Sup. Ct. Civil Case No 2/93

VERNON ROBERT STEEN v. ANDREW RONALD ANDERSON, LESLIE GEORGE CLINGHAM and THE ATTORNEY GENERAL

Davis C.J.

JUDGMENT

On the 2nd February 1992 the second defendant, Leslie Clingham, driving a Range Rover borrowed from the first Defendant, set off from Stanley on the Mount Pleasant road to Blue Beach. He was accompanied by his wife's daughter by a previous marriage, Kerena MacDonald. Some distance along the road Mr Clingham lost control of the vehicle; it rolled off the road and Kerena was thrown out of it. Mr Clingham found Kerena lying by the side of the road and shortly afterwards he ascertained that she was dead.

At the time of her death Kerena MacDonald was twenty-four. She was not married, but she had a son Christopher, born on the 3rd August 1986, who was 5½ at the date of his mother's death and is now 8½.

On the 28th January 1993 the plaintiff, who is the deceased's uncle (and Christopher's great-uncle) instituted proceedings under the Law Reform (Miscellaneous Provisions) Act 1934 on behalf of the deceased's estate, and under the Fatal Accidents Act 1976 on behalf of the deceased's son Christopher as a dependant of the deceased, against the three defendants, claiming that the accident resulting in the deceased's death was caused by the negligence of the first defendant and/or by the second defendant and/or by the negligence and/or the breach of statutory duty of the third defendant as provided by the Crown Proceedings Act 1947 in its application to the Falkland Islands.

The first and second defendants do not contest their liability under the claim. The third defendant contests liability and application has been made that paragraph 7 of the amended Statement of Claim relating to the third defendant be struck out. This application has been adjourned sine die and in the meanwhile, in accordance with an order made by the Senior Magistrate on the 18th August 1994, proceedings against the third defendant are stayed. By the same order, and by order of the 20th January 1995 transferring the matter to the Supreme Court, the issue of quantum of damages

as between the plaintiff and the first and second defendants has been ordered to be tried as a preliminary issue.

Accordingly, I am now concerned only with that issue.

It is not disputed that the Law Reform (Miscellaneous Provisions) Act 1934 and the Fatal Accidents Act 1976, as at present applied in England, apply in the Falkland Islands.

The plaintiff's first claim in the amended Statement of Claim is for damages on behalf of the deceased's estate under the Law Reform (Miscellaneous Provisions) Act 1934. It is conceded that in view of the deceased's death following almost immediately after the accident no claim for damages under the Act lies in this case. I am concerned therefore in so far as damages are concerned only with the second claim for damages on behalf of the deceased's dependent son Christopher under the Fatal Accidents Act 1976.

At the time of her death the deceased was employed by the Government as a cook at the King Edward VII Memorial Hospital. It appears that she worked on a shift system with other staff to provide catering facilities throughout the week working, on average, 40 hours a week. She also did a certain amount of overtime work, amounting in 1991 to an average of a little over 5 hours a week.

The deceased rented a flat from the Government in which she lived with her son Christopher. She paid rent amounting to £143 a month at the date of her death together with a fixed monthly charge of £45 for hot water and central heating. Her telephone and electricity bills amounted together to about £45 a month. The deceased took in lodgers to share her flat. In 1991 she had had two lodgers each of whom paid a third of the rent, heating, telephone and electricity charges. At the time of her death, however, only one of these lodgers remained with the deceased.

It is not disputed that the deceased's net income at the date of her death, excluding the outgoings on her flat, but including the payment she received from lodgers, allowances and state benefits received from the Government, and after deduction of tax, amounted to £10,762.45. It is also agreed on the same basis (except that the income from lodgers is halved) that the deceased's net income at the present date would amount to £10,644.73.

Since his mother's death Christopher has lived with the second defendant and his wife (Christopher's grandmother) and their son and daughter (who are slightly younger than Christopher) as one of their family. Nothing is known of Christopher's father whose relationship with the deceased occurred in England and ended before Christopher was born.

Both Mr and Mrs Clingham are employed: Mr Clingham as a cook at the hospital (in the post held by the deceased) and Mrs Clingham in helping to run a guest house owned by her mother, Mrs Emma Steen.

The plaintiff, Mr Vernon Steen (who is Mrs Clingham's brother) gave evidence to the effect that the deceased spent in the region of £30 - £35 a week exclusively on herself on social activities and cigarettes. She also had a loan from the Standard Chartered Bank for the purchase of a Land Rover and some household equipment including a washing machine and a refrigerator. The deceased made monthly payments in the region of £245 in reduction of the loan.

Mr Steen also gave evidence about Christopher's education. At the time of his mother's death Christopher had begun school at the Infant and Junior School in Stanley. At 11 he will go to the Community School. Mr Steen produced a letter from the Director of Education in which Christopher was described as "a bright child with average to above average academic ability". The Director predicted that Christopher "could be a candidate for post-sixteen full-time education overseas" and concluded that it could "be assumed that Christopher had the potential to take advantage of study at university level after completing entry qualifications at eighteen." This letter was dated 10 August 1994. In an affidavit sworn for the purposes of these proceedings seven weeks later the Director somewhat moderated her assessment of Christopher's abilities. She described him as of "average ability" and added that it was "too early to reach any reliable assessment of his eventual educational potential."

Mr Steen himself considered Christopher to be a bright child who, were present educational trends in the Falkland Islands to continue, would be likely to obtain a sufficiently high grade in his General Certificate of Secondary Education at the age of 16 to enable him to go on to study for "A" Levels at Peter Symmonds College at Winchester or a vocational qualification. This would take him to the age of 19. Were he to go on to university after taking his "A" Levels, this would take him to the age of 22 or 23 depending on whether he did a three- or a four-year degree course.

Although it appeared in evidence that the Government made extremely generous provision for students from the Islands at Peter Symmonds College or doing vocational training or at university, Mr Steen said that in the case of his own two daughters, when they were undergoing further education in England during the periods 1988-1990 and 1991-1993, he had spent about £1,500 to £1,800 on them (excluding holiday air-fares where these were not paid for by the Government and perhaps some clothing) over and above the allowances given by the Government.

Mrs Clingham in her affidavit sworn on the 15th November 1994 referred to her brother's hopes that Christopher would go on to further education abroad, but added: "Christopher is now only just 8, and I do not know if this hope is realistic. I have had eight children altogether, and none of them has yet gone on to further education."

It is not disputed in this case that the loss suffered by Christopher through his mother's death is of two kinds: (1) the loss of his mother's financial support - the financial dependency, and (2) the loss of his mother's care - the service dependency. My task is to determine what damages should be awarded to Christopher proportionate to the loss he has suffered from the death of his mother (section 3(1) of the Fatal Accidents Act 1976).

The Multiplier

For the purposes of this determination I have to decide on a multiplier representing the years during which Christopher's dependency on his mother would, subject to life's contingencies, be likely to continue.

Mr Kilmartin, dealing with this as a first step, has suggested following Hunt v. Severs [1994] 1 All E.R. 385 (H.L.) that the multiplier should be 11. He supported this by reference to Spittle v. Burney [1988] 3 All E.R.1031 (C.A.) and Cresswell v. Eaton [1991] 1 All E.R. 484.

Spittle v. Burney was a case of a 3 year old girl whose mother of 28 was killed in an accident. The trial judge found that it was "more likely than not" that the girl would proceed to tertiary education and that accordingly her dependency would continue until she was 22. On that basis he adopted a multiplier of 11. On appeal it was agreed that the multiplier was too long and should have been 9 or (at most) 10, but the Court held (Croom-Johnson L J. p.1038e) that although the multiplier was on the high side it was not too long. In Cresswell v. Eaton the divorced mother of 26 of three young children was killed in an accident. The youngest child was 4 at the date of the

accident. The judge found that his dependence was likely to continue till the age of 22 and decided on a multiplier in his case of 10.5. (For the other two children of 7 and 6 at the date of the accident, whose dependency he considered would continue until the age of 18, he decided on multipliers of 8 and 8.5 years respectively.)

Mr Kilmartin, supported by the oral evidence of Mr Steen, submits that there is a strong possibility that on reaching the age of 16 Christopher will go on to further education in England, possibly up to the age of 22 or 23, but certainly up to at least 18 or 19 and that his dependency on his mother had she lived would have continued until then.

Miss Parsons has argued persuasively that whether or not Christopher continues to further education abroad (a matter which is highly speculative at present), his dependency, had his mother lived, having regard to her employment prospects, earnings and way of life at the time of her death, would almost certainly have come to an end by the time he reached 16. I agree. This means that Christopher's dependency would have continued for no more than 10 years and 7 months. Miss Parsons, after reviewing the various contingencies which could occur in the lives of Christopher and his mother had she lived up to the time he was 16, suggested that a multiplier of 6 was appropriate in this case. I have formed the view that the appropriate figure is 7.5.

The Financial Dependency

I now turn to consideration of Christopher's financial dependency on his mother to calculate his loss to date and in the coming years.

Mr Kilmartin referred me to Harris v. Empress Motors Ltd [1984] 1 W.L.R. 212 and submitted that I adopt the figure of 75% - the agreed figure in respect of a dependent widow/mistress and two dependent children in the two incidents the subject of that case.

I am not satisfied, however, that the deduction of a percentage representing what the deceased would have spent exclusively on herself, referred to by O'Connor L J. in Harris v. Empress Motors Ltd as the conventional modern practice, is appropriate in this case. Miss Parsons has submitted figures as a basis for calculating Christopher's dependency which are in my view preferable.

This calculation involves the deduction from the deceased's monthly net income after tax of £897 of :-

(a) what she spent exclusively on herself by way of cigarettes and her social activities amounting together to £102 a month;

(b) her half-share of the rent and domestic outgoings (shared as to the other half with a lodger) amounting to £116.50 a month; and

(c) her monthly bank loan repayments amounting to £245.

In so far as (b) and (c) above are concerned, although it is clear that the payments in rent, etc. and, under the loan, for a car and domestic appliances, were for the deceased's and Christopher's joint benefit, Christopher has not lost anything in respect of these items as a result of his mother's death because he still has the benefit of what these payments represented in his present home with Mr and Mrs Clingham.

The monthly sum left after making the deductions set out above amounts to £433.37. Miss Parsons submits, and I agree, that this should be divided 50 : 50 as representing what the deceased would have spent on food and clothing for herself and Christopher and any savings for their joint benefit. Accordingly Christopher's monthly dependency comes to £216.68, that is just over £2,600 a year. Miss Parsons points out that 25% of the deceased's net income of £10,762.45 at the date of her death amounts to £2,690 and suggests that I should take that figure as representing Christopher's financial dependency. I raise this to the round figure of £2,700 for ease of calculation.

This figure, as indicated, is come to after deduction of the deceased's monthly loan payments to the Standard Chartered Bank. This loan has, as I understand it, now been paid off in the administration of the deceased's estate. But for the purposes of this calculation it has still to be taken into consideration. Unfortunately the evidence as to the loan is far from clear. Mr Steen in his affidavit sworn on the 24th November 1994, paragraph 12, referring to the deceased's bank accounts, deposed that the fixed loan account "stood at £6,660.60 on the 5th July 1991. Monthly payments of £185.18 from the current account were reducing the principal debt and further payments from the current account of interest at approximately £60 per month were being made." From this it would seem, if I have understood it correctly, that the loan would have been paid off - assuming the repayments had continued regularly - by the 1st July 1994, and should not therefore be taken into consideration as a deduction from the deceased's net income after that date in the calculations as to Christopher's dependency.

As this matter has not been be raised by counsel I do not propose to make any alteration in the calculations set out earlier in so far as the three years from the deceased's death up to the date of trial are concerned.

Accordingly I find that Christopher's loss for the three years up to date of trial is £8,100 plus interest at 4% amounting to £972, making a total of £9,072.

As regards the future loss, taking the agreed figure of £10,644.73 as the figure for the deceased's annual net income after tax - i.e. £887 a month, and making the deductions (a) and (b) from that as set out above, but not (c) (the loan repayments), I arrive at a figure of £668.50. Rather than divide this figure 50 : 50 as was done in respect of the calculation up to the date of trial, I think this should be divided in the proportion 40 : 60, as I think the deceased would have been likely to spend marginally more on Christopher as he got older. This gives an annual figure for Christopher's loss of £4,813. This figure multiplied by 4.5, being what is left of the multiplier of 7.5, gives a figure of £21,658.50, which I round up to £21,660.

Accordingly I find that Christopher's loss under the head of financial dependency amounts to a total of £30,732 and I make an award in damages under this head in that amount.

The Services Dependency

I must now try to assess the loss Christopher has suffered through the loss of the services of his mother, reminding myself that in doing so I must deal with the matter as if it were one for determination by a jury and, using my common sense, try to determine the true value to Christopher of his mother's services had she not died.

In Regan v. Williamson [1976] 2 All E.R. 241 at 244 Watkins J. (as he then was), in dealing with the value of a mother's services said:

"I have been referred to a number of cases in which judges have felt compelled to look on the task of assessing damages in cases involving the death of a wife and mother with strict disregard to those features of the life of a woman beyond her so-called services, that is to say to keep house, to cook the food, to buy the clothes, to wash them and so forth. In more than one case, an attempt has been made to calculate the actual number of hours it would take a woman to perform such services and to compensate dependants on that basis at so much an hour and so relegate the wife or mother, or so it seems to me, to the position of a housekeeper ..... I am ..... of the view

that the word "services" has been too narrowly construed. I should, at least, include an acknowledgement that a wife and mother does not work to set hours and, still less, to rule. During some of those hours she may well give the children instruction on essential matters to do with upbringing and, possibly with such things as their homework. This sort of attention seems to me to be as much of a service, and probably more valuable to them, than the kinds of service conventionally so regarded."

It is now well-established that a value should be put on the attention only a mother can give to her child over and above the value of the actual daily household services she performs for the child. Miss Parsons does not dispute this.

Mr Kilmartin has drawn my attention to the award of £20,000 for the loss of a mother's services in Hayden v. Hayden [1992] 4 All E.R. 681 (C.A.) and has submitted that I accept this as an appropriate figure in view of the similarity of the facts of that case with this one.

In Hayden v. Hayden the defendant was driving a car towing a caravan. His wife was a passenger in the car. The caravan overturned and the defendant's wife was killed. Liability was not disputed. At her death the deceased was 35. There were four children over 14 and one of 4. Six months after the accident the defendant sold his garage business. After that he did not work and lived on supplementary benefit. The youngest child, Danielle, lived with the defendant from the date of the accident to the trial of the action seven years later and he devoted himself to looking after her.

It was not clear to the Court of Appeal in that case how the trial judge had calculated the damages of £20,000 awarded for the loss of the mother's services. It appeared that he had accepted the evidence of the manager of a nanny agency as to the cost of providing a nanny for Danielle until she was 11 and thereafter at half cost until she was 15, but it appeared that the judge had not used this evidence in his award of £20,000.

There is no nannying service in the Falklands and even if there were it does not appear to me that it would be of help in this case. As Sir David Croom-Johnson said in Hayden v. Hayden at page 693, letter d: "On the facts of this case the whole concept of valuing the lost services by reference to a 'notional nanny' is inappropriate .... there is no room for using it when on the facts a nanny would never have been employed. Mr Hayden was not going to use one, and never did." Similarly in the present case, it is quite clear that Mr and Mrs Clingham would not have employed a nanny to look after Christopher had such a service existed (which it does not).

The nearest equivalent to a nannying service in the island is that of child-minding during the day for parents at work of children under school age. This was described in an affidavit sworn by Mrs Elliot who deposed that she charged £1.50 an hour per child, providing minor refreshments, but not meals. She believed that other child-minders charged up to £2.50 per hour, but she did not know whether that would include a meal. This service for 50 hours a week at Mrs Elliot's figure of £1.50 an hour would give a figure of £3,900 a year.

Mrs Hall, the Social Welfare Officer, in her affidavit described the system of fostering obtaining in the Islands. This provided usually for short-term fostering in cases such as bereavement, ill-health, matrimonial difficulties, etc. for which the charge was £10 a day. This was intended to cover food and any increase in household expenses for laundry, fuel and lighting etc. but not such things as clothing and toys which would have to be provided by the child's parents. This would give a figure of £3,640 a year from which should be deducted something for food and household expenses.

Miss Parsons submits that it would not be appropriate to adopt for this case the figure of £20,000 awarded in Hayden v. Hayden, as it appears to have included an element of financial benefit from the deceased's earnings, and that this would result in a duplication of damages. This is borne out by the passages in the judgements of McCowan L.J. at page 686, letters e and f, and of Sir David Croom-Johnson at page 693, letter b. Miss Parsons submits that I should in any case bear in mind that the deceased was in full-time employment, that she frequently made use of friends and relations to look after Christopher - as can be seen from Mr Steen's second affidavit (paragraph 16), Mr Clingham's second affidavit (paragraphs 4 and 5), Mrs Clingham's affidavit (paragraphs 8 and 10) and the affidavit of the deceased's one-time lodger, Tracy Saunders (paragraphs 6 and 7) - and that the award of damages under this head should reflect this - see Cresswell v. Eaton [1991] 1 All E.R. 484, where Simon Brown J. said that a "modest discount only should be made to reflect the part-time nature of the deceased's mother's care" (page 492h) and gave a discount of 15% (page 494) in the rather different circumstances of that case.

Miss Parsons suggested a figure of £8,000 as appropriate damages for Christopher's loss of his mother's care.

A matter touched on by Mr Kilmartin, but not raised by Miss Parsons, was whether any discount should be made under this head for the fact that Mr Clingham (one of the tortfeasors) and Mrs Clingham who, as well as being Christopher's grandmother, was

the tortfeasor's wife, had from the date of his mother's death provided Christopher with a home and care.

It is clear from the judgments of the Court of Appeal in Hayden v. Hayden that the trial judge was found to have incorporated in his award of £20,000 for loss of the deceased mother's services a discount to reflect that those services had been replaced to some extend by Danielle's father. The majority of the Court of Appeal held that there was nothing objectionable in that - see Sir David Croom-Johnson at page 693j and Parker L.J., pages 699g -700b. McCowan L.J. in his dissenting judgment came to the opposite conclusion. At page 689 McCowan L.J. said:

"The principle which emerges from Stanley v. Saddique [1991] All E.R. 529 is that there is to be no reduction in the amount of damages which would otherwise be awarded to take account of care voluntarily provided in substitution for the deceased's mothering services. That principle cannot, in my judgment, be affected by whether or not the person providing the care was the tortfeasor.

"I would hold, therefore, that the judge was wrong in law to take into account to any extent the care provided by the defendant for the plaintiff in substitution of her mother's care since the latter's death."

Accordingly he found that the damages awarded by the trial judge in respect of the loss of the deceased mother's services was too low and held that the figure of £20,000 should be increased to £30,000 (this included an element of financial benefit from the deceased's earnings put at £2,500 or £4,500).

Stanley v. Saddique was a case where the infant plaintiff's mother had died in a motor accident. The trial judge found that the deceased was unreliable as a mother and that if she had lived the motherly services she was likely to have provided would have been of indifferent quality. By contrast he found that the mothering services being provided by the plaintiff's stepmother after his father's remarriage were of a much higher standard. The Court of Appeal decided that the quality and continuity of the services which the deceased mother would have provided were matters which should be taken into account in assessing the plaintiff's loss of dependency. It then considered the wording of section 4 of the Fatal Accidents Act 1976 as amended by section 3(1) of the Administration of Justice Act 1982, which reads as follows:-

"In assessing damages in respect of a person's death in an action under this Act, benefits which have accrued or will or may accrue to any person from his estate or otherwise as a result of his death shall be disregarded."

The Court held that the word "benefit" in section 4 was not restricted to pecuniary benefit but included the benefit accruing to the plaintiff as a result of his absorption into a new family unit including his father and stepmother, with the result that the benefit must be wholly disregarded for the purpose of assessing damages for the loss of dependency. (See McCowan L.J. in Hayden v. Hayden, page 688 c and d)

In Hayden v. Hayden the majority of the Court of Appeal - McCowan L.J. and Sir David Croom-Johnson, Parker L.J. dissenting - held that Stanley v. Saddique was binding on the Court.

Stanley v. Saddique differed from Hayden v. Hayden and the present case in that it was not the tortfeasor who provided the substituted services on the mother's death.

The learned authors of Kemp and Kemp on The Quantum of Damages are critical of the decision of the majority in Hayden v. Hayden that a discount was allowable where the deceased mother's services had been replaced by the tortfeasor. They submit that McCowan L.J. was right and that Sir David Croom-Johnson and Parker L.J. were wrong. In paragraph 22-005/8 (as amended up to January 1995) of Kemp & Kemp the authors say : "It may be a question of fact, depending on the circumstances of the particular case, whether substitute services result from the deceased's death. But in any case, the services are to be disregarded in the assessment of damages. If they do not result from the deceased's death. they are to be disregarded by virtue of previous decisions at common law; if they do result from death they are to be disregarded by virtue of section 4 of the Fatal Accidents Act in its amended form."

Mr Kilmartin also referred me to the case of Hunt v. Severs [1994] 2 All E.R. 385 (H.L.). This was a case in which the plaintiff suffered severe injuries in an accident when she was a pillion passenger on a motorcycle driven by the defendant. The plaintiff and the defendant later married and he cared for her. The defendant admitted liability. The House of Lords held that where services in the form of care and assistance were gratuitously rendered by a defendant tortfeasor to a plaintiff injured as a result of the defendant's negligence, the plaintiff could not recover those services by way of damages.

In my view, however, this decision has no application to the present case in that it does not come within the scope of the Fatal Accidents Act 1976 as amended nor was it a case in which death resulted and substituted services were provided for those previously provided by the deceased.

Although the decisions of the Court of Appeal of England are of considerable weight, they are not binding on this court. In any event, neither Sir David Croom-Johnson nor Parker L.J. in their judgments in Hayden v. Hayden go so far as to say that the services provided by a tortfeasor defendant in place of the services previously provided by the dependant plaintiff's deceased mother should be discounted in an award of damages for the loss suffered by the plaintiff in the loss of his mother's services: they go no further than saying that if such a discount had been made by the trial judge "there is nothing wrong or objectionable in that" (Sir David Croom-Johnson at page 693 at j) and that such an award would be "entirely reasonable" and "to do justice between the parties" (Parker L.J. at page 700, letter a).

In the present case I consider I should follow the decision in Stanley v. Saddique. Accordingly I find that Christopher's absorption into Mr and Mrs Clingham's family falls within the meaning of the word "benefit" appearing in section 4 of the Fatal Accidents Act 1976, with the result that the value of the care and services provided to Christopher by Mr Clingham (the tortfeasor) or Mrs Clingham in the place of the deceased must be disregarded in assessing what damages should be awarded for the loss to Christopher of his mother's services.

Miss Parsons has supplied me with figures based on a "notional foster parent" at the daily rate of £10 given by Mrs Hall with a deduction in respect of food of £1.64 giving a daily rate of £8.36 - say £8 to include increased household expenses. Miss Parsons then discounts this figure by half to reflect the fact that the deceased was employed for 40 hours a week - and with overtime about 45 hours a week. In my view, however, a 50% discount is excessive. I would reduce it to 33⅓% giving a daily rate of £5.34. Otherwise following the figures suggested by Miss Parsons for Christopher's decrease in dependency from the date of his mother's death, that is to say at full value to the age of 11 (5½ years), and from 11 to 16 (5 years) at one-third of the value of the dependency at the date of death. This results in an average yearly dependency over 10½ years (that is, until Christopher is 16) of £1,326.69. On these figures the loss to the date of trial would be £3,980.08, plus interest at 4% of £477.61, giving a total of £4,457.69. Future loss, using the balance of 4½ years of the multiplier of 7.5 would come to £5,970.10, giving a total figure of £10,427.80. Similar calculations on the

basis of a "notional child-minder" rate of £75 per week would result in a total figure of £17,192.18.

On the basis of these figures, and treating the matter as I am bound to do as a jury matter, I have come to the conclusion that the appropriate figure for damages in this case for the loss to Christopher of his mother's services is £12,000 including interest at 4% for the 3 years from the date of the deceased's death to the date of trial.

Funeral Expenses

Finally, I must deal with the outstanding issue of the plaintiff's claim for the cost of a headstone to mark the deceased's grave to be included in the claim for funeral expenses made under the Particulars of Special Damage in the amended Statement of Claim.

The funeral expenses claimed in the amended Statement of Claim amounting to £456.67 relate apparently only to the actual cost of the deceased's funeral and grave. In the event these costs came to £423.67 on which interest at the rate of 8% is claimed to the date of trial amounting to £101.68, making a total of £525.35. This figure is not contested by the defendants, and it is accordingly allowed.

The plaintiff has now put in a further claim in the sum of £700 for a headstone. No mention of this claim is made in the amended Statement of Claim, nor has Mr Kilmartin made any application further to amend the Statement of Claim either in the present proceedings before me or in the proceedings before the acting judge, although it appears from the acting judge's order of the 20th January that he could have done so on the 14th February 1995 which was listed as a final date for any further directions on the issue of quantum. What he has done is to include in a document headed "Schedule of Damages as at the 2nd February 1995" a fax dated the 15th February 1995 from the Falklands Islands Co. Ltd's West Store, relating to a telephone conversation of the same day, which says that a basic headstone delivered to Stanley would cost around £700.

Not surprisingly Miss Parsons objects to the inclusion at the last minute of this claim of £700 for a headstone and to the production of the West Store's fax, no reference to which had been made, it seems, before the filing of the plaintiff's "Schedule of Damages as at the 2nd February 1995."

Mr Kilmartin relies on the judgment of Mr B. A. Hytner Q.C. sitting as a Deputy Judge in Gammell v. Wilson & Swift & Co Ltd in July 1979, extracted from Kemp & Kemp on The Quantum of Damages, Volume 1, in the Appendix to Chapter 20. In that case the learned judge held that in the circumstances of the case the claim for the cost of a tombstone to be included in the claim for funeral expenses was justified and would be allowed, and this was confirmed on appeal. In that case, too, as in this case, the claim for the cost of the tombstone was a late claim, but it appears that the defendants were given prior notice of the claim, though not of the amount, and accordingly the learned judge allowed an amendment to the Statement of Claim to permit the claim.

Mr Kilmartin conceded that the claim for the cost of a headstone was made very late. He said that this was primarily because of lack of funds and that sufficient funds for a headstone only became available after the sale of a plot of land forming part of the deceased's estate.

Apart from her objections on procedural grounds, Miss Parsons submitted that having regard to the fact that the deceased's plot of land was sold in September 1994 (this was not disputed) it was extraordinary that no claim for a headstone should have been made nor notice of any such claim should have been given until so shortly before the trial. She submitted that there was insufficient evidence in the circumstances of an established intention on the part of the plaintiff to erect any headstone.

In all the circumstances, though with some reluctance, I have come to the conclusion that the plaintiff's claim for a headstone costing £700, to be included in the claim for funeral expenses, must be refused in this case, and I so order.

To summarize therefore, I find that :-

(1) total damages, including interest, by way of financial dependency, amount to £30,732;

(2) total damages, including interest, by way of services dependency, amount to £12,000; and

(3) special damages, including interest, amount to £525.35.

Remmy Darzins
Chief Justice.
23 May 1995