal of British Columbia to the Privy Council. The issue there was whether there was contributory negligence on the part of the deceased and whether there was a misdirection by the trial judge to the jury. However, the Privy Council also dealt with the quantum of damages. On the quantum of damages, Viscount Simon said at 614:

> The second question is, what principles the court of first instance should itself apply in determining the quantum of damages under the relevant British Columbian legislation, which reproduces with inconspicuous differences the Fatal Accidents Acts in force in the United Kingdom. …
>
> The claim to damages in the present case falls under two separate heads. First, if the deceased had not been killed, but had eked out the full span of life to which in the absence of the accident he could reasonably have looked forward, what sums during that period would he probably have applied out of his income to the maintenance of his wife and family? … Secondly, in addition to any sum arrived at under the first head, the case has been argued *on the assumption, common to both parties, that according to the law of British Columbia it would be proper to award a sum representing such portion of any additional savings* which he would or might have accumulated during the period for which, but for his accident, he would have lived, as on his death at the end of this period would probably have accrued to his wife and family by devolution either on his intestacy or under his will, if he made a will.
>
> [emphasis added]

39 As Mr Loh stressed, there was no issue in *Nance* that savings were claimable in a dependency claim. This is important because *Nance* is cited in subsequent cases and textbooks as authority for the proposition that a claim for loss of savings is maintainable in a dependency claim.

40 In *Mallet v McMonagle* [1970] AC 166 ("*Mallet*"), a claim was made under the Fatal Accidents

Act. Lord Diplock said at 174–175:

> To assess the damages it is necessary to form a view upon three matters each of which is in greater or less degree one of speculation: (1) the value of the material benefits for his dependants which the deceased would have provided out of his earnings for each year in the future during which he would have provided them, had he not been killed; (2) the value of any material benefits which the dependants will be able to obtain in each such year from sources (other than insurance) which would not have been available to them had the deceased lived but which will become available to them as a result of his death; (3) the amount of the capital sum which with prudent management will produce annual amounts equal to the difference between (1) and (2) (that is "the dependency") for each of the years during which the deceased would have provided material benefits for the dependants, had he not been killed.

41 As can be seen, there was no express mention about savings in *Mallet*.

42 In *Taylor v O'Connor* [1971] AC 115 ("*Taylor*"), the House of Lords, in assessing damages for a dependency claim under the Fatal Accidents Acts, took into account the savings which the deceased would have made provision for but for his death. Lord Reid said at 127–128:

> The general principle is not in doubt. They are entitled to such a sum as will make good to them the financial loss which they have suffered and will suffer as a result of the death. But future loss is necessarily conjectural. If all had gone well, the husband would have earned very large sums for a long period so that he could have maintained them at least at their standard of living at the time of his death and made other provision for their future.
>
> …
>
> It had been assumed that the wife's dependency ought to be calculated on the footing that it would have ceased when the husband ceased earning. I do not think that is right in this case. Before he reached 65 he would have been able to make ample provision for the future, whether or not he survived, and I think that, if one is to be realistic, dependency should be taken on the basis that she would be maintained at the same rate of expenditure throughout her life. We were informed that her expectation of life was about 21 years.
>
> I regard this as the main element in the respondent's claim, and I think that any discount for contingencies should be comparatively small. She or the daughter would also have an interest in any capital which the deceased might have accumulated before his death. …
>
> But take the present case. The respondent will have the £10,000 [being the amount saved so far] to which I have referred and damages in respect of (a) loss of her dependency and (b) loss of her interest in the savings which the husband would have made.

43 Lord Pearson said at 141–142:

> *The lost benefit.* The next step was to estimate the pecuniary benefit which the dependants, the respondent and the daughter, probably would have derived from the earnings of the deceased over the 15-year or 18-year period if the earnings had not been lost. …
>
> The judge estimated that of the deceased's net spendable income, estimated at £6,000 per annum, two-thirds, that is, £4,000 per annum, would have enured to the benefit of the respondent and the daughter. That must include both elements of the lost pecuniary benefit,

namely, the maintenance element and the savings element. Presumably the deceased would in the later years of his working life have been both maintaining the family and saving for the benefit of the family. The savings would have provided some present financial security not only for the deceased but also for the respondent and the daughter, and probably the savings or the residue of them would ultimately have been inherited by the respondent and the daughter or one of them. I think the £4,000 per annum was a moderate estimate of the lost benefit.

44 Although this case appeared to be authority for the proposition that future savings should be taken into account in a dependency claim, it seems to me that the point was not in issue there. While Lord Reid appeared to treat the loss of savings as a separate head of claim to loss of dependency, the judgments of the law lords do not indicate any argument that loss of savings should rightfully be a claim by the estate. Lord Reid also did not think that the dependency ought to be calculated on the footing that it would have ceased when the husband ceased earning. While it may be true that a wife's dependency does not actually stop when her husband stops earning, the fact is that, in Singapore, a wife's dependency claim is calculated with reference to when the husband would stop earning had he not been killed in the accident.

45 Although I have not cited from the judgment of Lord Morris of Borth-y-Gest in *Taylor*, I note that he referred to Viscount Simon's judgment in *Nance* as regards the additional amount the husband in *Taylor* would probably have saved. However, as I have stressed, *Nance* had assumed that future savings are claimable in a dependency claim. It seems to me that *Taylor* was no more an authority to support AML's claim for loss of inheritance than my decision in *Tan Harry v Teo Chee Yeow Aloysius* [2004] 1 SLR 513 ("*Tan Harry*") was such an authority. I will come back to *Tan Harry* later.

46 Mr Loh submitted that *Taylor* has not been subsequently cited as authority for the proposition that future savings are claimable as part of a dependency claim. I note that, for example, although *Taylor* was referred to in *Cookson v Knowles* [1979] AC 556 ("*Cookson*"), the House of Lords there did not say that future savings were claimable in a dependency claim. In *Cookson*, Lord Diplock said at 567 and 568:

> When the first Fatal Accidents Act was passed in 1846, its purpose was to put the dependants of the deceased, who had been the bread-winner of the family, in the same position financially as if he had lived his natural span of life. In times of steady money values, wages levels and interest rates this could be achieved in the case of the ordinary working man by awarding to his dependants the capital sum required to purchase an annuity of an amount equal to the annual value of the benefits with which he had provided them while he lived, and for such period as it could reasonably be estimated they would have continued to enjoy them but for his premature death. Although this does not represent the way in which it is calculated such a capital sum may be expressed as the product of multiplying an annual sum which represents the "dependency" by a number of years' purchase. This latter figure is less than the number of years which represents the period for which it is estimated that the dependants would have continued to enjoy the benefit of the dependency, since the capital sum will not be exhausted until the end of that period and in the meantime so much of it as is not yet exhausted in each year will earn interest from which the dependency for that year could in part be met.

47 At 571, Lord Diplock also said:

> Quite apart from the prospects of future inflation, the assessment of damages in fatal accidents can at best be only rough and ready because of the conjectural nature of so many of the other assumptions upon which it has to be based. The conventional method of calculating it has been to apply to what is found upon the evidence to be a sum representing "the dependency," a

multiplier representing what the judge considers in the circumstances particular to the deceased to be the appropriate number of years' purchase.

48 Although *Cookson* did not expressly say that savings were to be excluded in a dependency claim, the subsequent case of *Gammell* did say this. I refer again to the judgments of Lord Diplock and Lord Fraser of Tullybelton which I have cited at [23] and [24] above.

49 I come now to the interesting case of *Cape Distribution Ltd v O'Loughlin* [2001] EWCA Civ 178 ("*O'Loughlin*"). The judgment of Latham LJ sets out the facts in some detail as well as the reasons for his decision. He said:

> 1. On the 13th May 1995 Mr O'Loughlin died. He was 50 years of age, having been born on the 17th September 1944. His death was due to mesothelioma contracted as a result of exposure to asbestos dust while working for the appellants at their factory in Uxbridge for four months in 1966. On the 2nd July 1999, Forbes J awarded his widow, the respondent, a total of £284,652.38 inclusive of interest in respect of the claims which she had made arising out of her husbands [*sic*] death on her own behalf, and on behalf of the two teenage sons of the marriage, under the Fatal Accidents Act 1976, and of his estate under the Law Reform (Miscellaneous Provisions) Act 1934. Of this award, £164,035.95 represented the loss of past and future financial dependency under the Fatal Accidents Act, and interest. In this appeal, the appellants challenge the judge's findings upon which he based this part of his award.
>
> 2. This appeal raises once again the difficult question of how to assess the value in monies worth of the loss of a husband and father when the family's financial affairs are not straight forward. Mr O'Loughlin had, together with a partner, run a successful plant hire business in Ireland for some years. The respondent's claim was, however, based upon Mr O'Loughlin's business activities in and after 1989, when he severed his relationship with his partner. Although to begin with, these activities were based on plant hire, through the medium of two companies, Ready Hire Ltd and Green Hire Ltd, they gradually concentrated on property development, so that by 1994, the year before his death, property formed the sole basis of the family's finances. …
>
> 3. When he started property dealing in 1989, the family owned three properties, including the matrimonial home which was subject to a mortgage. Excluding these properties, he had, by the time of his death built a property portfolio of some seven investment properties worth approximately £750,000, three of which were subject to commercial mortgage of approximately £120,000. These properties were held in the name of Mr O'Loughlin and the respondent, or Ready Hire Ltd. He also had a 50% share in two companies together with Mr Howley, which owned two other properties. He was obviously successful; and by the time of his death he had repaid the mortgage on the family home. Mr O'Loughlin's income tax returns disclosed substantial income receipts. His gross income was £92,527 for the year ending 1992, £49,097 for 1993, £51,828 for 1994, and £59,283 for 1995. These figures are to a great extent artificial, in significant part constructed so as to take as much fiscal advantage as possible of the period leading up to his death. The rental receipts which underpinned his and the company's annual earnings were approximately £32,000. After his death, the respondent did not suffer any immediate financial disadvantage. She received the full value of all Mr O'Loughlin's capital assets. Although before his death she would help in a secretarial capacity, she never involved herself in the management or development of the properties. After his death, she attempted to do so, but found that she did not have the necessary skills. In order to maintain her life style, she has sold three of the properties and enjoys the investment income from these as well as the rental from the remainder. She has not been able to carry on the property development side of the business. …

4. On behalf of the respondent, it was submitted to the judge that the court had to approach the assessment of damages on the basis set out by Staughton LJ in *Wood-v-Bentall Simplex Ltd* [1992] PIQR 332 at 349:

> One then turns to the case where the income is in part derived from labour and in part from capital. Suppose that the husband owns a boarding house and that he and his wife run it together. If he should happen to be killed by a negligent wrongdoer and his widow inherits the house and continues to run it, should she recover to the extent of her dependency on the whole of the profit of the boarding house? This is not very different from the present case. My answer is that one must again determine what the dependants have lost. No question of deduction arises. The court has to ascertain how much loss has arisen because the deceased is no longer alive and able to work, and how much the deceased's income is derived solely from capital which the dependants have inherited.

5. On that basis it was contended that the loss to the dependants as a result of Mr O'Loughlin's death was his flair, experience and entrepreneurial skills to manage and develop the property portfolio and the financial benefits that that would bring to the family. It was contended that he would have continued to have done so until at least aged 60. As a result, it could have been anticipated that he would have increased the portfolio and the rental income by acquisition and development which are clear benefits which the dependants have now lost. It was submitted that the most secure way to assess the value of these services would be to determine what it would cost to replace them. A Mr Potterton of a firm of estate agents produced a report in which he assessed the cost of replacing these services at £28,000 per annum.

6. For the appellants, it was submitted that in truth, the dependants had lost little. The full value of the capital assets remained available to them. They had the benefit of the rental income and interest on investments from the whole of the capital assets of Mr O'Loughlin. They submitted that it was wholly inappropriate to assess the dependency on the basis of a valuation of the loss of services. This, it was submitted, failed to take any account of the fact that the evidence before the judge showed that for the period immediately after his death, the respondent, and therefore the family, had lost little. More fundamentally, it was submitted that no proper basis had been put before the court on behalf of the respondent to determine the true nature and extent of the dependency which could enable the court to come to a proper conclusion as to the true value of the dependency.

…

11. The starting point must be the terms of the relevant provision in the Fatal Accidents Act 1976. Section 3(1) provides:

> In the action such damages, other than damages for bereavement, may be awarded as are proportioned to the injury resulting from the death to the dependants respectively.

This provision replicates, though not in precisely the same words, the basis upon which damages have been assessed since the passing of the Fatal Accidents Act 1846. …

12. The first clear expression of this principle to which we have been referred is in the judgment of Erle CJ in *Pym v Great Northern Railway Company*, which I have already cited. However, in *Taff Vale Railway v Jenkins* [1913] 1 AC 1 the courts first recognised that a claim could be made in respect of services rendered gratuitously by the deceased. …

13. This principle has been applied time and time again by the court in cases where the claimant has lost the services of a wife or mother. It has also been applied to the loss of a husband's services as handiman [*sic*], gardener, or any other such service activity as has been lost and has a money value in the sense that it will cost money to replace. I can see no difference in principle between the loss of services of that domestic nature, and the loss of services which have a positive financial value to the family. For example, a husband may be so skilled and successful in dealing with the family's investments that he has no need of a stockbroker or other financial adviser. His death, whatever other loss may result, will mean that the family will have to replace that expertise and advice at the appropriate market cost. That cost is as much a loss to the family as could be the cost of a gardener. And, clearly, the position cannot be different, indeed it is a fortiori, if the family's sole source of support is the investment portfolio managed by such a husband.

15. In the present case, the judge came to the clear conclusion that the dependants had lost the flair and business acumen which would, by clear inference have resulted in a successful development of the property portfolio which represented the family's assets, with consequential increases in both the capital and the income value of that portfolio. In my view the judge was clearly correct in concluding that the dependants had thereby suffered a loss capable of being measured in money terms. He could, as submitted by Mr Alliott, have been asked to embark upon a complex evaluation of the extent to which the portfolio managed by Mr O'Loughlin would have been more valuable than the assets managed by the respondent. This would have involved a comparison of on the one hand, the likely increase in income and capital to be expected from prudent investment by somebody on the respondent's behalf of these assets, for she herself on the judge's findings, could not be expected to have managed them herself, and a projection of the increase in income and capital values of the portfolio based upon an extrapolation from Mr O'Loughlin's success between 1989 and 1995. It seems to me that such an exercise, although theoretically possible, would be so riddled with uncertainty and speculation as to make it difficult for a judge to find a secure basis for any conclusions that he might seek to reach.

16. But one thing is certain, namely that the respondent would have to have professional advice in order to manage the family assets properly and effectively. The cost of such advice therefore represents the most secure basis from which to attempt to place a pecuniary value on the loss to the dependants arising from Mr O'Loughlin's death. Whether she chooses to have such an advisor or not is another matter. But the fact will always remain that she and the dependants will have lost the services of Mr O'Loughlin as the manager of the family assets, and that loss is capable of being valued in money terms. I have no doubt, in these circumstances, that the judge was entitled to take the course that he did.

17. … Implicit in the judge's findings is the conclusion that Mr O'Loughlin, with his flair, could have produced greater benefit to the dependants than a manager could. It follows that not only is there no benefit that I can see which could sensibly be prayed in aid by the appellants in reduction of the damages, but this is not a case in which the cost of replacing services would exceed the level of the lost dependency.

50 Judge LJ said:

23. The features of the deceased's working life which created difficulties in the ready calculation of the appropriate level of damages to be allowed to his dependants was that his formal earnings were very modest. Concentrating exclusively on the formal level of his remuneration gives a wholly misleading picture of the true financial worth of his working life. Sometimes, of course, the pay and rewards of an individual do not appear to bear any realistic

relationship to the notional value which might be attributed to the efforts and responsibilities borne by him, whether as an employee, or for that matter, self-employed. Some are under-paid: some run businesses which are, for reasons quite unconnected with their own abilities, unsuccessful. In cases like these, where the earnings figures of the deceased in the period leading up to his illness and death come to be analysed, there is no gainsaying the actual figures. So, unless, for example, there is evidence to suggest that the individual in question would have changed jobs for better rewards, the notional, often subjective, evaluation of what an individual's work should have produced, as opposed to what it did produce, is usually irrelevant. However where, as in the present case, the deceased chose to reward himself very modestly while simultaneously increasing his assets, or put another way, in effect took his rewards for his labour partly in income and partly by building up his capital and income creating assets, it would be wholly unjust to assess the damages due to his dependants (or for that matter, if rather than causing death, his injuries had made him permanently unemployable) as if the calculation of any consequent loss should be based exclusively on the modest salary he paid himself. And the difficulties of ascertaining the appropriate and fair figure does not mean that the loss is speculative, or unproved. It is merely difficult to quantify.

24. Faced with the difficulties inherent in a claim arising from the dependency on a deceased whose financial position was neither based exclusively, or nearly exclusively, on income, nor exclusively or nearly exclusively on income derived from capital, Forbes J accepted the submission that the calculation of the loss sustained by the dependants in this case would best be ascertained by evaluating "the likely cost of maintaining developing and enhancing the property portfolio which existed at the date of Mr O'Loughlin's death".

25. That approach followed from his conclusion, first, that despite her best efforts, the widow of the deceased lacked her husband's flair and skill as a property developer, a view confirmed by the fact that by 1997 she had sold three of the properties without reinvesting the proceeds in further properties, and second, by the concessions made by the accountant'[s] evidence called by the defendants that the deceased's efforts in managing the property portfolio and maintaining it, produced a clear economic benefit to the family as a whole.

26. I agree with Mr Alliott's submission that this was an unusual, probably indeed unconventional approach. The question however is whether it was inconsistent with principle, or whether the result was disproportionate. In my view, in this case it was not. Indeed although the analogy is incomplete, as Latham LJ's judgment demonstrates, it is well established that the value of the unpaid services provided by a deceased for his (or her) family may properly involve reference to the cost of supplying someone else to provide them. I merely sound the cautionary note that where the court is invited to adopt an unusual or unconventional approach in a case of this kind, an additional burden is imposed on the judge to ensure that the more conventional approach would not provide the fairest way to do justice between the parties, and, even if he is satisfied that it would not, he should stand back from the figure to which the unconventional approach had led him and examine whether it fairly reflected the practical realities of the case.

51 Schiemann LJ agreed with both judgments. Consequently, the appeal of the defendants was dismissed with costs.

52 *O'Loughlin* is interesting because it is a case after the UK had abolished the estate's right to claim loss of future earnings and the achievements of Mr O'Loughlin were similar in nature to those of HAL although not as spectacular. Significantly, Mr O'Loughlin, like HAL, chose to reward himself modestly while increasing his assets. On the other hand, Mr O'Loughlin did not face the liquidity problem that HAL had come to face before HAL's death, a point which I shall elaborate on later.

53 In *O'Loughlin*, it was the defendant's counsel who suggested that the trial judge should have considered the extent to which Mr O'Loughlin's portfolio as managed by him would have been more valuable than the portfolio as managed by his wife. Latham LJ was of the view that this exercise would be too speculative. He therefore preferred the trial judge's approach of awarding a sum equivalent to the cost of replacing the services which Mr O'Loughlin performed, such services being that of a skilled property manager. Naturally, such services alone would not be an adequate assessment as Mr O'Loughlin, like HAL, was more than a skilled property manager. He was an entrepreneur with considerable business acumen. Nevertheless, the Court of Appeal decided that that would be an appropriate basis to make an award for loss of services.

54 Before me, AML's claim for loss of inheritance was not presented on the basis of a loss of HAL's services but rather a loss of what HAL would have accumulated. It seems to me that if such a claim had been made in *O'Loughlin*, the defendant's counsel would not have objected. Indeed, as I have said, it was he who suggested that such an exercise be undertaken subject to a deduction for what the wife could have accumulated on her own efforts. It appears that the Court of Appeal was of the view that such an exercise was not objectionable in principle but that it was too speculative to be undertaken.

55 Therefore, although the claim in *O'Loughlin* for loss of services was not the same as AML's claim for loss of inheritance, it can be said that the Court of Appeal in that case did not object to a claim for loss of inheritance in principle. However, it was not argued in *O'Loughlin* that a claim for loss of inheritance is actually a claim to be made by the estate, and not the dependants, and that since the estate may not claim for loss of income after the 1982 amendment a claim for loss of inheritance or indeed for loss of services which result in the accumulation of wealth is not maintainable.

56 Therefore, as regards the claim for loss of Mr O'Loughlin's services, it seems to me that while one may say that there is no difference in principle between the loss of services of a domestic nature and the loss of services which have a positive financial value, there may well be a difference in the result. Services of a domestic nature, while perhaps having some sort of financial value, do not result in the kind of accumulation of wealth discussed in *O'Loughlin* whereas those which have a positive financial value usually do. It is important to bear in mind that in the accumulation of wealth, it is really the estate that benefits. The dependants do not benefit *qua* dependants unless the accumulation results in an increase in the amount spent on them annually, which is a different point. Likewise, there may be services with a positive financial value which have an immediate financial impact on the dependants and are maintainable in a dependency claim, but that again is a different point.

57 While it may seem unjust from a plaintiff's point of view that a claim for loss of inheritance should not be allowed in Singapore because of the 1987 amendment, it seems to me that the question is what our Legislature intended. This brings me back to the question whether a claim for loss of inheritance is maintainable in a dependency claim in Singapore. I have so far considered the English position, which is not clear, and the Privy Council decision in *Nance*, which has been cited in English cases, as well as in Malaysian and Singapore cases as I will elaborate later.

58 In Hong Kong, there has also been an amendment to disallow the estate from claiming future earnings but with the important proviso that the estate may claim for the deceased's accumulation of wealth. Section 20(2)(b)(iii) of the Hong Kong Law Amendment and Reform (Consolidation) Ordinance (Cap 23), states:

> Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person shall, where the death of that person has been caused by the act or omission which gives rise to the cause of

action not include any damages for loss of property, whether income or otherwise, in respect of any period after his death, *except in so far as the court is satisfied that, but for the act or omission that gave rise to the cause of action, the deceased would have achieved an accumulation of wealth by the time that he would otherwise have died, in which case damages may be awarded in respect of the loss of that wealth*:

Provided that damages awarded under this sub-paragraph shall be subject to such deduction as the court considers it just to make in the circumstances of any particular case on account of the accelerated receipt of that wealth and in order to avoid over-compensation.

[emphasis added]

59 The Law Reform Commission of Hong Kong's *Report on Damages for Personal Injury and Death*, which was presented on 5 October 1984, shows that in Hong Kong, a dependency claim does not include a claim for savings, although there was a suggestion by Roberts CJ that it should. Hence the Commission recommended that the estate claim for savings should be retained although the rest of its claim for loss of income was to be abolished. I quote parts of the report which said at ch XI, pp 54–60, 64–69:

(a) Claims under the Fatal Accidents Ordinance

11.2 The dependants of a person who has died as a result of his injuries are entitled to claim for their loss of financial support under the Fatal Accidents Ordinance ('FAO'). This remedy has been available in Hong Kong since 1889.

11.3 There are two ways in which such a claim may be presented. The first and more cumbersome way is to calculate the dependency of each claimant separately and then check the totals against the deceased's net annual income at the date of his death. The second method is explained in Kemp and Kemp, The Quantum of Damages (4^{th} ed, 1975) vol 1, pp 235-6 as follows –

> Start with the deceased's net income at the date of his death: estimate how much of this he spent on himself: then, if his pattern of life justifies the assumption, take the remainder of his net income as being spent for the benefit of his dependants.

In estimating how much the deceased spent on himself, no account is taken of expenditure on things the cost of which continues unabated after his death, such as mortgage payments, lighting and heating.

…

(c) The claim under LARCO

11.8 Section 20 of the Law Amendment and Reform (Consolidation) Ordinance ('LARCO') provides, as a general rule, that on the death of any person all causes of action vested in him shall survive for the benefit of his estate. This means that the persons named in the deceased's will or, where there is no will, those entitled to claim under his intestacy will obtain any damages recovered in respect of such causes of action.

...

11.14 … The English Court of Appeal has recently decided, however, that the calculation of living expenses for the purposes of the LARCO award are slightly different from those calculated under the FAO. For the purposes of the FAO the living expenses are those sums which the deceased would have spent exclusively on himself, whereas under LARCO they include a pro rata share of sums spent for the joint benefit of the deceased and others (eg rent) (see Harris v Empress Motors Ltd (1984) 1 WLR 212).

11.15 Another approach has been suggested in Hong Kong by Roberts CJ in Wong Sai-chuen v Tam Mei-chuen –

> I suggest that it is open to a trial judge, having assessed the FAO dependency:-
>
> (a) to apply this figure as the first part of the free balance, unless there is evidence that the amount of dependency might have varied during the lost years;
>
> (b) to add to that the deceased's notional savings during his lost years.
>
> As a starting point, it would be reasonable, in my view, to adopt the formula … of taking 10% of the deceased's net earnings as the amount of the notional savings … The natural thrift of the inhabitants of Hong Kong suggests that this is not an unreasonable assumption.

11.16 This approach recognises that a person's income may be used for three purposes – for supporting his dependants, for personal expenses, and for savings. Whereas a claim under the FAO only relates to the amount spent on the dependants, a claim under LARCO should be for the whole of the net income minus the personal expenses, and therefore should include any savings. Hong Kong courts have in a number of cases therefore awarded more under LARCO than under the FAO …

…

Reform options

11.27 We are in no doubt that the law relating to damages for the lost years in fatal cases is in need of reform. In our view, the fact that a defendant may have to pay double compensation, under the FAO and LARCO, cannot possibly be justified. We have therefore considered three ways of improving the law, namely:-

(a) to abolish the claim under the FAO;

(b) to abolish the claim under LARCO;

(c) to retain both claims, but limit the claim under LARCO to the loss of net savings.

We now propose to consider each option.

Option (a)

11.28 Lord Scarman stated in Gammell v Wilson that the 'logical, but socially unattractive, way of reforming the law would be to repeal the Fatal Accidents Act … This would leave recovery to the estate; and the dependants would look, as in a family where the breadwinner is not tortiously killed, to him (or her) for their support during life and on death. They would have the final

safeguard of the Inheritance (Provision for Family and Dependants) Act 1975.'

11.29 We are against this approach for several reasons. In our view it is the dependants of the deceased who are in the greatest need of compensation in respect of the financial loss caused by the death. It is therefore wrong to allow the estate to claim the financial loss, since the money may not go to those dependants. It is true that certain dependants may claim reasonable provision out of the estate under the Deceased's Family Maintenance Ordinance but this is a round-about procedure and in any event it only protects a limited class of persons. Furthermore the class under the FAO is well established and the courts are used to dealing with such claims. We conclude, as did Lord Scarman that 'the protection of the fatal accidents legislation has been with us for so long that [we] doubt whether its repeal would be welcomed.'

Option (b)

11.30 The second approach is to abolish the claim under LARCO for damages for the lost years in fatal cases. …

11.31 There are, however, arguments against the complete abolition of the LARCO claim. The main criticism of the present law is that it allows double recovery in respect of the money which would have been spent on the dependants of the deceased. If the LARCO claim were to be abolished, however, it would mean that the deceased's estate would be deprived not only of the sums which would have been spent on the dependants, but also of the amount which the deceased would have saved. This leads us to consider our third option.

Option (c)

11.32 This option involves the retention of claims under both the FAO and LARCO, but is aimed at eliminating any double recovery. As has been pointed out above, double recovery may occur because the sums that would have been spent on the deceased's dependants are not deducted from the LARCO award. This anomaly could be overcome by requiring the courts to make such a deduction. The effect would be that the LARCO award would be calculated by reference to the net savings which the deceased would have made had he lived a normal lifespan (the "net savings method"). Such an approach was in fact adopted in the Hong Kong case of VSL Engineers (HK) Ltd v. Yeung Wing [1981] HKLR 407, and although the Court of Appeal subsequently disapproved this method of calculation, Roberts CJ thought it had some attraction. He observed that –

> The net savings method has attractions. It involves a relatively simple calculation. It treats the amount which the deceased handed to his wife for her maintenance in the same way as that which he handed to her for his maintenance. It ensures that there would accrue to the deceased's estate only what, had he lived, would have been found in it at his death, because he would have saved it. And it avoids the inflation of LARCO awards by the amount of the dependency, which will appear in the FAO award as well.
>
> (See Wong Sai-chuen dec'd v Tam Mei-chun (1982) Civ App No 133 of 1981)

Since the net savings method takes into account the sum which the deceased would have spent on his dependants there is no overlap between the LARCO claim and awards under the FAO. No merger of these awards should therefore take place.

11.33 This approach is also consistent with the rule that in assessing damages for pecuniary

loss, the principle of full compensation should be applied. …

Where the deceased would have saved part of his income during the lost years there is no doubt that his estate has been deprived of that money. Damages should therefore compensate the estate for this loss.

Our recommendations

11.34 The provisional view of the sub-committee was that option (c) should be adopted. …

11.35 Some commentators pointed out that it was incorrect to regard the net savings as the only surplus left from the net income after deductions are made for personal expenses and sums spent on the dependants. We acknowledge the logic of this. There may be other amounts which were dealt with in other ways by the deceased. Nevertheless we are of the view that the estate should only be able to claim for the loss of those sums which would have been saved by the deceased. If other uses made by the deceased of his money were to be taken into account we feel this would create an unacceptable level of speculation as to whether that money should be regarded as a loss to the estate.

11.36 Another commentator considered that lost years awards had considerably increased the level of awards and that the social cost of this increase was not justified. We sympathise with this view but do not consider that this should lead us to recommend that total abolition of damages for the lost years. Our recommendation that only the loss of savings should be recovered would, if implemented, reduce the level of awards considerably.

11.37 The same commentator also regarded the degree of speculation involved in lost years claims as unacceptable. This does seem to us to be a valid criticism. A degree of speculation enters into claims for loss of dependency under the FAO, but in the case of claims under LARCO, the amount of speculation may be much greater. In some cases the courts have held that where some matters are very speculative they would simply consider the facts as at the date of death and not make any guesses as to what the future might hold (see eg Lee Kai-cheung v Yim Tat-kuen (1983) HCA No 1374 of 1983). In our view this approach should be adopted in all cases relating to lost years in fatal cases. We recommend that a LARCO claim for damages for the lost years should only lie in respect of the loss of saving during the lost years, and that such a loss should be calculated on the basis of the established pattern of savings (if there is one) of the deceased prior to the accident. This approach will eliminate speculation as to the future savings habits and will make settlements easier to arrange. It will enable the estate of a deceased person with an established pattern of savings (eg a middle-aged family man) to recover the loss of future savings, but will eliminate claims in the case of a young person with no savings pattern. In our view this approach is preferable to the total abolition of damages for the lost years and yet has a degree of certainty and simplicity.

11.38 The discussion of the lost years has so far concentrated on the loss of income during those years. In most cases this will be the only financial loss in that period. It is possible, however, that there may be other losses. In the recent cases of Adsett v West [1983] 3 WLR 437 it was held that a claim for the lost years could include a claim for the loss of an inheritance during those years. That decision led to the rather bizarre result that the father of the deceased who was the beneficiary of the estate, could claim for his son's loss of inheritance from the father. In our view such losses should not be recoverable as being too speculative. …

60 In the summary of its recommendations, the Commission said (at ch XIII, p 81):

13.26 The law relating to the 'lost years' in fatal cases should be reformed (paras 11.1-27). The claim under LARCO for the lost years should be reduced so that it represents only the net savings which the deceased would have made during the lost years. The award should be calculated on the basis of the established savings pattern (if any) of the deceased at the time of the accident (paras 11.32–40).

61 The Commission suggested the following terms of amendment on this point (at p 93):

2. Section 20 of the principal Ordinance is amended –

(a) …

(b) in subsection (2) by deleting paragraph (a) and substituting the following –

"(a) shall not include –

(i) …

(ii) …

(iii) …

(iv) any damages for loss of income in respect of any period after his death, except where before the date on which the cause of action accrued he had established a pattern of making savings from income, in which case the damages shall include an amount calculated on the basis of that pattern, subject to such deduction as the court thinks fit on account of the accelerated payment of any such lost income for which damages are awarded;"; …

62 As it turned out, the amendment was in different terms from those proposed by the Commission. I have set out the actual amendment in [58] above. It seems that in Hong Kong, the estate may claim for loss of accumulation of wealth which is not confined to any established pattern of savings. Be that as it may, it is clear that in Hong Kong, a dependency claim does not include a claim for loss of savings.

63 Closer to home is the Malaysian case of *Chan Yoke May v Lian Seng Co Ltd* [1962] MLJ 243. There, Suffian J was considering the amount of damages to be awarded under s 7 of the Civil Law Ordinance 1956. Citing *Nance*, he was of the view that the amount the deceased would have saved should be included in the general damages. Again, there did not seem to be any dispute on the point in that case. Furthermore, Mr Hwang did not cite any recent Malaysian case which would demonstrate that in Malaysia, a claim for loss of inheritance is maintainable in a dependency claim. On the other hand, Mr Loh did not cite any recent Malaysian case which would demonstrate that a claim for loss of inheritance is not maintainable in a dependency claim.

64 For Singapore, neither counsel cited a case which was exactly on the point. However, Mr Hwang relied on *Singapore Bus Service (1978) Ltd v Lim Soon Yong* [1982–1983] SLR 167 ("*Lim Soon Yong*"). There, the plaintiff's husband was killed in a motor accident on 26 May 1979, *ie* before the 1982 amendment in the UK and before the 1987 amendment in Singapore. The plaintiff brought a dependency claim under s 8 of the Civil Law Act (Cap 30, 1970 Rev Ed) on behalf of herself as well as the children and parents of the deceased. No claim was brought on behalf of the estate. One of the heads of claim was the contributions the deceased and his employer would have made to the Central

Provident Fund ("CPF") for his account. Contributions to the CPF are special savings mandated by law in Singapore and at that time could be withdrawn by the wage earner when he reached 55 years of age. This was one of the issues that the Court of Appeal had to grapple with. F A Chua J, delivering the judgment of the Court of Appeal, said at 169, [14]–[15]:

> The contention of the appellants is that the CPF contributions cannot form part of a dependency claim. It is money held in trust by the CPF Board and when the contributor reaches the age of 55 it would go to the contributor. If the contributor dies before the age of 55 the money is paid to the nominee, but not as a dependant. It is not money on which the family depends from day to day.
>
> We are unable to accept the contention of the appellants. CPF contributions are not chargeable with estate duty. The money does not go to the estate of the contributor. In this case it goes to the widow and the parents of the deceased. Had the deceased lived to the age of 55 he would have withdrawn the sum standing to his credit in the CPF and the widow and children would necessarily have benefited from the deceased having this money if not for this accident. In our view, therefore, the CPF contributions do form part of the widow's dependency claim.

65 The defendant appealed to the Privy Council (reported at [1985] 1 WLR 1075) and the sole issue there was whether the claim for the CPF contributions was maintainable. The Privy Council was aware that the appellant was contending that such a claim should have been made by the estate instead. In delivering the judgment of the Privy Council, Sir Edward Eveleigh cited the judgment of the Court of Appeal below. He also cited the judgment of Viscount Simon in *Nance* regarding the assumption that, according to the law of British Columbia, it would be proper to award a sum representing a portion of any additional savings which the deceased might have accumulated. Sir Edward was of the view that Viscount Simon was dealing with a dependency claim and not an estate claim. Sir Edward then said at 1079–1080:

> The deceased would have continued to contribute [to the CPF] and so would his employer if the accident had not occurred for payment was compulsory under the Act [meaning the CPF Act]. … Had he died before the age of 55 his dependants would have been entitled to their portions by virtue of section 12(5). The deceased might have lived beyond 55 and withdrawn the sum standing to his credit. In that event it is reasonable to infer that he would have used the money not only for his own benefit but for the benefit of his dependants. To the extent that he did not spend it he would have saved it and his dependants, particularly his widow who was younger than he was, would reasonably have expected to inherit from him.
>
> The fact that the deceased's estate might have had a claim for the value of lost contributions to the Fund in no way affects the right of the dependants to claim for their own loss. The fact that, in England, before the Administration of Justice Act 1982 damages could be claimed by the estate for loss of the ability to earn over the "lost years" (see *Gammell v Wilson*) did not take away the right of dependants to claim for their loss of dependency. The claim by the estate might affect the valuation of the claim by the dependants to the extent that they benefited from the estate but the two claims are independently sustainable.

66 The approach of the Privy Council in *Lim Soon Yong* was not exactly the same as that of the Court of Appeal. The Court of Appeal considered the CPF contributions as distinct from the estate of the deceased and allowed such contributions to be claimed because the deceased would have withdrawn the sum standing to his credit in the CPF and spent it on his wife and children before his death, although he had aged parents as dependants too. While the Privy Council took into account the point that the deceased would have withdrawn his CPF savings and spent it on his dependants

(and not just on the wife and children), the Privy Council also took into account the fact that the wife was likely to have inherited whatever the deceased would have saved from so much of his CPF contributions which would not have been spent. The Privy Council also appeared to have been influenced by the fact that at that time, the estate was not precluded by law from claiming the savings.

67 With respect, it seems to me that the Privy Council had erred in taking into account the fact that the wife would have inherited the savings from the CPF contributions. That would have been an estate claim. As I have said, in *Nance*, it was assumed that a claim for savings was maintainable in a dependency claim.

68 *Lim Soon Yong* has since been cited with approval in Singapore to allow a dependency claim to include a claim for future CPF contributions. Apparently, it has not been cited for the proposition that future savings are claimable in a dependency claim. Indeed, if future savings had been generally claimable in a dependency claim, the CPF contributions would not have been an issue in *Lim Soon Yong*.

69 Accordingly, it is my view that *Lim Soon Yong* is not an authority that supports AML's claim for loss of inheritance. Instead, it suggests that such a claim is not maintainable.

70 I come now to my decision in *Tan Harry*. There, the dependants were aged parents of the deceased who died intestate on 1 October 1999 after an anaesthetic procedure administered by the first defendant. The deceased was not married and had no children. One of the issues there was the amount of the multiplicand. The plaintiffs contended that the multiplicand used by the assistant registrar should be increased by, *inter alia*, taking into account 50% of the deceased's savings. I did not take into account the deceased's savings because it was unlikely that the plaintiffs would have outlived the deceased but for the unfortunate incident. It can be argued that had the plaintiffs been the younger wife and children of the deceased, I would have taken into account the savings and hence, in principle, a claim for loss of savings is maintainable in a dependency claim. However, in *Tan Harry,* it was assumed that loss of savings was a maintainable claim in a dependency claim. Neither counsel for the first defendant, *ie* the anaesthetist, or counsel for the second defendant, *ie* the hospital, had taken the point that a claim for loss of savings is really an estate claim and hence not maintainable in view of the 1987 amendment. On the facts in *Tan Harry*, I did not take into account the loss of savings, but for a different reason. In the circumstances, *Tan Harry* is not authority for the proposition that a claim for loss of savings is maintainable in a dependency claim.

71 As I mentioned in *Tan Harry*, the *Practitioners' Library – Assessment of Damages: Personal Injuries and Fatal Accidents* (Butterworths Asia, 2001) suggests that the dependency claim is calculated by adding up all the benefits received by the dependants or by splitting the deceased's income into what he would have spent on himself and on his dependants. There is no express mention therein about loss of savings although that is not expressly excluded either. It seems to me that if loss of savings were part of a dependency claim, it would have been expressly mentioned as a head of claim.

72 It seems that, generally, cases in England and in Hong Kong deal with loss of savings as a part of earned income. This is different from the kind of claim which AML is making under loss of inheritance. AML is claiming for something over and above HAL's earned income. In that context, loss of savings is not interchangeable with loss of inheritance.

73 Coming back to the speech of Prof Jayakumar when he was moving the second reading of the Bill on the 1987 amendments, the minister was clearly aware of amendments made in the UK and in

Hong Kong as he had alluded to them. He said similar amendments had been made in other countries but he did not say identical amendments had been made there. He must have been aware that in Hong Kong the claim for loss of savings is not part of the dependency claim and was saved for the estate claim. As I have said, the Hong Kong amendment allows a claim for loss of accumulation of wealth which is potentially larger than a claim for loss of savings *per se*. Singapore does not have that provision. The question then is whether Singapore omitted to provide for a loss of inheritance or loss of savings claim for the estate claim because that was already part of the dependency claim or irrespective of it being excluded from the dependency claim. I am of the view that it was the latter. Such a claim has not been recognised as such by the Singapore courts. While this may appear unjust to claimants like AML, there are considerations at the other end of the scale. Such claims are by nature in the minority. The majority of people working in Singapore would be salaried workers, not entrepreneurs. Even among entrepreneurs, not all are successful and few can claim to be very successful. Of those few, there would be some who pay themselves modest salaries and bonuses while keeping the rest of their gains for accumulation of further wealth. Others would still pay themselves huge salaries and bonuses while also keeping a part of their gains for accumulation of further wealth. However, in either case, where the entrepreneur has been very successful, the claim for loss of inheritance would be very large indeed. Such a burden would eventually be borne by the public who pay premiums for all kinds of insurance cover. A few would benefit at the expense of the majority. In any event, it is not for this court to say how the scales should be balanced. Suffice it for me to conclude that at present, the Legislature has decided that the scales should be in favour of the majority by not including the Hong Kong proviso which allows an estate to claim for loss of accumulation of wealth. For present purposes, I equate the loss of accumulation of wealth with a loss of inheritance although the former would probably not include the kind of claim for loss of inheritance as in *Adsett v West* [1983] QB 826.

74 I would mention that to allow dependants to claim for loss of inheritance would be to introduce a host of complexities. Supposing a child dependant would remain a dependant for only one more year after the death of the deceased but nevertheless has a reasonable expectation of being a beneficiary of the estate as she is named as a beneficiary in the deceased's will. Will that child be entitled to claim her entire share of the loss of inheritance proportionate to what was given to her in the will or only a small percentage thereof, and if the latter, how would that percentage be calculated? Take another example. Supposing a wife has her own successful career and is dependent on her husband to a small extent, but enough to qualify her as a dependant. There are child dependants who enjoy more financial support from the deceased when he was living than the wife but the children will not remain as dependants for very much longer. The wife is named as the main beneficiary in the deceased's will. Would that mean that she is entitled to claim more for herself than the children in the loss of inheritance claim?

75 Perhaps it is preferable to allow an estate claim for loss of inheritance with a cap on the quantum and with a qualification that such a claim is permissible only to the extent that the beneficiaries of the estate are also dependants so as to avoid benefiting distant relatives of the deceased. That will not address all the complexities I have mentioned and others not mentioned, but it will address the apparent injustice that someone like AML will face. In any event, that is a matter for the Legislature, as I have said.

76 I should mention that Mr Hwang also referred to cases from the US, Canada and Australia to support the claim for loss of inheritance. It is unnecessary for me to deal with them as they do not assist me to reach a conclusion on the Singapore position. It is also unnecessary for me to refer to the various textbooks which Mr Hwang cited as they rely on cases which I have dealt with.

Quantum of the claim for loss of inheritance

77 In the circumstances, the quantum of the claim for loss of inheritance is academic. However, as much time was spent on this issue, I will say something about it. References to dollar values will be to dollars in the US currency unless otherwise indicated.

78 HAL had attended Georgia State College on a scholarship. After graduation, he began working as an actuary with Life Insurance Company. In 1970, he resigned from his job and began selling life insurance with Aetna Life & Consulting Company ("Aetna") and sold life insurance policies with premiums amounting to more than one million dollars. It was during this period that he began to study real estate investments. While selling life insurance, he began to make investments in real estate and deal in real estate on weekends. By 1972, he quit his job at Aetna and devoted his efforts to using real estate to accumulate wealth.

79 In the early 1970s, HAL bought inexpensive land in outlying rural areas, sub-divided them and sold the sub-divided land to others. By the middle of the 1970s, he focused on buying timber land. He would sell standing timber on the land before completing his land purchases. In this way, he used the proceeds of the timber sales to pay for most or all of the purchase prices for the land and standing timber. He was a very hardworking man, working at least 16 hours a day for seven days a week and subsequently, lesser hours on Fridays, Saturdays and Sundays. He had no hobbies.

80 HAL rewarded himself modestly, as much of the available funds were reinvested in land or used to pay bank borrowings.

81 In 1983, HAL moved his business office from a house to an office complex. By the end of the 1980s, HAL and a business partner, James Baker, were in the process of building a 58,000 sq ft, freestanding office building or corporate centre.

82 In 1983, HAL's family moved to a larger home and he invested in a condominium unit in Florida where the family took their summer vacations.

83 From 1990, HAL's salaried income from the two companies he controlled increased. The two companies were Lassiter Properties, Inc ("LP") in which he had a 100% interest and MDI International, Inc ("MDI") in which he had a 98% interest. On 6 February 1991, HAL also obtained a lease and option to purchase an approximately 10,000 sq ft house in Emerald Drive which was the only house situated on a four-acre peninsula on Lake Spivey in South Atlanta.

84 Dr Bruce A Seaman was the expert witness for AML's claim for loss of inheritance. He has an impressive *curriculum vitae*. He is a tenured Associate Professor of Economics and a Senior Associate in the Fiscal Research Program in the Andrew Young School of Policy Studies, Georgia State University at Atlanta, Georgia. He formerly served as Chair of the Department of Economics. He also has other appointments and was President of the Association for Cultural Economics International at the time he issued his first and supplemental reports on February 2001 and 2002. He has various professional affiliations and awards. He has various fields of specialisation including Law and Economics/Forensic Economics and Economic Impact Analysis. He has numerous publications and has extensive experience as an expert witness in civil trials and has testified in numerous trials involving damages related to the value of a deceased's life in cases throughout the US.

85 In his first report, Dr Seaman noted that HAL's estate was estimated at about $39.1m as at the date of his death. Using a five-year period from 1985 to 1990 as an example, he said HAL's net wealth grew from about $25m to about $150m. The compound annual growth rate was nearly 43%. Notwithstanding some financial problems confronted by HAL in the early 1990s which HAL had to deal with through the bankruptcy courts, Dr Seaman was of the view that this led to a temporary

reduction in HAL's wealth at the time of death and HAL was "again poised to accumulate wealth". Using 20% or 25% of the 43% compound annual growth rate would yield a compound annual growth rate of 8.6% or 10.75%. Assuming HAL worked until 70 years of age, Dr Seaman estimated HAL's net worth to be about $234m to $358m. If these figures were calculated to the value as at, say, the date of his first report, *ie* 15 February 2001, Dr Seaman estimated the loss of inheritance to be between about $98m to $149m, but in any case, no lower than about $66m.

86 In Dr Seaman's supplemental report dated 25 February 2002, he included an alternative approach by suggesting a 10.75% growth rate between 1994 to 2001 and 4.3% growth rate (being half of 8.6%) beyond 27 February 2002. HAL would have accumulated about $155m. The present value of that sum as at 27 February 2002 would be about $69m.

87 However, Mr Loh submitted that Dr Seaman was an unreliable witness.

88 Firstly, he submitted that although Dr Seaman had mentioned that HAL had faced some financial complications through the bankruptcy courts, Dr Seaman had not stated plainly in either of his reports that HAL had in fact filed for Chapter 11 bankruptcy in November 1991.

89 Secondly, although Dr Seaman had listed the documents he had considered for his reports, he did not list any bankruptcy documents which he subsequently admitted he had considered, like a reorganisation plan and disclosure statement.

90 Thirdly, during the evidence-in-chief of Dr Seaman, he decided to lower his assessment about the loss of inheritance to 45% of $66m, *ie* about $30m, which he said would be his most defensible case for loss of inheritance.

91 Fourthly, Mr Loh submitted that Dr Seaman had not mentioned in his reports the change in banking regulations from 1990 resulting in a savings and loan crisis ("S&L crisis") which affected the viability of HAL's real estate business. Loans were no longer easily available for the purchase of undeveloped land. On the other hand, Dr Seaman claimed during cross-examination that he had taken the S&L crisis into account as it changed how HAL was going to do business.

92 Fifthly, Dr Seaman had used the years 1985 to 1990 to derive the compounded annual growth rate of nearly 43%. However, this was the highest growth rate for HAL. The period between 1990 and 1994 would show instead a negative growth rate.

93 Sixthly, Dr Seaman had not mentioned in either of his reports that HAL had been indicted under the Georgia Racketeer Influenced and Corrupt Organization ("RICO") Act which would affect his standing with banks. Dr Seaman claimed in cross-examination that he had taken this into account.

94 Seventhly, Mr Loh criticised some errors in calculations made by Dr Seaman which it is not necessary for me to set out.

95 Eighthly, Mr Loh pointed out that Dr Seaman was floating around various figures as the loss of inheritance. I have mentioned some of them above. Others were mentioned by Dr Seaman during oral testimony.

96 Ninthly, Dr Seaman had claimed during cross-examination that HAL's estate was worth actually $100m as at the date of his death. It was reduced to $39.1m because of a downward adjustment made by the US government because of a key man discount since HAL was no longer around. However, eventually Dr Seaman had to accept that no such discount was applied to reach

the $39.1m figure.

97 Tenthly, Mr Loh submitted that Dr Seaman's recommendations relied heavily on the views of others as Dr Seaman did not know HAL personally. Dr Seaman himself said:

> However, there is no doubt that at the time of his death, he was again poised to continue to accumulate wealth, as attested to by the other affidavits and financial documents that serve as a record in this case.

98 I am of the view that the arguments made by Mr Loh were well taken. Notwithstanding Mr Hwang's attempts to counter Mr Loh's arguments in order to portray Dr Seaman as a reliable and conservative expert witness, it is clear to me that Dr Seaman was nothing of the sort. It was telling that Mr Hwang made the following oral submissions before me:

(a) "At the end of the day, I would not place so much emphasis on Dr Seaman's evidence as expert evidence. He is putting together a bunch of assumptions. In saying how much [HAL] would have earned, his guess is as good as yours or mine";

(b) "He is a vehicle for a mathematical table of possibilities";

(c) "Seaman gave us a platform to make our arguments which we could have made without him";

(d) "We do not rely on Dr Seaman as the primary prover of the point that [HAL] was poised to accumulate wealth";

(e) "All we are offering Dr Seaman for is to offer a methodology".

99 Furthermore, AML herself was not a credible witness. In her first affidavit of evidence-in-chief ("AEIC"), she had suggested that things were looking up from 1990. For example, she said in para 21 of her first AEIC that by 1990, HAL was not required to reinvest every dollar in the business to reach his goals. Commencing in 1990 until his death in 1994, his salaried income from LP and MDI steadily increased. Paragraph 22(a) of her first AEIC mentioned how, in February 1991, HAL obtained a lease and option to purchase the Emerald Drive property I have mentioned. Paragraphs 40 and 41 of her first AEIC stated how HAL's land dealings were conducted in his own personal way and as there was no one to take his place, AML had to adopt a ten-year liquidation plan for LP and HAL's individual land holdings. Paragraph 42 of her first AEIC stated that HAL was providing the leadership, vision and direction, and financing for MDI. In the preceding years before his death, MDI had been increasing its gross revenues and net profits. MDI continued to operate profitably in 1995 as a result of momentum but because of the void in leadership, vision and direction caused by HAL's death, MDI started to experience a net operating loss from 1996 which increased annually. By 1999, MDI itself had to file for Chapter 11 bankruptcy.

100 As Mr Loh submitted, although LP was HAL's main business, AML's first AEIC did not dwell on its business between 1990 and 1994 and focused instead on MDI. It was after Dr Seaman's first report was disclosed that Mr Loh had an inkling about the Chapter 11 bankruptcy proceedings involving HAL and three of his companies, *ie* LP, Ansley Development Corporation and Little Henry's Food Stores Inc. Mr Loh subsequently learnt that on 4 November 1991, HAL had filed such proceedings for himself and the three companies. LP actually had a negative worth of $5.497m as at HAL's death.

101 Even for MDI, the Disclosure Statement filed for its own bankruptcy proceedings revealed that increasing revenues disguised some fundamental problems that had developed by early 1994, *ie* before HAL's death, and ultimately proved impossible to overcome. This Disclosure Statement listed five factors for the fundamental problems:

(a) MDI's products were subjected to increasing competition from other companies. By the beginning of 1994, the Small Computer Systems Interface ("SCSI") Express product of MDI was experiencing competition from companies which were much better capitalised than MDI and therefore enjoyed much larger budgeting for marketing, and for research and development;

(b) MDI's concentration on a Novell operating platform subjected its products to competition from Microsoft NT;

(c) MDI was not able to reorient its SCSI Express products to Microsoft NT because:

(i) MDI had limited funds to undertake the necessary research and development;

(ii) MDI had aligned itself with Novell as a marketing partner, and had embedded itself in a distribution and reseller network which was oriented toward Novell products;

(d) Novell changed its relationship from a marketing partner to a competitor;

(e) The two-tier sales channel MDI used was falling apart due to a series of consolidations, bankruptcies and liquidations of distributors with whom MDI had traditionally done business.

102 A sixth factor was the death of HAL. However, as Mr Loh pointed out, a Mercer Capital valuation report, which had been prepared for estate filing, had mentioned that HAL had been withdrawing money from MDI to repay part of his loans to MDI because of his other financial commitments and so critical investments were not being made in product development and in strengthening the balance sheet.

103 Mr Hwang, however, relied on Daniel Pieplow's evidence that had HAL been alive, he would have addressed MDI's problems. Mr Pieplow was the Chief Financial Officer of MDI. Yet, HAL's involvement in MDI was described in a newspaper article as follows:

> As he begins to expand and diversify his holdings … Lassiter will have to bring in outside talent, partners and expertise. And he'll have to curb his compulsive risk taking. A case in point: In 1987 Lassiter invested $3 million in Micro Design International Inc … With no knowledge for computers, Lassiter apparently based the investment on an employee who heard about the deal from a neighbour who knew a fellow who knew the man who ran the company. Two years later Lassiter filed suit … claiming he'd been duped … The case has since been settled with Lassiter now assuming total control of Micro Design.

104 It seems to me that in view of MDI's problems even when HAL was alive, HAL was not the panacea for MDI's problems as Mr Pieplow wanted to believe. However, the same newspaper article also described HAL as a driven self-made millionaire from the wrong side of Atlanta and described his one goal in life to be a billionaire and his overriding interest to be to catch and surpass the ultimate dealmeister, Donald Trump.

105 Mr Hwang emphasised that HAL was a healthy, hardworking, intelligent, experienced and skilled entrepreneur. He was not a one-trick pony. Furthermore, HAL's estate was worth $39.1m and

this was a figure assessed by the relevant government organisation in the US.

106 Mr Loh argued that the estate was hardly worth anything. HAL's gross estate was supposed to be worth $57.1m. From that sum, $10.1m should be deducted for insurance. He had debts of about $7.9m leaving a net amount of about $39.1m. Of this sum, about $20m was in stocks and bonds and this included stocks in MDI which was valued at about $18.3m by Mercer Capital but which eventually turned out to be worthless. There was also a loan of about $6.8m by HAL to MDI which would also be worthless since MDI was going down. Mr Loh also submitted that even AML had claimed that MDI was not worth $18.3m in order to minimise estate taxes.

107 I am of the view that even if MDI were worthless, HAL's estate was still worth about $14m, *ie* after deducting $18.3m and $6.8m from $39.1m. Furthermore, as Mr Hwang had stressed, HAL himself was not insolvent although he was facing liquidity problems. The Chapter 11 reorganisation for HAL and his three companies received creditor support and they were supposed to be paid 100 cents to the dollar with interest at prime plus one per cent although this would be over perhaps 15 years. There was no suggestion of any default. I accept that with the reorganisation, HAL would have been free to engage in deals. He was a hardworking self-made man with proven entrepreneurial skills. This is not a case of an infant victim where the evidence about the ability to earn income or accumulate wealth would be sparse.

108 On the other hand, HAL's successes were more in respect of his property deals for which he would have had to be able to borrow large sums of money easily. He would not be able to do this with the change in banking regulations. Secondly, his reputation would have been tarnished by the Chapter 11 proceedings and the charges under the Georgia RICO Act. Thirdly, he took great risks. In the same newspaper article I have mentioned, AML was quoted as saying:

> [HAL] is a gambler. He thrives on it. If something went wrong, we'd be gone tomorrow.

109 In the circumstances, while it may be likely that HAL would have been able to continue providing AML with the same level of financial support as he had done before his death, it is difficult to say that he would have continued to accumulate wealth to the tune of millions of dollars and to say exactly how much wealth he would have accumulated. Accordingly, I would not have awarded more than $1m for loss of inheritance if that claim were maintainable in a dependency claim.

Loss of support

110 As regards the claim for loss of support, Mr Loh submitted that because AML would derive income from HAL's estate which was assessed at $39.1m, the interest on that alone would be sufficient to compensate AML for her loss of support. Hence, AML had in fact suffered no loss. Mr Loh relied on *dicta* in *Kandalla v British Airways Board* [1980] 1 All ER 341, where Griffith J said at 349:

> As a further illustration, consider the position of a very high earner of 38 years of age who is also possessed of a large fortune. Suppose he is contributing £10,000 per annum to the support of his wife and family during his lifetime and on his death leaves them an estate of, say, £500,000. The interest on the estate is more than adequate to replace the dependency of £10,000 per annum and so the accelerated benefit from the estate extinguishes any Fatal Accidents Acts claim.

111 Mr Loh also submitted that although I had said in *Tan Harry* that there should be no deduction for whatever a younger spouse may receive by way of inheritance, I should re-consider that decision. I also mention that although AML was of the same age as HAL, Mr Loh did not suggest that she was likely to pre-decease HAL but for the accident and Mr Loh's argument was on the

premise that AML would have survived HAL but for HAL's accident.

112 Mr Loh's argument about interest being earned on HAL's estate of $39.1m was on the contingency that I might not agree with his contention that HAL's estate was not worth that amount at the time of his death.

113 In any event, whether HAL's estate was worth $31.1m, or $14m if MDI were worthless, I am of the view that I should not take into account the interest earned from the capital for the purpose of determining the quantum of AML's loss of support.

114 In *Tan Harry*, I had referred to the Privy Council decision in *Kassam v Kampala Aerated Water Co Ltd* [1965] 2 All ER 875. In that case, the Privy Council decided that there should not be a deduction in a dependency claim for the acceleration of benefit which the young dependants had received from the estate of the deceased, having regard to the anticipated savings which the deceased might reasonably have been expected to make. This decision was cited with approval by Choor Singh J in *Neo Seo Thun v Ng Peng Hui* [1975–1977] SLR 345. In *Tan Harry*, I was of the view that there should not be any deduction for the acceleration of benefit where the dependants would in any event ultimately inherit the assets, although at a later time. That view was expressed in the context of the question as to whether there should be a deduction for the acceleration of capital. If there should not be a deduction for the acceleration of capital, there should also not be a deduction for the interest earned on capital. I see no reason to depart from the view I expressed in *Tan Harry* on the point.

115 It was not suggested by Mr Loh that the capital as at HAL's death would have been eventually lost by HAL had he not been killed. In any case, that is too speculative an occurrence for me to give any weight to.

116 Mr Loh also submitted that AML should not be entitled to claim for loss of support because, after HAL's death, AML was drawing salaries from LP and MDI in excess of what HAL had been providing her. Mr Loh relied on *Yap Ami v Tan Hui Pang* [1982] 2 MLJ 316 ("*Yap Ami*"). In that case, the deceased was killed in a hunting accident. He was a partner in a business and was drawing a certain sum per month. After his death, the partnership continued to pay the dependants what the deceased used to draw. The trial judge found that there the dependants did not suffer any loss. In fact they were getting more than when the deceased was still living as he would have retained a portion of what was drawn for his personal needs. The dependants' appeal to the Federal Court of Malaysia was dismissed.

117 Mr Loh also referred to *Jung Estate v Krimmer* (1990) 47 BCLR (2d) 145 ("*Jung*"). The deceased was a director of a company. He was drawing a salary of $74,000 of which he provided $36,000 for family expenses. After he died, his widow drew a director's fee of $50,000. In that case, the widow did not claim for loss of dependency.

118 Therefore, although Mr Loh accepted that the law is such that what a dependant earns after the death of the deceased should be disregarded for the claim for loss of support, Mr Loh submitted that an exception exists where the dependant does not actually go out to the market and get a job but continues to draw the deceased's salary in his stand as in the cases of *Yap Ami* and *Jung*. Mr Loh relied on AML's evidence that as chairperson of the board of LP, she had no choice other than to adopt a ten-year liquidation plan for LP. As the chairperson of the board of MDI, she had attempted to retain managers but eventually MDI was no longer able to continue its operations. Mr Loh also relied on the evidence of Mr Pieplow who said that when AML and one of her daughters became involved in MDI, they did not really have any experience and one of the first things that had to be

done was to make up a dictionary to explain basic terms to them. Thus Mr Loh submitted that AML was not employed by LP and MDI for her abilities but rather so that she could draw salaries from these two companies.

119 I am prepared to accept that AML was paid, not so much for her abilities but because she was the wife of HAL. However, there was insufficient evidence before me to say how much should be attributed solely to her efforts and how much to her status as HAL's wife. While AML was overpaid, this is different from saying that she was paid for doing nothing. It appears that she did put in additional effort to do what she could, even if that was not enough.

120 In *Yap Ami*, there was no suggestion that any of the dependants had done anything to earn the amount paid by the business after the deceased's death. In *Jung*, the plaintiff did not pursue a claim for what the deceased had been paid and so it is of limited persuasive weight.

121 Ultimately, AML had to take on certain roles in LP and MDI which she would not have had to if HAL had not been killed.

122 Mr Loh further argued that from 1997 onwards, AML's salary began to dwindle because of the eventual collapse of MDI as well as LP. For LP, it had a negative value as at HAL's death. Accordingly, Mr Loh submitted that even if HAL had been alive, the financial support he had been providing would have been similarly reduced.

123 In my view, this argument assumes that HAL would not have been able to turn things around and that he would not have been able to engage in other deals which would have been profitable. I am not prepared to make that assumption.

124 In the circumstances, I am of the same view as the AR that AML is entitled to claim for loss of support and there is to be no deduction either for interest on capital inherited or for the amounts she earned from LP and MDI after HAL's death. I come now to the multiplicand for loss of support.

Multiplicand

125 Paragraph 4(c) of the Statement of Claim asserts that HAL gave a total of $250,000 as financial support for AML and her four daughters. Yet, in para 22(e) of AML's first AEIC, she alleged that at the time of HAL's death, he was providing approximately $160,000 per year either by direct payments to her or in kind for her daughters and herself. Then, in para 28 of the same affidavit, AML said she had various needs for support which HAL would have provided and she listed out various items totalling $294,199 per year. Subsequently, in the Opening Statement for AML for the assessment, her claim for loss of support was reduced to $198,516 per year.

126 Mr Siva Murugaiyan, who was AML's other counsel, sought to explain the discrepancy between the figures of $160,000 per year and $198,516 per year in paras 5 to 6 of his written submission as follows:

> 5. In paragraph 22(e) of the Plaintiff's affidavit, she has put forward a sum of US$160,000.00. The difference[s] between this sum and the present sum of US$198,516.00 are essentially as follows.
>
> (a) As regards clothing and food, the $160,000.00 per year claim includes $15,600.00 per year for "food, clothing and incidentals". The present claim separates food ($11,511.00) and clothing ($15,000.00). The difference of $10,911.00 per year relates primarily to the

portion for food.

(b) The $160,000.00 only included a sum of $3,600.00 for transport which only took into account a monthly charge of $300.00. Whereas the present claim for transportation is for $15,386.00 per annum which includes other costs of running a car including purchase, insurance and maintenance. This accounts for a difference of $11,786.00.

(c) The $160,000.00 claim did not include any medical expenses. The present claim includes medical expenses of $3,059.00.

(d) The $160,000.00 per year amount did not include health insurance. The present claim includes health insurance of $2,370.00.

(e) The $160,000.00 per year claim did not include entertainment. The present updated claim includes $4,598.00 for entertainment. Paragraph 22 overlooked any expenses for entertainment, though HAL provided entertainment, usually by cash outlays.

(f) The $160,000.00 sum also did not include miscellaneous incidentals which would inevitably be incurred in the normal course of life. The present claim for $198,516.00 includes a sum of $3,892.00.

6. The above sums add up to $36,616.00 which is approximately the difference between the present claim of $198,516.00 and the $160,000.00 claim put forward in paragraph 22.

127 However, this submission did not explain how AML had come to make the alleged errors in the first place or why four sets of figures had been advanced for loss of support for AML and her daughters.

128 Mr Murugaiyan also submitted that AML's evidence (presumably he meant her evidence for the sum of $198,516) was supported by the evidence of Herman Kooymans who was the accountant of HAL personally as well as for LP and other affiliated companies since 1987.

129 Paragraph 11 of Mr Kooymans' first affidavit stated various amounts of money which HAL paid to AML or for her benefit. However, the amounts included salaries drawn by AML from LP. A breakdown of Mr Kooymans' figures can be found in a report prepared by Mr Foong Daw Ching, an expert witness for the Driver. Mr Foong is a certified public accountant and a partner of M/s TeoFoongWongLCLoong. The breakdown is as follows:

	Gross payment to or for AML	Salary to AML AML from LP	Net amount provided by HAL to or for AML
	US$	US$	US$
1991	88,458.72	36,000.00	52,458.72
1992	199,689.25	37,800.00	161,889.25

1993	179,437.82	39,720.00	139,717.82
1994 (1 Jan to 8 May	57,810.26	13,800.00	44,010.26
	525,396.05	127,320.00	398,076.05

130 So, even if the salary to AML were to be included and assuming Mr Kooymans' figures above are correct, they would still show an annual figure of less than $160,000 per year, *ie* $525,396.05 ÷ 40 months x 12 months = $157,618.82 per year, and not $198,516 per year.

131 Paragraph 5.2.6 of Mr Foong's report states that based on a review of the cheques exhibited in Mr Kooymans' first affidavit, the total payment by HAL to AML for the same 40-month period does not exceed $326,011.49. This works out to less than $98,000 per year. Yet in para 6.2.3 of Mr Foong's report where he commented on AML's estimation of $160,000 per year, Mr Foong estimated the annual support to AML to be $130,000 per year at most, after deducting schooling expenses for the daughters. The AR had adopted this $130,000 as the multiplicand.

132 Mr Kooymans had criticised Mr Foong's estimation of $130,000 per year because AML had not included her daughter's education expenses in para 22(e) of her first AEIC when she mentioned the figure of $160,000 per year. I note that while AML did not mention the daughter's education expenses as part of the $160,000 figure, she did indicate that the $160,000 was to support her daughters and herself. In any event, Mr Foong had made his own checks and calculations from the documentary evidence supplied to support AML's claim.

133 Mr Loh submitted that AML's salary from LP before HAL's death should not be taken into account as loss of support, citing *Burgess v Management Committee of the Florence Nightingale Hospital for Gentlewomen* [1955] 1 All ER 511 ("*Burgess*"). In that case, the widower was suing for his loss of dependency as a result of the death of his wife. They were professional dancers and it was his contention that his income had been affected as he could no longer have his wife as his dance partner. It was held in that case (as set out in the headnote of the report) that:

> [D]amages for injury to a husband resulting from the death of a wife were only recoverable under the Fatal Accidents Act, 1846, s 2, if they were attributable to the relationship of husband and wife, and as no benefit arose from the dancing partnership of the plaintiff and his wife which could properly be attributed to their relationship as husband and wife, no damages were recoverable for the value of the wife to the plaintiff as his dance partner.

134 I am of the view that *Burgess* is not applicable to the facts before me. The salary which was paid to AML before HAL's death was not because of her business relationship with HAL but because of their relationship as husband and wife. It was HAL's way, *qua* husband, of providing AML with some financial support and apparently she did no work or little work to earn that salary.

135 Mr Loh also submitted that Mr Foong's figure of $130,000 per year did not take into account other expenses of the daughter although the Opening Statement for the Driver had urged that Mr Foong's figures be adopted. It seems to be from Mr Foong's summary worksheet that the expenses of the daughters, other than the educational expenses, were minor and I am not inclined to make a deduction for other expenses for the daughters.

136 Mr Loh further submitted that AML had exercised her option to purchase the Emerald Drive property on 28 December 1995 and had reduced her outlay on the mortgage of her house from $7,587.67 a month to $5,646.06 a month, a reduction of more than 25% or $23,299.08 per year. He submitted this should be taken into account as well. However, Mr Loh's reference to p 29 of AML's first AEIC to support this factual assertion is not borne out by the said p 29.

137 In the circumstances, I am of the view that the multiplicand should remain as $130,000 per year.

Multiplier

138 After considering the range of multipliers in a number of local cases, HAL's health, his hardworking habits and the nature of his work, the AR adopted a multiplier of eight years.

139 Mr Murugaiyan had sought 16 years before the AR. Before me, he sought 14 to 16, alternatively 12 or 13 and, then, at least 10 to 12 years.

140 Mr Murugaiyan relied on a judgment of Judith Prakash J in *Lim Fook Lau v Kepdrill International Incorporated SA* [1993] 1 SLR 917 where he claimed that the judge had said that it was not unusual for professionals or businessmen to work to their late 60s or even their 70s. That was not an accurate representation of what Prakash J said. What the judge said, at 921, [9], was that the deceased doctor, who died when she was nearly 30 years old, "could probably have worked till her late 60s". Prakash J then took the view that the deceased would therefore have a further working life of between 30 to 35 years but for the accident.

141 Be that as it may, I accept that in view of HAL's good health and working habits as well as his very ambitious character, it was likely that he would have worked to 70 years old. He was killed when he was 48 years old and AML was also 48 years old then. Having considered the same range of multipliers as the AR did, I am of the view that a multiplier of ten years is fair.

142 As I said in *Tan Harry*, the multiplier is to be calculated from the date of HAL's death.

Claim for professional fees

143 After HAL's death, the only will that was discovered was one made by him in 1970 which did not take into account subsequent changes in the law which would have enabled HAL to devise all his assets to AML without taxes. As a result, the US government assessed HAL's estate taxes to be about $14m plus interest which amounted to a total of about $20m. AML disputed the assessment on the grounds that prior to HAL's departure to Singapore and his death, HAL had evinced an intention to update his estate planning and execute a new will to take into account changes in the law. Consequently, lawyers' fees, valuers' fees, accountants' fees and other related expenses were incurred to dispute the US government's assessment. The amount incurred was said to be $1,269,422.33, although the pleadings claimed a total of $984,971 only for such expenses. The US Tax Court ruled in favour of the estate on 19 October 2000 that no taxes were payable. Mr Hwang submitted that had the US Tax Court not ruled accordingly, the $20m tax would have been a separate head of claim under the principle in *Davies v Whiteways Cyder Co Ltd* [1975] QB 262 ("*Davies*"). Accordingly, he submitted that AML should be entitled to claim the professional fees incurred to avoid such taxes.

144 In *Davies*, the deceased had made gifts of property and money to his wife and son. Within seven years of the gifts, he was killed in an accident. Accordingly, the value of the gifts was taken

into account for the purpose of estate duty and an additional sum became payable as estate duty. The widow and son claimed, *inter alia*, the additional estate duty against the owners and driver of the lorry which had collided with the deceased's car. O'Connor J allowed this claim.

145 Mr Loh submitted that *Davies* is distinguishable on the facts. There the gifts had already accrued to the dependants. Mr Loh submitted that *Davies* is not authority for the proposition that a dependant can claim for post-mortem estate planning. The AR decided that AML's claim for the professional fees did not fall within a dependency claim as it was an estate claim.

146 I am also of the view that such a claim is an estate claim and not a dependency claim. Therefore, I will not allow it.

147 The tax initially imposed was for the account of the estate and the expenses incurred to avoid the tax was for the benefit of the estate. Any benefit which AML would have derived from HAL's estate would have been *qua* beneficiary of the estate and not *qua* dependant.

Claim for US$85,000 for post-trial non-recurring expenses for the weddings of Christy and Cheryl Lassiter

148 In Mr Hwang's summary of reliefs claimed, there is an item of $85,000 for post-trial non-recurring expenses for the weddings of Christy and Cheryl Lassiter. The AR had awarded $60,000 for such expenses. As AML's appeal had been confined to a claim for herself as dependant, it is not open for AML to claim for an increase for such expenses. Secondly, this claim was not even pleaded. Thirdly, no reason was given to show that the AR's decision on this claim was wrong. Therefore, I will not increase the aforesaid wedding expenses to $85,000.

Summary

149 In summary, the Driver's appeal in respect of loss of support is dismissed.

150 I allow AML's appeal in part in that I will vary the multiplier for the loss of support for AML from eight years to ten years. The rest of her appeal is dismissed.

151 I will hear the parties on costs of the appeals and the assessment below and on any other consequential orders that may be required.

Defendant's appeal dismissed and plaintiff's appeal allowed in part.

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