Hooper v Territory Insurance Office & Anor [2002] NTSC 5

PARTIES:	HOOPER, Garry James as litigation guardian for Christopher James Hooper and Jaclyn Tracey Hooper v TERRITORY INSURANCE OFFICE AND WILKIE, Ian Murdoch
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	M8 of 2001 (20108398)
DELIVERED:	10 January 2002
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JUDGMENT OF:	MARTIN CJ

CATCHWORDS:

Motor accidents compensation – reference to Motor Accidents (Compensation) Appeal Tribunal – interpretation of s 22 of the Motor Accidents (Compensation) Act 1979 (NT) – words and phrases – "relative needs and degrees of dependency of the dependent child or children" – history of legislation – assessment of proportion of fund payable.

Motor Accidents (Compensation) Act 1979 (NT), s 22, s 22(1)(b)(ii) and s 29

Sweeney v Fitzhardinge (1906) 4 CLR 716, considered.
Builders Licensing Board v Sperway Constructions (1976) 135 CLR 616, considered.

Bull v Attorney-General (New South Wales)(1913) 17 CLR 370, followed.
Aafjes v Kearney (1975) 180 CLR 199, applied.
Kauri Timber Co (Tas) Pty Ltd v Reeman (1973) 128 CLR 177, applied.

REPRESENTATION:

Counsel:

Applicant:	T Young
1st Respondent:	M Grant
2nd Respondent:	P Walsh

Solicitors:

Applicant:	Michael Whelan & Assoc
1st Respondent:	Cridlands
2nd Respondent:	Paul Walsh

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Mar0204

IN THE MOTOR ACCIDENTS
(COMPENSATION) APPEAL TRIBUNAL

Hooper v Territory Insurance Office & Anor [2002] NTSC 5
No. M8 of 2001 (20108398)

BETWEEN:

GARRY JAMES HOOPER
As litigation guardian for Christopher James Hooper and Jaclyn Tracey Hooper
Applicant

AND:

TERRITORY INSURANCE OFFICE
First Respondent

AND

IAN MURDOCH WILKIE
Second Respondent

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 10 January 2002)

[1] This is a reference under the Motor Accidents (Compensation) Act 1979 (NT) ("the Act"). The applicant claims to be a person aggrieved by a determination of the Board of the Territory Insurance Office made on 3 April 2001. The reference jurisdiction is found in s 29(1)(a). Any person who is aggrieved by a determination of the Board may within 21 days after

being served with a copy of the determination refer the matter to the Tribunal.

[2] He applies as litigation guardian for his two infant children. The determination was as to compensation payable under s 22 of the Act arising from the death of his former wife, the mother of the children.

[3] Kim Elizabeth Wilkie, then Dawking, ("the deceased") and the applicant were married in 1987. They were the parents of the two children, Christopher, aged 11, and Jaclyn, aged 9 ("the children"). In 1998 the deceased and the applicant separated and the children went with the applicant to Sydney. Shortly thereafter the deceased formed a relationship with the second respondent ("Mr Wilkie"). In January 1999 the deceased and Mr Wilkie purchased a house in Katherine in order to live there together with the children. They returned to Katherine. The marriage between the deceased and the applicant was dissolved in February 2000 and the deceased and Mr Wilkie married in May of that year.

[4] On 8 August 2000 the deceased sustained fatal injuries in a motor vehicle accident. Two days later the children returned to live with the applicant, with whom they continue to reside.

[5] On 14 August 2000 Mr Wilkie applied for compensation under the Act. The deceased was a "resident" and a "qualifying person" within the meaning of the Act.

[6] Where the death of a qualifying person results from or is materially contributed to by an injury suffered in or as a result of an accident that occurred in the Territory or in or from a Territory motor vehicle, there is payable pursuant to s 22(b):

> "for the benefit of the qualifying person's spouse or dependent child or dependent children, or a spouse and a dependent child or dependent children –
>
> (i) the prescribed proportions; or
>
> (ii) in the case of a dependent child or dependent children such proportions as the Board determines on an application under subsection (2), having regard to the relative needs and degrees of dependency of the dependent child or dependent children,
>
> of an amount equal to 156 times average weekly earnings at the time the payment is made.
>
> (2) For the purposes of subsection (1)(b), a person claiming to be a spouse or a dependent child of the deceased qualifying person may apply to the Board for a determination under that subsection.
>
> (3) For the purposes of subsection (1)(b)(i), the prescribed proportions are those specified in column 2 of the Table in respect of the spouse or dependent child or dependent children specified opposite in Column 1 of the Table.

TABLE

Column 1	Column 2
Dependents	Proportion
Spouse	100%
one child	100%
2 or more children	Equally between children
Spouse and one child	10% to child, balance to spouse
Spouse and not more than 5 children	5% to each child, balance to spouse
Spouse and more than 5 children	25% divided equally between children, balance to spouse

[7] On 25 September 2000 the designated person of the Board (see definition in s 27) made a determination for payment of compensation in respect of the death pursuant to s 22(1)(b)(i) of the Act. That is, that the prescribed amount be paid as provided for by s 22 and the Table.

[8] By letter dated 19 October 2000, the applicant applied for a determination by the Board under s 22(2). A copy of the determination made by the Board on 3 April follows:

> "In the matter of an application by **Garry Hooper** (the Applicant) for benefits under the Act arising from an occurrence on the **08 August 2000**
>
> Pursuant to the provisions of the Motor Accidents (Compensation) Act 1979 it is hereby determined:-

1. Kim Wilkie (The Deceased) was a qualifying person as defined within Section 20 of the Act.

2. Ian Wilkie was the spouse of the qualifying person, as defined within Section 4 of the Act, at the date of accident.

3. Christopher Hooper, born 12 July 1990 and Jaclyn Hooper born 29 September 1992, were both dependent children as defined within Section 4 of the Act, at the date of occurrence.

4. Pursuant to Section 22(1)(b) of the Act, in the absence of any special circumstances of the relative needs and degrees of dependency of the dependent children on the deceased at the date of the occurrence, the prescribed amount of $120,494.40 is payable proportionally as follows:

   Surviving Spouse Ian Wilkie
   $108,444.96

   Dependent Child Christopher Hooper (Payable to the Public Trustee)
   $6,024.72

   Dependent Child Jaclyn Hooper (Payable to the Public Trustee)
   $6,024.72

5. Pursuant to Section 23 of the Act, in addition to the amount payable under Section 22(1)(b), there shall be payable to the carer(s) of Christopher Hooper and Jaclyn Hooper, on their behalf, an amount equal to 10% of average weekly earnings, per week (currently $80.00), per child on a monthly basis until the children attain the age of 16 years, marry or reach the age of 21 years if receiving full time education at a school, college or university."

[9] It will be noted that the Board determined that both the children were dependent children. By definition a dependent child, in relation to a person, means a child of the person who, inter alia, is primarily dependent on the person for financial support. That determination is not challenged in the applicant's reference to the Tribunal. The grounds specified are:

1. That the Board has failed to have regard to the relative needs and degrees of dependency of the children on an application pursuant to s 22(2) of the Act.

2. That the Board has erred in adhering to the prescribed proportions pursuant to s 22(1)(b)(i) of the Act and should have exercised its discretion under s 22(1)(b)(ii) of the Act.

[10] Following the prescribed procedure, the Board filed an answer in which it said that it had had regard to the information provided by the applicant to determine whether the relevant needs and dependency of the dependent children warranted a departure from s 22(1)(b)(i), and that the information provided did not warrant such a departure. Such an answer is otiose when the parties adopt the course which the nature of the hearing before the Tribunal allows. The real dispute here was between the applicant on behalf of the children and Mr Wilkie.

[11] Where a matter is referred to the Tribunal it is to conduct such hearing into the matter as it thinks fit and may make such determination as the Board could have made as the Tribunal considers proper in the circumstances (s 29(3)). The hearing by the Tribunal, "shall be a hearing *de novo*", s 29(4). Treating such a hearing as being analogous to an appeal by way of hearing de novo, I consider that the intention of the Parliament is that the Tribunal may conduct a fresh hearing with the parties being entitled to begin again and advance new evidence (*Sweeney v Fitzhardinge* (1906) 4 CLR

716; *Builders Licensing Board v Sperway Constructions* (1976) 135 CLR 616).

[12] The language employed in s 22(1)(b) is strange. For example, there can be no "spouse" of a deceased qualifying person. In ordinary language and by the definitions in s 4, a spouse is a person who is married or in another prescribed domestic relationship. Such a relationship comes to an end upon death of the partner to it. To qualify as a "spouse" as defined, the person need not be dependent if falling within par (a) and par (c) or the latter part of par (e). The heading to Column 1 of the Table "Dependents" may operate so as to qualify the meaning of "spouse" in the Table, but that would be contrary to the unqualified reference to "spouse" in s 22(3) which establishes the Table.

[13] These apparent difficulties to the case put forward on behalf of Mr Wilkie are overcome by holding that the intention of the Parliament, to be gleaned from s 22(1)(b), is that a surviving marriage partner of a deceased qualifying person is entitled to a proportion of the benefit prescribed upon that death (the proportion may be up to 100%). That is so whether that person was dependent upon the deceased or not. That is born out by the legislative history of the provisions.

History of legislation

[14] The original provisions were enacted in the Motor Accidents (Compensation) Act 1979 (NT) No 75 of 1979. Part V provides for

"payments in respect of death". Sections 21 and 22 provide for benefits payable to a dependent spouse. Leaving aside s 21 for the time being, s 22 provided that where a qualifying person who is the head of a household dies in an accident, leaving a dependent spouse, his spouse would be paid (a sum calculated in accordance with a complex formula) and $15 per week in respect of each dependent child of the deceased in her custody. Where such a person is the dependent spouse of the head of a household and dies in an accident, there is payable to the head of the household in respect of that death $5,000 or a sum calculated by reference to the average income of the dependent spouse (s 23).

[15] The phrase "dependent spouse" was not defined, but the word "spouse" was defined in a manner similar to that presently appearing. A "dependent child" was defined in similar terms to the present definition including that the child be primarily dependent on the deceased for financial support. There was no provision for the division of any lump sum benefit as between a spouse, dependent or otherwise, and dependent children. Nothing was said in the Second Reading Speech upon introduction of the original Bill which assists. An amendment in 1982 does not appear to shed any light on the present problem. In 1984 s 22 was repealed and the substitute provided for payment to a dependent spouse of an amount calculated by a much less demanding formula, together with the payment in respect of each dependent child of the deceased qualifying person "in her custody". Section 23 was also repealed and re-enacted, but retained the words "dependent spouse".

The 1984 amendment further refined the provisions as to the amount payable by providing for it to be prescribed.

[16] Sections 22 and 23 were again repealed and re-enacted in 1986. The new provisions contained no reference to "dependent" in relation to spouse and a prescribed amount became payable to the person who had the care and custody of a dependent child of the deceased qualifying person.

[17] The present provisions were enacted in 1991. The Second Reading Speech of the Minister spoke of the repeal of s 22 and the new s 22 (amongst others) "to allow for more equitable payments in the event of death" noting that the lump sums payable now clearly set out in table form provide for a dependent child to receive a percentage of the lump sum payable to the surviving spouse. That particular amendment was said to be an important new initiative prompted by a case recently brought to the Minister's attention. "It ensures that dependents will have access to lump sum payments, regardless of whether they remain with the surviving spouse or not". Unfortunately perhaps, nothing was said regarding s 22(1)(b).

[18] It was not until the 1997 amendment that the reference to "the dependent spouse" was omitted from s 21 and replaced with "the spouse". The legislation now appears to be non-discriminatory on the basis of gender and the notion of a dependent spouse is these circumstances is no more. Given the history of the legislation I consider that to have been deliberate.

[19] Section 22(1)(b)(ii) and s 22(2) are intended to provide a means whereby the spouse or a dependent child may seek to obtain a variation of the proportion of the benefit payable by way of lump sum compensation in respect of the death of a qualifying person. In this case, it is not necessary that Mr Wilkie have been dependent upon the deceased to qualify as a "spouse" (see definition (a) of spouse in s 4).

[20] In considering such an application, the Tribunal is to have regard to the "relative needs and degrees of dependency of the dependent child or dependent children". The correct construction of that phrase, in the circumstances of this case, is not without difficulty. The parties all made substantial submissions in respect of it. It is novel (although a similar phrase is employed in s 62(1)(b)(ii) of the Work Health Act). Research failed to disclose any case in which its meaning had been considered.

[21] The provision takes its place in a statutory scheme to provide compensation in respect of death or injury in or as a result of a motor vehicle accident (Preamble). Part of the scheme involved the abolition of common law rights. No action for damages lies in the Territory in respect of the death or or injury to a person who at the time of the accident was a resident of the Territory (s 5). However, with some specified exceptions (s 9), prescribed compensation is payable regardless of the fault of the person killed or injured.

[22] The Act is beneficial in that it gives benefits to remedy the abolition of the rights. It must therefore be construed beneficially, so as to give the fullest relief which the fair meaning of its language will allow, (*Bull v Attorney-General (New South Wales)* (1913) 17 CLR 370 per Isaacs J at p 384). The Act being intended to benefit a particular person or class of persons, it is preferable for any ambiguity to be resolved in favour of the intended beneficiary (Pearce, Statutory Interpretation in Australia, 4th Edition, par 9.3).

[23] The submissions made on behalf of each of the parties may be summarised as follows. For the applicant it was put that the phrase is to be read as a whole, the "needs" of the child or children are "relative" not simply to other dependent children but relative to the needs of the spouse and to the "degree of dependency" of the child in relation to that spouse. It is said that the correctness of that submission is demonstrated by reference to s 22(b)(i) of the single dependent child. In the case of such a child, the word "relative" can refer only to "needs" relative to the only other potential beneficiary, the spouse. It was put that that would seem to be deliberate as the drafter has referred to the situation of the single dependent child twice in the clause. The submission goes that 22(2) enables a spouse to apply under s 22(1)(b)(ii). The construction advanced was said to be one that promotes the purpose or object underlying the Act especially in relation to dependent children. The abolition of common law rights, it was said, included claims, in the case of death, for damages for loss of dependency, solatium, loss of

care and guidance and to replace those rights with a defined lump sum together with, for dependent children, the weekly payment provided for in s 23. The submission went on that in the common situation where children continue to reside with the parent who is the surviving spouse, the loss of support to the children because of the death is adequately compensated by giving the bulk of the benefit to the spouse in accordance with the prescribed proportions. He or she would ordinarily continue to care for the child or children. However, where the children do not remain with the surviving spouse and that person has no moral or legal obligation to care for the children, then there is a danger of inadequate compensation being made available for them.

[24] On behalf of the first respondent it was put that par 22(1)(b)(ii) applies to the entire lump sum benefit and not only the children's share, and it conceded that any apportionment under that paragraph was to have regard to the needs of the children relative to each other and the surviving spouse. The relative needs and degrees of dependency are to be assessed as at the date of death of the deceased and the dependency referred to is that of the children upon the deceased.

[25] For Mr Wilkie it was put that the intention of the prescribed benefit paid to him was to compensate, as far as such payments are able to, for the loss of his wife. The prescribed proportions set out in the table give rise to a presumption that it was the intention of the Parliament to compensate the spouse in some way for such a loss. There will be many cases where the

spouse would not have been dependent upon the deceased yet the Act prescribes a benefit, and the largest benefit, to go to the surviving spouse. That the Act abolished common law rights does not mean that the purpose of the benefit provisions can not be intended to compensate for some or all of the usual common law heads of damage. It was submitted that the real intention behind the abolition of common law rights was to replace the open ended aspect of heads of damage known at common law with a statutory scheme that limits and prescribes the compensation payable in defined circumstances, and thus the surviving spouse is entitled to consideration in respect of solatium, loss of consortium and the like.

[26] In reply, the applicant contended that the Act was directed to providing compensation for financial loss and the provision being considered is overwhelmingly directed to the consideration of relative financial needs and degrees of financial dependency. It was put that compensation for solatium and loss of consortium appeared to have little or no place.

[27] I turn to consider the contentious provision in the light of those submissions. If a surviving spouse was dependent upon the deceased for financial support, then that would demonstrate a need. But since a surviving spouse need not necessarily be dependent for financial support to qualify for a lump sum benefit, the need to be compensated for may be other than financial. Similarly, although the definition of dependent child includes reference to financial support that does not exclude consideration of other forms of support.

[28] The word “needs” ought not to be construed as having any lesser ambit than its ordinary meaning. In a family situation they extend beyond needs met out of the earnings of the deceased. “Needs” are what are necessary or required and in the context of the relationship between spouses and parent and child other needs may be significant.

[29] The Act provides that no action for damages shall lie in the Territory in respect of death or injury to a person who at the time was a resident of the Territory. Nothing is provided concerning the heads of damage which might have been claimed in such an action nor as to the matters under that head which were in contemplation when the benefit was fixed by Parliament in relation to death. It appears from the Minister’s Second Reading Speech that its purpose was to reduce motor vehicle third party premiums by reducing the quantum of the compensation which might be payable. When regard is had to the benefits provided for in the case of injury, it can be seen that common law concepts intrude. Compensation is payable for loss of earning capacity, permanent impairment, medical and rehabilitation expenses, attendant care, cost of medical appliances and alterations to a house.

[30] The Compensation (Fatal Injuries) Act was passed in 1974. It provided that an award of damages under its provisions may include, inter alia, loss or impairment of consortium, hire of help to perform household services customarily performed by the deceased (servitium) and as well loss of care and guidance of a child of the deceased parent.

[31] It is provided in s 5(2) of that Act that it does not apply to a death compensable under the Motor Accidents (Compensation) Act. But that only means the claim for damages for death arising as a result of a motor vehicle accident can not be brought under the general Act. The reason is to be seen from the purposes of the Act. However, I do not think that because the general Act does not apply to a death compensable under the Act, the Tribunal is precluded from adopting a concept relating to assessment of damages to be found in the common law and the general Act. The difference is that in the one case there is no cap on the quantum of the award, and in the other there is. However, both have to do with compensating the family of a deceased person for the loss or damage suffered by members of the family arising from death. To approach the matter on another basis would be arbitrary.

[32] I would include such of the considerations referred to in the Compensation (Fatal Injuries) Act as are relevant to a case under the Act in making an assessment of the proportions of the fund to be distributed to the potential beneficiaries.

[33] The Compensation (Fatal Injuries) Act also provides for an award of damages for solatium, but such an award is not recoverable at common law and I do not think it was intended that it be included in the considerations going to an assessment of loss under the Act. As I understand it, it is necessary for the statute to specifically provide for an award under that head of damage (see Luntz, Assessment of Damages, 2nd Edition, par 9.7.01).

[34] In the context of the Act "needs" embrace day to day requirements whether ordinary or out of the ordinary because of some special need of the person claiming to benefit. But whatever it is that is under consideration it must truly be a need and not simply a wish or a want. There must be a loss of the means of meeting the need arising from the death of the deceased. For example, if the deceased provided financial means to satisfy the need or needs then that would be relevant as would be the cost of employing a person to perform work formerly undertaken by the deceased to meet the need. Compensation for loss of other needs is not so easily determined, nor is the relationship between such needs as between potential beneficiaries, but there are analogies which can be drawn upon.

[35] The use of the word "relative" requires identification of the relationship in question. I consider that the relationship is that of the needs of the persons entitled to a proportion of the fund. Section 22(1)(b) provides for the benefit of the spouse or dependent child or dependent children, or spouse and dependent child or dependent children. They are all entitled to a statutory proportion of the fund under s 22(1)(b)(i). However, s 22(1)(b)(ii) allows for a variation to be made where there is a dependent child or dependent children. Inclusion of the spouse as one who may make application for a variation of proportions otherwise payable, further demonstrates that his or her needs are relevant. Accordingly, in assessing "relative needs" the needs of the spouse, child or children are each to be regarded in relation to each other.

[36] If a dependent child is the only potential beneficiary of the fund, the question does not arise. However, if the deceased is survived by a spouse and but one dependent child, the only relationship is that between those two people. They are both entitled under the Table, and there is no reason why the spouse should be excluded if the child applies.

[37] Notwithstanding the lack of felicity, I regard the issue of "relative needs" as being a consideration separate from that encompassed by the "degrees of dependency of the dependent child or dependent children". The degree of dependency of the spouse, if any, is not included. It envisages an assessment being made of the degree to which each child was dependent upon the deceased for support.

[38] The alternative is to take the phrase "relative needs and degrees of dependency of a dependent child or dependent children" as a whole disregarding a surviving spouse. In the case of dependent children, the needs of each can be assessed in relation to the other or others as can their individual degrees of dependency. But, where there is a surviving spouse, a sole dependent child is bereft since his or her needs cannot be assessed in relation to any other child or children. Nor can his or her degree of dependency be compared with another child or children. There is nothing to which the Board or Tribunal is to have regard. That suggested construction is not open.

[39] Degree of dependency, another criteria for assessment, is not necessarily a simple task, but it is not difficult to imagine a family of children, the individual members of which were dependent upon a deceased parent to a greater or lesser degree because of a range of factors such as age, physical or mental health and character. The legislation requires that regard be had to those differences.

[40] It is the child's dependence upon, or reliance upon, the deceased parent which matters (per Gibbs J in *Aafjes v Kearney* (1975) 180 CLR 199 at p 208. The means by which the deceased parent provided the financial support for a dependent child or children may have come from a number of sources. The parent's earnings from personal exertion, from investments, social welfare benefits or monies received by way of maintenance or support for the child from the other parent, or a combination of all sources and others may have been available. However, none of that changes the dependence or reliance of the child upon the parent prior to his or her death. In any case, once it is established that the child fell within the definition, then he or she qualifies for a proportion of the fund.

[41] If a child living with his or her parents is dependent upon both, then the needs of the child and degree of dependency upon the parent killed in a motor vehicle accident would be capable of being assessed. On the other hand, should a dependent child be in receipt of independent income to meet his or her needs, then his or her degree of dependency upon the deceased

parent may be reduced when compared with the degree of dependency of any other dependent children.

[42] There is no definition of "dependency" under the Act. However, in the context of workers compensation legislation, it has been consistently held that the question is one of fact. *Kauri Timber Co (Tas) Pty Ltd v Reeman* (1973) 128 CLR 177 and *Aafjes v Kearney* (1975) 180 CLR 199. In the first of those cases at p 179 Barwick CJ said that dependency is not limited to the provision of bare necessities of life and that underlying the concept of dependency in such legislation there is the notion of maintenance and support. I should mention that those cases have to do with claims by dependents under workers compensation legislation, and the question to be resolved was whether they fell within the definition as being wholly or in part dependent for support upon the worker at the time of his death. That type of issue does not arise in this case.

[43] Finally, I am of the opinion that the relevant date for establishing needs and dependency is the date of death of the qualifying person. It is the fact of death which gives rise to the entitlement to the benefit (s 7). The fixed amount of the benefit divisible pursuant to the proportion specified in the Table is not affected by any consideration other than the fact of the death. It is those proportions of the fixed benefit which can be varied by the Board or Tribunal under s 22(1)(b)(ii). There is no suggestion in the Act generally or those provisions in particular, that events after the date of death would have an effect upon the benefit or the proportions to which the potential

beneficiaries are entitled. I see no reason why any need which may arise after death should cause any change to the proportions nor why any other benefit received by a spouse or dependent child after the date of death, even when the death is the precipitating circumstance for the payment of that benefit, should decrease the proportion of the fixed benefit payable pursuant to the Act to the spouse or the child. The Act itself provides for the payment of weekly amounts to a dependent child or dependent children and there is no reason to think that the conferral of that benefit is to be taken into account upon an application to vary the proportions of the fixed lump sum benefit. That benefit is for present maintenance not past loss.

[44] I turn now to the material placed before the Tribunal for consideration. It comprised affidavits sworn by the applicant and Mr Wilkie. Much of it is irrelevant and it seems to have been directed to exciting the interest of a Tribunal in their respective present personal financial circumstances. The applicant demonstrated that his financial position is not as good as Mr Wilkie's endeavouring to persuade the Tribunal, I think, that upon that basis the proportion allotted to Mr Wilkie should be reduced and redirected to the children. I do not consider that the relative means available to either man has any bearing on the outcome. What must be considered is the allocation of a fixed sum to compensate for the loss occasioned by the death of the deceased. Whether that loss or any part of it can be compensated for from another source or not is not to the point.

[45] For the same reason I do not consider it important that Mr Wilkie is in a better financial position than the applicant. If he has suffered a loss compensable under the Act, then if he is able to make up for it or any part of it, is not relevant.

[46] In like manner, a substantial amount received by Mr Wilkie and each of the children in what appears to be Superannuation benefits accruing to the deceased does not influence my thinking about the proportion of the fund which should be allotted to each of them. I note that no reduction of damage is to be made on such an account on a claim under the Compensation (Fatal Injuries) Act.

[47] I consider that the interest derived by Mr Wilkie by survivorship in the jointly owned property in Katherine or benefits derived by him under the will of the deceased do not affect his entitlements under the Act, if any.

[48] I would not wish it to be thought that in putting aside those various matters I am being critical of either man for raising them, nor do I doubt their respective concerns for the welfare of the children. It is just that this being the first reference to the Tribunal of such a matter, there is little guidance available to them or their advisors. However, it has been necessary for rulings to be made in accordance with what I conceive to be relevant and irrelevant considerations within the framework of the legislation.

[49] The children did not remain with Mr Wilkie after their mother died, but returned to their father, the applicant. It can not be assumed that a

proportion of the fund paid for the benefit of Mr Wilkie will enure for the benefit of the children. Any monies paid directly for the benefit of a child is to be paid to the Public Trustee (s 35).

[50] Judges of the Supreme Court have made Rules regulating the practice and procedure of the Tribunal. Subject to those Rules the practice and procedure of the Tribunal in relation to a matter referred to it will be determined by it. The Rules, made in 1986, provide a mention before the Tribunal at which directions may be made. They may include dispensation with or compliance with the provisions of the Evidence Act 1939 (NT) and rules of evidence at common law. No such direction was given in this case.

[51] Directions were given as to the use of affidavits by way of evidence. That procedure was followed. No objections were made to the contents of any of the affidavits, notwithstanding that some were inadmissible. No deponent was required to attend for cross-examination.

[52] Mr Wilkie deposed to the circumstances in which the relationship between he and the deceased was established, the purchase of the house in Katherine and that the children then returned to live with him and the deceased at Katherine. His work place was away from the town, but he returned there at weekends.

[53] I infer that the deceased cared for the children in Mr Wilkie's absence. He says that it was a very happy and contented household. The deceased was not in paid employment until about the time of their marriage in May 2000,

but thereafter organised her work so as to be able to take the children to and from school.

[54] Mr Wilkie deposed that the deceased died at the scene of the accident and as to his grief. For reasons already given I do not think that that is a compensable loss.

[55] Mr Wilkie has not deposed to any financial support received by him from the deceased nor as to any particular services provided by her for him. But I infer, from the general tenor of his evidence, that the deceased provided the usual domestic services around the home. He is entitled to a proportion of the fund for loss of those services, but there is no evidence going to their value.

[56] Mr Wilkie does not depose to his providing any financial support for the children beyond contributing unspecified amounts to a bank account to which the deceased also contributed and which was intended for the education of the children.

[57] At the time he swore that affidavit, Mr Wilkie had a copy of the applicant's affidavit sworn on 14 September 2001. He did not wish to comment on most of it, but provided information in respect of some matters raised by the applicant, but which I consider to be irrelevant.

[58] The applicant deposed to the history of his marriage to the deceased, the separation, dissolution of marriage and custody and care of the children. He provided details of his employment history.

[59] The applicant remarried in March 2000 and his wife and her son lived together with him and the two children. The applicant speaks of the ambition which he and the deceased had to enable the children to have a private school education. They lost another child after a long period of illness, the cost of which was "enormous". They incurred significant debts.

[60] The applicant deposes that all of the money that he and deceased had left was spent on the children.

[61] The applicant says that he "knows that while the children lived with their mother up until her death, she would have continued to strive to give them what she could on her income and that of her partner". That is not admissible, it is really speculation. There was no objection taken to it and Mr Wilkie did not comment upon it, although he was in the best position to provide evidence as to the disposal of the household income. I rely upon the acceptance by the parties that the children were primarily dependent upon the deceased for financial support.

[62] The inference I draw from the whole of the evidence is that at the time of her death the children were also heavily reliant upon the deceased for care, education, training, guidance, example and encouragement. Mr Wilkie was absent during the working week.

[63] The children are entitled to a proportion of the fund to compensate for the loss of the deceased's financial and parental support. On the material available, I am unable to differentiate between them as to their degrees of dependency as at the date of death.

[64] I have approached this difficult matter generally upon the basis that the amount in question is not large (when compared with common law damages awards) and is to be divided between two or more people. A contest before the Tribunal will probably involve legal cost in the preparation and presentation of evidence and submissions. Upon its true construction the criteria for adjusting the statutory proportions of the fund can be made to work in a sensible manner. There is no need to evolve a new body of law from which to draw guidance as to relevant considerations.

[65] In the end result the assessment of the proportion of the fund payable to each of Mr Wilkie and the children is not capable of a arithmetical calculation. It must be approached on a broad-brush basis, but so as to do justice between the potential beneficiaries.

[66] Mr Wilkie's case does not depend on financial need or any special need. It is limited to compensation for loss of services and impairment of consortium. The value of services has not been put forward.

[67] As to the children, they are admitted to have been primarily dependent upon the deceased for financial support and, as I have found, for parental support

and guidance. I assess the loss of that support and guidance as being greater than the loss of consortium.

[68] Doing the best I can, I determine the proper proportion of the fund payable for the benefit of Mr Wilkie as twenty percent and for the benefit of each of the children as forty percent.
