COMPENSATION FOR ECONOMIC LOSS: THE SEARCH FOR STANDARDS IN PAPUA NEW GUINEA

BRUCE L. OTTLEY*
JOSEPHINE F. MILLOTT+

There are a number of major obstacles to the study of the law of torts in Papua New Guinea. First, there is an almost complete lack of cases decided within the country dealing with tortious issues.[1] It may be argued that cases are unnecessary because, since the reception of the English common law, the principles of tort law applicable in England and Australia have been received in Papua New Guinea.[2] However such wholesale reception does not take into account particular local circumstances that could modify the law.

Most of the cases decided by the courts in Papua New Guinea, and particularly by the Supreme Court, have involved members of the expatriate community whose life styles and tort situations parallel those of Australia.[3] The lack of impact by the received law on the vast majority of Papua New Guineans can be attributed to a number of factors. The rules of tort law were developed in Western industrial societies and thus many torts have little relevance to village life.

---

* Lecturer in Law, University of Papua New Guinea.

+ Research Fellow, Faculty of Law, University of Papua New Guinea.

1 Few substantive areas of tort law have been considered by the Supreme Court in Papua New Guinea. In the area of defamation, for example, only two cases have been decided: *Bending* v *South Pacific Post* (1967-68) PNGLR 161 and *Paul and Thompson Pty Ltd v Steamships Co. Ltd*, Sup. Ct. (1971) No.619.

2 This thinking was reflected, for example, in the use of Australian and English casebooks and textbooks in teaching law at the University of Papua New Guinea.

3 Although there is no precise definition of "expatriate", we use the term in this article to designate persons who are neither Melanesian nor mixed race. Particularly it is applied to Australians, Chinese, Germans and Americans.

Yet the majority of tort situations do arise in Papua New Guinea, although in different forms than encountered in Australian textbooks. To deal with these situations, the people of Papua New Guinea have developed customary procedures independent of the foreign judicial system whose costs still remain beyond the means of all but a small group of persons. However as more Papua New Guineans move to urban areas the customary procedures will break down and they will be forced to rely on the courts for remedies. If this process continues, it will be possible for the law of torts to assume a Papua New Guinean character.

The majority of tort cases that have come before the Supreme Court have involved assessment of damages rather than substantive issues. Again, these cases have usually involved expatriates and were thus determined by English or Australian standards.[4] However in recent years the court has

---

4 In recent years there has been some debate in the Supreme Court as to the proper standard for compensation in Papua New Guinea for loss of amenities and loss of expectation of life. Are expatriates to be compensated by Australian standards or is there to be one standard for the entire country, regardless of race? In *McLean* v *Carmichael* (1969-70) PNGLR 333 the court held that in assessing damages for loss of expectation of life, the earnings of everyone in the country, regardless of race, must be taken as the money standard. The court said that

> ... in arriving at a reasonable sum, whilst I must leave out of account for this purpose the case of a tribesman living in a remote valley, I should take as a monetary standard the range of earnings of all people who live in the Territory, irrespective of race. As both 'social position and worldly possessions are ... irrelevant' the sum I arrive at, I recognize, will then be one applicable, with variations in small compass, to all persons in the Territory. The deceased is thus not to be treated as an Australian and his case judged on Australian standards, but rather as one of the more affluent members of a single community which includes at the other end of the material scale unskilled workers, who earn much less than the incomes for comparable work in Australia, the villager and the unemployed. At 340. (Footnote 4 continues.)

begun to deal with cases involving claims for compensation by Papua New Guineans and, with increased urbanization, it can be expected that such claims will increase. This, then, has been the first area of tort law which the court has had to consider in a Papua New Guinea context.

Claims for compensatory damages in tort cases have traditionally been divided into two categories: special damages, for losses which can be calculated in precise money terms (i.e., hospital expenses, past loss of wages, the cost of an artificial limb) and general damages, for losses which are not subject to evaluation in any precise monetary terms (i.e., pain and suffering, loss of the enjoyment of life, loss

---

4 (cont.)

However in *Carroll* v *The Administration of Papua New Guinea*, Sup. Ct. (1974) No.753, the court took the opposite view in determining loss of amenities. The court said:

> ... it is not possible to talk about equality, similar yardsticks, and so on, when one comes to assess damages ... It is to the point to remind myself that economic and social conditions in this country vary even more than they do in Australia, and that this is true as between native born and native born, European and European, and native born and European ... As between the native born and Europeans, it is also impossible to apply yardsticks or talk about equality. There are very many natives in high positions, or natives who will eventually be in high positions, men of sensitivity, fond of reading or music, or their profession, whose loss and sense of loss in many cases would far exceed the loss and sense of loss of Australian clerks employed here whose only interest, outside their often rather dull employment, is found in the immediate vicinity of the bar in the local clubs during the week and at weekends. At 3-5.

This view was upheld on appeal to the Full Court. See: *The Administration of Papua New Guinea* v *Carroll*, Full Ct. (1974) No.FC56.

of future earnings).[5] In the cases which have come before the Supreme Court of Papua New Guinea, it has been the determination of the plaintiff's general damages, and especially his future economic loss, that has caused the most difficulty. The purpose of this article is to examine those cases in order to determine what factors the court applies in assessing damages.

Claims for compensation for future economic loss have involved two situations: first, where the injured person himself sought compensation for his injuries and, second, where the relatives of a deceased person sought compensation for their loss resulting from the death. Each of these situations will be considered separately.

I. Claims for Compensation by Injured Persons

A. Claims by Persons Living in Villages

In recent years the Supreme Court of Papua New Guinea has been called upon to consider four claims by individuals living in villages for compensation for injuries resulting from tortious acts. Three of these cases involved claims on behalf of young children and thus raised the problem of their future economic loss resulting from the injury.

The first case involving a claim for compensation by a Papua New Guinean to reach the Supreme Court was *Guba Kevau* v *Steamships Trading Company Ltd.*[6] The plaintiff was a four year old girl living in Hanuabada who suffered permanent damage to her left leg as the result of the defendant's negligence. The circumstances of the accident were not discussed by the court as the defendant admitted liability. The sole question for the court was the assessment of the girl's damages.

A similar situation arose in *McCarthy* v *The Public Curator of Papua New Guinea.*[7] Here the plaintiff was a 14 year old girl from Tatana village whose right leg was severely injured when she fell from a bus. Again, the only issue for the court

---

5 See Street, *Principles of the Law of Damages* (1962) 18-22.

6 Sup. Ct. (1959) No.151.

7 Sup. Ct. (1962) No.335.

was the assessment of damages. In the third case, *Gaudi Kidu* v *Port Moresby Freezing Company*,[8] the plaintiff was a 13 year old school boy from Pari Village whose leg was amputated as the result of a truck collision.

In assessing the amount of damages in all three cases the court considered the plaintiffs' claims under the traditional tort headings:

(1) The out-of-pocket expenses, present and future.
(2) Pain and suffering and general inconvenience past, present and future.
(3) Economic loss in the future.
(4) The plaintiff's inability to enjoy the usual amenities of life, past, present and future.
(5) Cosmetic disability, past, present, and future.[9]

In none of the cases did the court have difficulty in concluding that the plaintiff had suffered out of pocket expenses, pain and suffering, cosmetic disability and a general loss of the ability fully to enjoy life. The difficulty arose when the court attempted to determine what future economic loss, if any, the plaintiffs would suffer because of their injuries. The assessment of loss was complicated in each case by the changing nature of life in the villages and the existence of traditional forms of "social security" within the villages.

1. The Changing Nature of Life in the Plaintiffs' Communities

In each case the plaintiff came from a village near Port Moresby in which "economic and social conditions have already changed greatly and are likely to change over the next few years at an even greater rate."[10] Thus the assessment of economic loss had to take into consideration not only the present social conditions of the plaintiffs but their potential futures and the extent to which the accidents harmed them. In the *Kevau* case the court said:

> The plaintiff is the daughter of one of the more highly advanced of the natives of

---

8 (1967-68) PNGLR 466.

9 Sup. Ct. (1962) No.335, 5-6.

10 Sup. Ct. (1959) No.151, 1.

> Hanuabada village. Inogo has been employed for a long time by the Government Printer and is an established and responsible citizen. He is bringing up his children with a proper regard for education and there is no reason why the plaintiff should not in the ordinary course pursue her education up to the Intermediate Standard or beyond. With advancing education Hanuabadans are likely to find greatly increased scope for employment in the future in the increasing commercial and other activities in Port Moresby.[11]

In *Gaudi Kidu* the plaintiff was "one of a group of gifted Papuan children who were taken from the Primary T School and admitted to the Coronation A School."[12] In his two and a half years at the school he had done well and was considered academically "well above the normal standard for a European child."[13] In addition to his academic achievements, the plaintiff excelled at sports. His brother was a final year law student at the University of Queensland, and the plaintiff intended to study medicine.

How, then, did the accidents affect the plaintiffs' futures in their changing communities? In the *Kevau* and *McCarthy* cases the court held that the rapid changes occurring within the society coupled with the girls' educational opportunities, which were not affected by the accident, would lead to potential jobs as typists or in commercial offices. Since their futures were more dependent on educational abilities than on their physical condition, neither girl was likely to suffer financial loss.

In *Gaudi Kidu* the court recognized that the physical disability of the plaintiff would affect his educational future. Although the plaintiff's entry into high school was delayed by only six months, "it was a different boy who began his secondary education. The future was changed from that of an active confident boy, popular and respected because of his prowess at sport."[14] The difficult adjustment to secondary school was eased for most students by participation in sport.

---

11 *Ibid.*, at 2.

12 (1967-68) PNGLR 476.

13 *Ibid.*

14 *Ibid.*

However the plaintiff now became an on-looker. As a result his marks suffered and his chances of going beyond Form IV were greatly reduced. But despite these handicaps the court did not feel that a case for great future economic loss was established.

> Indeed, although his prospects prior to the accident were bright, the plaintiff's case cannot be put so high as involving the loss of a reasonable likelihood that he would have succeeded in matriculating or entering the Medical College and then going on to qualify as a doctor.[15]

Instead the court viewed the plaintiff's loss as a "serious impairment to his capacity to make the most of his educational opportunities for which he is to be compensated under the heading of loss of amenities."[16] For this the Court awarded the plaintiff $8000.

The court applied "loss of amenities" in a very broad context in this case. Here the plaintiff's loss of the enjoyment of life was more than just his inability to enjoy cultural or recreational facilities. It was the possible loss of the ability to engage in a profession of his choice which constituted a serious economic loss. Whether or not the plaintiff would have succeeded in becoming a doctor had it not been for the accident was only speculation. But all estimates of future economic earnings are only speculation and in light of the plaintiff's background and educational opportunities a prophesy that he would have qualified as a doctor would have been no more speculative than other estimates of future earnings.

2. The "Social Security" System within the Village

In the *Kevau* case and the *McCarthy* case the court considered the extent to which village concepts of "social security," upon which the plaintiff could rely as a matter of right, mitigated against possible economic loss. Speaking of Guba Kevau the court said:

> Other people will help and support her as necessary ... During the lifetime of the

---

15 *Ibid.*, at 477.

16 *Ibid.*, at 477-478.

> plaintiff the westernization of native life is not likely to proceed to a stage at which she would be left without security and support in her native village.[17]

In both cases the court felt that even if the plaintiffs were unable to take advantage of the increasing employment opportunities, they would still be able to rely on their villages for support and thus would suffer no economic loss. However, while it is true that the plaintiffs themselves might not suffer in such a case, their financial support would have to come from the village as a whole, so the village suffers economic loss from plaintiff's injuries. Viewing Papua New Guinea society in group rather than individual terms, an injury to one member of the group is an injury to the entire group. Thus the principle of tort law, limiting compensation to the financial loss of the individual himself, does not adequately provide for situations of economic loss in Papua New Guinea.

In both cases the court concluded by awarding damages under all of the headings discussed in the *McCarthy* case except future economic loss. In the *Kevau* case the plaintiff was awarded £800 while in *McCarthy* she received £530.

A different situation was presented to the Court in *Iapidik* v *Green*.[18] The plaintiff was a passenger in a truck owned by the defendant travelling from her home to take produce to the market in Rabaul. The truck overturned fracturing her leg causing permanent injury and disability. In contrast to the rapidly changing communities of the previous cases, the plaintiff lived with her husband and two small children at Rabagi in a way "much the same as the life of such people has been for generations."[19] Her duties within the village consisted of washing the family clothes, preparing and cooking the food, cleaning the house, carrying water from the stream and bringing in chopped wood. In addition she helped her husband in the gardens, which were the source of the family food and exchange. After the accident the plaintiff was still able to perform her domestic duties but could no longer work in the gardens.

---

17 Sup. Ct. (1959) No.151, 1.

18 (1964) PNGLR 178.

19 *Ibid.*, at 181.

The court considered the plaintiff's claim for damages under the same headings as in the previous cases: pain and suffering, damage to her leg, loss of the enjoyment of life and economic loss. As in the previous cases, it was the claim for future economic loss which presented the greatest difficulty for the court. The claim was based on the fact that although the plaintiff's husband continued to work some of the land as gardens, he was unable to do so to the same extent as before the accident due to the lack of his wife's help. It was conceded that this loss amounted to £45 per year.

The court rejected the plaintiff's claim for compensation under the heading of "future economic loss" and instead awarded her £160 damages for the "loss of her earning power as a result of the injury."[20] The court was forced to rely on this distinction in order to overcome two problems. First, the court found that, in the plaintiff's community, gardens belong to the husband. Although the plaintiff sold the produce from the land at the market, received the money for it and kept the money in her possession, the produce from the gardens *belonged* to the husband and thus the future economic loss was his and not his wife's. Second, since she was the wife of a villager, the court found that the plaintiff's earning power had no marketable value. She could not contract to work for any garden owner but was obligated to work in the gardens with her husband.

Despite these difficulties, the court recognized that the plaintiff would lose some of the benefits of the family income that would have been earned from her work in the gardens had she not been injured. Thus the problem for the court was to award her compensation for this future economic loss while overcoming the technical barriers to such an award. The court's choice of the term "loss of earning power" recognized that the plaintiff's future earning power would be diminished by her injury. However the award of £160 was substantially below the £45 per year which the family would lose due to the plaintiff's inability to work in the gardens. The court's aim appeared to be to award the plaintiff a lump sum to compensate for the present impairment of her future earning power rather than attempt to approximate the future loss.

---

20 *Ibid.*, at 183.

Despite the award in the *Green* case, the Supreme Court has not yet specifically granted compensation for future economic loss to anyone living in a village environment. This is due partly to the range of cases presented to the court for decision. However the court's decisions against such awards have relied heavily on the idea of traditional village support as a mitigating factor. Whether this idea will continue to guide the court's thinking, especially in light of recent cases in the area of compensation to relatives, must await future decisions.

B. Claims by Persons Not Living in Villages

In recent years many Papua New Guineans have left subsistence farming and taken jobs in the cash economy either in commercial jobs in the urban areas or with the government. When such a person is injured, he frequently decides to return to his village. In such a case the court phrases its argument about his future economic loss in terms similar to those in the *Kevau* and *McCarthy* cases: to what extent should the lower costs of living in the village and support from clan members mitigate against the amount of compensation?

The usual method of calculating future economic loss is to multiply a plaintiff's estimated future earnings by the number of years he would have continued to work until retirement and then deduct an amount for "contingencies" (i.e., unemployment, sickness) and then reduce the amount to its present "capitalized value," which would be equivalent to his income over the years.[21] The purpose is to preserve the person's standard of living as nearly as possible. However a sum of money awarded for economic loss in an urban area assumes a much greater value in a village setting. The compensation no longer preserves his former standard of living but makes him a wealthy man. In the two cases in which the court has considered this problem, it has been divided in its attitude towards the amount of compensation proper.

The first case in which the Court had to face this problem was *Maraipa-Daeni* v *Bagari-Dubere*.[22] The plaintiff was a 25 year old apprentice joiner and carpenter working for a company in Port Moresby. As the result of an automobile accident, he "was found to have undergone a substantial change in his

---

21 See Fleming, *The Law of Torts* (1971) 204-06.

22 Sup. Ct. (1963) No.301.

attitude toward work and in his capacity for it."[23] He suffered headaches and an impairment of his balancing mechanism which made it difficult for him to walk. The court found that before the accident the plaintiff had a promising future in his trade. His examination marks had been high and he could have looked foreward to becoming a teacher. He earned 11 per week before the accident but was capable of earning only 4 or 5 per week after it.

In the same accident in which the plaintiff was injured, his uncle was killed. As a result of his injuries and the new responsibilities thrust upon him by his uncle's death, the plaintiff decided to return to his village. How was his economic loss to be assessed?

First, the court considered the plaintiff's loss of his ability to perform his trade.

> His trade capacity might be as much as 50% of that of a normal tradesman, and this might afford a useful skill should he go back to the village, but it would hardly give him any sort of a career.[24]

In calculating this loss to the plaintiff the court did not discuss any actuarial basis for determining what his future income would have been had he continued to work as a carpenter or what his income would now be in the village.

Second, the court considered the plaintiff's inability to live in an urban environment and his increased responsibilities in the village.

> ... the plaintiff, having left the village home environment to pursue an urban career, had been eagerly looking forward to a civilized and urbanized life at a comfortable economic level. The same accident which deprived him of a career has presented him with a picture of tribal obligations and responsibilities inconsistent with the career he had been hoping for.[25]

---

23 *Ibid.*, at 1.

24 *Ibid.*, at 3.

25 *Ibid.*

Although the court did not specifically discuss reducing the plaintiff's award because he had returned to the village, the amount of compensation, £3500, is far below what the plaintiff would have earned in his trade. Before the accident the plaintiff earned £11 per week and a good chance for advancement. Even assuming no increase over a potential working life of 40 years, his future earnings would have amounted to almost £23,000. Thus the actual award of £3500 for both economic loss and loss of amenities (i.e., the loss of the ability to live in an urban environment) represents a considerable reduction for village living standards.

This case raised a second problem which all courts must face in determining the scope of economic loss: is the compensation to cover economic loss based on the plaintiff's pre-injury living standards or must the plaintiff take all possible steps to minimize his post-injury loss, including returning to the village if necessary?

A situation similar to the *Maraipa-Daeni* case, although different in its conclusion, was presented to the court in *Raquel* v *Smerdon*.[26] The plaintiff was a 40-year-old ungraded school teacher in Lae injured when a motorcycle he was riding collided with a car driven by the defendant. Although he tried to resume teaching about 15 weeks after the accident, his injuries made it impossible for him to carry out his duties as before. He therefore returned to his village where his wife did all of the gardening and marketing.

Despite the fact that the plaintiff had only a Standard 7 education he was considered one of the best teachers in his school. Because he was continuing his own studies, the court found that he could have looked forward to promotion in coming years. As a result of the accident the Supreme Court found that he would never be able to teach again. However, it calculated his loss on the basis that he would never be able to work again.

The court estimated the plaintiff's future economic loss by averaging the income he would have received at each possible teaching level and multiplied his figure by the remaining number of years he would have taught until retirement. From this amount the court made a deduction for "the vicissitudes of life and the possibility of other incapaciting factors

---

26 Sup. Ct. (1972) No.706.

and other such contingencies"[27] as it could envisage. Based upon this, the court awarded the plaintiff $19,000 for future economic loss and total damages of $27,540.

This decision was appealed to the Full Court, which reduced the amount of total damages by $5000 on the basis that the Supreme Court erred in assuming that the plaintiff would be a permanent invalid.[28] "The possibility of future improvement certainly cannot be disregarded."[29] The Full Court held that it was not established that the plaintiff would never be able to resume his duties as a teacher, and, even if he were unable to resume teaching, the Full Court saw no reason why he could not find employment as a clerk.

Thus neither the Supreme Court nor the Full Court considered the difference in value that the $19,000 would have in the village as opposed to the town. Nor did the court reduce the plaintiff's award because of the support he could expect to receive in his village, as it did in the *Kevau* and *McCarthy* cases. The court measured the plaintiff's economic loss by what he would have received had he continued in his pre-accident employment. One reason given by the court for its failure to make such a reduction was that the higher value of the money may compensate for the fact that some injuries are a greater loss in a village setting than in an urban one.

> A man who has been accustomed to a full range of village activities - hunting, gardening, sports, sing-sing, fishing, the carrying of timber, tree climbing and house building - would find that the loss of a leg would cause a more severe invasion of his life than a similar loss would to an urban dweller; that he would be unable to face and cope with the hazards of nature, fire and flood and danger from attack by animals or men in varying degrees of primitive environment that he might still have to cope with; that he would be unable to forage for and house his dependents and carry on essential manly duties of the village.[30]

---

27 *Ibid.*, at 10.

28 *Smerdon* v *Raquel*, Full Ct. (1973) No.50.

29 *Ibid.*, at 13.

30 Sup. Ct. (1972) No.706, 11.

II. Compensation to Relatives

Under the early common law, all causes of action in tort ceased with the death of either the plaintiff or the defendant.[31] The surviving members of the plaintiff's family could not recover damages for the death even if it adversely affected their support. The increased use of machines and the coming of the automobile greatly increased the number of fatal accidents and led to the enactment of legislation providing for compensation to certain close relatives of a person killed by a tortious act, provided that the relatives suffered damage arising out of their family relationship with the deceased.[32] The first such statute was *Lord Campbell's Act* adopted in England in 1846. In Papua New Guinea, a *Compensation to Relatives Act* was enacted in 1951.[33] The provisions of this act have since been incorporated in sections 8 to 16 of the *Law Reform (Miscellaneous Provisions) Act* 1962-1969.

Under section 9 of the act, no action may be brought unless the deceased, had he survived, would have had a cause of action against the defendant.[34] Under section 10(1), the damages recoverable in such a suit are for the benefit of the wife, husband, parents, children, grandparents, grandchildren, and stepchildren of the deceased.[35] In addition,

---

31 *Baker* v *Bolton* (1808) 1 *Camp* 493; 170 *ER* 1033.

32 See *Burgess* v *Florence Nightengale Hospital for Gentlewomen* (1955) 1 *QB* 349; (1955) 1 *All ER* 511.

33 No.34 of 1951.

34 S.9 provides: "Where the death of a person is caused by a wrongful act, neglect or default and the act, neglect or default is such as would (if death had not ensued) have entitled the party 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 and notwithstanding that the death has been caused under such circumstances as amount in law to an offence."

35 S.10(1) provides: "An action referred to in the last preceding section shall be for the benefit of the wife, husband, parent and child of the deceased person, and a person who is, or is the issue of, a brother, sister, uncle or aunt of the deceased person, and shall be brought by and in the name of the executor or administrator of the person deceased."

under section 10(2) of the act, in the case of the death of a Papua New Guinean, an action may be for the benefit of persons, who by custom, were dependent on the deceased immediately before death.[36]

The act is designed to provide compensation for economic loss resulting from the death of a family member.[37] It includes the loss of future earnings, medical expenses incurred by the injury causing death and reasonable funeral expenses.[38]

In calculating the amount of the future economic loss to the family, the court must determine:

> ... first the value of the material benefits for his dependents which the deceased would have provided for each year in the future during which he would have provided them, had he not been killed. Secondly, the value of any material benefits derived by the dependents which would not have been available to them had the deceased lived. And thirdly, the amount of the capital sum which prudent management would produce annual amounts equal to the difference between the first and second sums for each of the years during which the deceased would have provided material benefits for his dependents, had he not been killed.[39]

---

36 S.10(2) provides: "In the case of the death of a native, an action referred to in the last preceding section may be for the benefit of the persons who by native custom were dependent upon the deceased immediately before his death, in addition to the persons specified in the last preceding subsection."

37 However s.12A(1) provides: "In an action referred to in Section 9 of this Ordinance in relation to the death of a child, the court may give such damages, not exceeding six hundred dollars in the aggregate, as the court thinks just, by way of solatium for the suffering caused to the parent or parents by the death of the child."

38 S.12(2).

39 Street, *op. cit.* at 144.

A. Claims by Relatives Living in Villages

Two cases have come before the Supreme Court involving claims for compensation by relatives of a deceased person living in a village environment. The first case, *Director of Native Affairs* v *Green*[40] was brought under the *Compensation to Relatives Ordinance* 1951. The action was for "the benefit of the relatives" of a Papua New Guinean woman "who by native custom were wholly or partly dependent on" her at the time of her death.[40A] In *Ogan Bal* v *Ninkama Bomai* the action was brought by a widow and her young son to recover damages resulting from the death of her husband in a road accident.[41]

In both cases the families were engaged in subsistence farming at the village level. In *Ogan Bal* the Court described the deceased as a man who

> ... according to the traditional way of life of his people combined with his wife - and probably with other clan or family members - to form a social group which basically derived shelter, food and most essentials from their own labours in the mountains.[42]

How is the future economic loss to the family or clan measured in the case of the death of one of its members?

In the *Green* case the husband claimed for the economic loss of his wife's services as the result of her death. These services were domestic (cooking, cleaning, firewood gathering, water carrying, home rebuilding) and economic (assistance in the gardens and cocoa plot). In the *Ogan Bal* case the deceased was about 25 years old. He was in good health and had inherited his father's land on which he grew yams and sweet potatoes. In addition he grew coffee which he occasionally sold, although the financial return amounted to only $1 or $2 per year.

---

40 (1964) PNGLR 24.

40A *Compensation to Relatives Ordinance* 1951, No.34 of 1951, s.6(2); now repealed and replaced by *Law Reform (Miscellaneous Provisions) Act* 1962, s.10(2).

41 Sup. Ct. (1972) No. 696.

42 *Ibid.*, at 10.

In assessing the extent of the economic loss in each case, the court had to consider a number of factors. In the *Green* case the court said that it must first determine whether the husband was dependent upon his wife, for purposes of the act. It concluded that the husband's claim was similar to those of small farmers in Australia whose wives help them to build up the family income. However having established dependency, the court then said that the act does not require a showing of dependence if the plaintiff is a husband or other immediate family member. All that was required was a showing that the action was "for the benefit of" the particular family member. Thus in order to determine the value of the wife's services which were lost to the husband, the court asked the value of the services she would have continued to render if she had not died. The court estimated that the value of her lost services in the gardens and the cocoa plot amount to 300.

The action was also brought for the "compensable loss of the pecuniary value of her future services" that the deceased would have rendered to her son.[43] However the court found that the services she would have rendered to the husband would also have been for the benefit of the son and were thus represented in the husband's award.

In *Ogan Bal* the court found that in such a community as the plaintiff's, the husband's death must "be regarded as an injury to the surviving dependents - members of the group. In this type of society one must depend on the others - not only for physical security but for maintenance of the way of life."[44] The plaintiff estimated that she would remain on her husband's land (which now passed to her young son) until her son reached the age of 15 when she would remarry. Although the court took into account the possibility of the plaintiff's remarriage, it did not assume it as a fact.

Evidence was presented at the trial indicating that the average value of subsistence crops grown by individuals - men and women - was $200 per year. However the court felt that this figure did not give an adequate picture of the deceased's potential economic future.

> So much depends on future trends but just as one makes allowances for a young tradesman progressing in his career it would not

---

43 (1964) PNGLR 28.

44 Sup. Ct. (1972) No. 696, 10.

> be proper for me to assume that the deceased would for the remainder of his life have remained in his village. It is probable that in time his fortunes would have improved.[45]

Thus, the court would not rely on estimates of the value of subsistence farming, and, further, suggested the possibility that, had he entered other employment, he might have eventually earned much more than $200 a year. However, the court then assessed the future economic loss to the plaintiff of the deceased's services at only $100 per year for 14 years. This amount was based on the court's view of deceased's future earnings, less an amount for his own necessities.

The range of factors considered by the Supreme Court in assessing economic loss to relatives in a village environment have been similar to those used by courts in assessing damages in other circumstances. The principal difficulty for the Supreme Court in Papua New Guinea has been in estimating the economic value of the individual member to the group as a whole. This is especially difficult in light of the fact that most of these services are performed outside the cash economy and are thus not easily calculated in money terms. The court has chosen to limit its consideration to those activities that touch upon the cash economy.

B. Claims by Relatives Living in Urban Areas

The Supreme Court has not faced the same problems in calculating economic loss in those cases involving claims by relatives living and working in the urban economy. Two cases have come before the court involving such claims.[46] In both cases the action was "for the benefit" of the widow and children of the deceased. Before their deaths, both husbands were employed by the government, one in Port Moresby and the other in Goroka.

In both cases the court estimated the deceased's future earnings and multiplied this by the number of years he would have continued to work. From this amount the court made deductions for contingencies and for the amount the deceased would have required for his own support.

---

45 *Ibid.*, at 13.

46 See *Sebea Eava* v *Seaka Kabua*, Sup. Ct. (1972) No. 691; and *Agnes Bi* v *James Leahy and Alex Harold*, Sup. Ct. (1972) No. 692.

The most difficult problems for the Supreme Court, in actions under the *Law Reform (Miscellaneous Provisions) Act*, have involved claims by wives who lived in urban areas at the time of their husband's death but afterwards returned to their village. In *Largo Gerebi* v *Joseph Tomonoi* the deceased was a 29 year old school teacher killed in a truck accident on the Highlands Highway.[47] His widow brought the action for loss of support on behalf of herself and two children. In *Mary Gugi* v *Stol Commuters Pty. Ltd.* the decased was a 23 year old mechanic employed by the Department of Transport in Alotau.[48] The plaintiff brought the action "for the benefit" of herself and infant son.

In both cases deceased were young men employed in good jobs with promising opportunities for advancement. In the *Gerebi* case the court's finding that "the deceased had good prospects for advancement"[49] were based upon his academic background, the rating he had received from the Department of Education and his continuing studies. In the *Gugi* case the court found that the deceased was a "skilled tradesman and above average in capacity"[50] who "with more experience ... would have had reasonable prospects for promotion in due course to appointment as foreman."[51]

In its assessments of the economic loss suffered by the plaintiffs as a result of the death of their husbands, the court chose to do more than merely estimate future earnings. It also searched for factors that might mitigate this loss, and settled upon three: the return of plaintiffs to their villages, where living costs are lower than in the towns; the possibility that plaintiffs might remarry; and, the right, under Papua New Guinea custom, to call upon members of the extended family or clan for support.

1. Return to the Village

In both cases, the plaintiff and children returned to their village after the husband's death. In the *Gerebi* case

---

47 Sup. Ct. (1972) No. 695.

48 Sup. Ct. (1973) No. 741; Full Ct. (1973) No. 52.

49 Sup. Ct. (1972) No. 695, 16.

50 Sup. Ct. (1973) No. 741, 1.

51 *Ibid.*

the plaintiff returned to her father's land where she helped in the gardens. Because of her husband's death, the plaintiff would now eventually inherit this land. Thus the court had to decide whether the value of the land should be counted as a "benefit" that would reduce plaintiff's loss.

Section 13 of the *Law Reform (Miscellaneous Provisions) Act* lists a series of items that are not to be taken into consideration when calculating a plaintiff's damages. Section 13(d) provides that among these are "any benefit or gratuity in cash or kind received as a result of the death by a person for whose benefit the action is brought." Without specifically discussing the application of section 13(d), the court held that the inheritance would not reduce the amount of the plaintiff's award.

> I do not think I should take this possible bounty into account in mitigation of damages any more than one would consider gifts from a family member to aid a widow. The benefit, if it accrues, probably depends upon continued widowhood...[52]

In the *Gugi* case the plaintiff returned to her village on Bougainville after the husband's death where she lived with her family "on traditional garden produce, fish and a supplement of purchased foods such as meat and rice."[53] Although she intended to remain in the village for some time, the plaintiff "preferred the comparative sophistication of the town to the simple living of her village."[54] Thus the death of her husband deprived the plaintiff of the financial ability to live in an urban area as she preferred. Is this loss to be treated as a loss of amenities - the loss of the ability to enjoy life in the urban area - or is it to be treated as a financial loss to the plaintiff? If it is a financial loss, then the amount of that loss is mitigated by the ability of the plaintiff to return to her village where she can rely on her family for support and a lower cost of living. To then assess the plaintiff's financial loss on the basis of her expenses in the village environment would result in an award too small to allow her to live anywhere but the village.

---

52 Sup. Ct. (1973) No. 695, 18.

53 Sup. Ct. (1973) No. 741, 2.

54 *Ibid.*, at 2.

> Just as the freedom of a widow to remarry is to be taken into account so also should be her freedom to live where she wishes. This may have no real significance where the widow has always lived in a sophisticated urban area and could be expected to continue to do so; but where the choice is between a traditional village life and a much more costly urban life it becomes a relevant factor.[55]

The Supreme Court made "some reduction"[56] in the plaintiff's award based upon the support she would receive in her village, although it held that "it would be wrong" to reduce the award to such a degree as to compel her to remain permanently in the village."[57] On appeal, the Full Court held that the evidence established that the deceased and the plaintiff would have continued to live in the urban wage economy and thus "her loss is the sum required, subject to any proper reduction for contingencies, to replace the economic loss from that source."[58] Thus the Full Court held that the plaintiff was entitled to have her award raised.

2. Possible Remarriage

The *Gugi* and *Gerebi* cases presented, besides the issue of a possible return to the village, a second ground on which the court might lower an award. In both cases the plaintiffs were young at the time of their husbands' deaths. The court had to consider the likelihood of remarriage as mitigating against future economic loss. In the *Gerebi* case the plaintiff was 25 years old at the time of her husband's death. Although she testified that she had neither the prospects nor the intention of remarriage, the court found that because of her youth and "means" as result of her husband's death, "prospects of remarriage must at least be taken into account," although the court did not indicate to what degree.[59]

In the *Gugi* case the court also made a reduction in the

---

55 *Ibid.*, at 3.

56 Full Ct. (1973) No. 52, 7.

57 Sup. Ct. (1973) No. 741, 3.

58 Full Ct. (1973) No. 52, 7.

59 Sup. Ct. (1972) No. 695, 16.

plaintiff's damages based upon her good prospects of remarriage:

> It may be doubted whether many women whose marriages are so destroyed would immediately perceive that the freedom to remarry which arises from the husband's death is a gain to her capable of monetary evaluation. But in the approach to which the Court is directed when assessing pecuniary loss in claims such as the present it has long been established that this is so.
>
> The plaintiff said that as an educated woman among uneducated villagers her prospects of remarriage are not great. That may be so if she remains continuously in the village; but by indigenous standards she will at the conclusion of these proceedings be a wealthy woman able to come and go with some freedom. Further, she is young, personable and attractive.[60]

Although the court held that the prospect of remarriage was a factor in mitigating the plaintiff's economic loss, it added that it "must bear in mind that probably few of her prospective suitors will have the same potential earning capacity as her late husband."[61] The court did not elaborate on this point, beyond noting that the possibility of remarriage at a different economic level could have an important effect on remarriage as a mitigating factor. Although the amount of damages which the plaintiff received may have made her a wealthy woman by village standards and thus enabled her to come and go with some freedom, damages assessed in terms of village living standards would still compel her to live permanently in the village. Thus her opportunities for meeting and marrying a person engaged in the urban wage economy are slight. In Western society, when a woman's husband dies, the possibility that her remarriage will be at a greatly different social and economic level is very small. However in Papua New Guinea the differences in live-styles and earning capacity between a man in the urban economy and a man engaged in traditional village occupations are very

---

60 Sup. Ct. (1973) No. 741, 4.

61 *Ibid.*

great. Thus the court must consider not only the possibility of remarriage but the possibility that the remarriage will be to a man of earning power comparable to that of her previous husband.

In her appeal to the Full Court, the plaintiff argued that the Supreme Court erred in reducing her award because of her prospect of remarriage and instead should have considered it as a "benefit" to be excluded from consideration by section 13(d) of the *Law Reform (Miscellaneous Provisions) Act*. The Full Court did not discuss the "potential earning capacity" of any future husband. Instead it rejected the plaintiff's interpretation of section 13(d):

> In attempting to construe the meaning and application of paragraph (d) of Sec. 13 the court is traditionally not entitled to look at the marginal note which in the form 'exclusion of payments by insurers in assessment of damages' might otherwise have been thought to have been helpful here. One must look at the section as a whole and may perhaps gain some assistance from the collocation of phrases in the section - all containing some synonym for money. Though the phrase 'in cash or kind' comes readily to one's tongue, I have not been able to find any judicial interpretation of the phrase 'in cash or kind;' nor am I able to recall any other legislative use of the phrase.
>
> I am of the view that to regard the right to remarry as a 'benefit or gratuity in cash' would entail straining of language. Reading the added words 'or in kind' in the most ample way without unnatural strain of language might produce the alternative of a 'benefit or gratuity in some tangible property or something of the same value as money.' Again to my mind it would be an unnatural bending of words to conclude the right to remarry or an evaluation of that right as coming within such a notion.[62]

Thus the likelihood and prospects of remarriage were not

---

62 Full Ct. (1973) No. 52, 10-11.

considered a "benefit" under section 13(d), and the Supreme Court did not err in taking them into account as mitigating the plaintiff's future loss. However, because the Full Court did not discuss the issue, it remains to be seen to what extent the courts will be willing to allow the economic standard of a future husband to affect this reduction.

3. Obligations to Family and Clan

In the *Gugi*, the Supreme Court noted that deceased husband's earnings would have gone, in the future, not only to the plaintiff and their children, but also to members of the extended family. Thus, the court decided, plaintiff would not normally expect to receive all of her husband's earnings, and it concluded that the amount of her award should be reduced accordingly. Thus, the court recognized a widespread customary practice in Papua New Guinea, the right of relatives and clan members to call upon each other for support in time of need. This is the correlative of the situation encountered in the *Kevau* and *McCarthy* cases. Just as the plaintiffs in those cases had their economic loss lessened by the right of support from other members of the family, the plaintiff's benefits in the *Gugi* case were reduced because of the obligation of her husband to provide similar assistance. In rejecting her appeal against this reduction, the Full Court said:

> I think it suffices to say that these are matters which the court in attempting to apply 'foreign law' to Papua New Guinea society was entitled to and required to consider in light of its experience of matters notorious in the community - a consideration of course to be undertaken in the setting of the evidence actually given.[63]

A comparison of the *Gugi* case with the *Kevau* and *McCarthy* cases leads to the conclusion that Papua New Guinean plaintiffs may lose both ways. Their awards will be reduced both because they are entitled to receive assistance from the extended family and because they are obligated to give assistance to the family. But, in a society based on reciprocal relationships, obligations and entitlements eventually balance out, so that, for example, Mary Gugi's husband would have received as much as he gave. Thus, the court's best approach might be to ignore this aspect entirely in assessing

---

63 *Ibid.*, at 12.

the amount of future economic loss. Or, to take Papua New Guinea custom into account, it should, in the *Gugi* case, have recognized that the husband would have received, for himself and his wife, approximately as much as he gave, and adjusted the award accordingly.

III. Conclusion and Comments

Cases involving claims for future economic loss in Papua New Guinea have presented three different types of problems to the Supreme Court, none of which is readily solvable by reference to traditional tort principles.

A. Injured Children

The first series of problems have involved claims on behalf of injured children. The difficulties of estimating the amount of future economic loss resulting from injury in childhood are made more difficult in Papua New Guinea by the educational and social system.

In *Gaudi Kidu* the plaintiff was one of a small group of children singled out for special educational opportunities not available to other young people. Because of this advantage, his chances for success were deliberately made more certain than those of other children his age. Thus a childhood injury which affects his ability to take advantage of educational opportunities will have a greater effect on his future earning ability than in the case of children without such education.

The problem of certainty in predicting the amount of future economic loss is usually greatest in the case of a child. Yet in Papua New Guinea, where formal education is not available to all children, special educational opportunities make a child's future almost ensured. Thus an estimate based upon such education would be no more speculative - and may be more certain - than attempts to arrive at an amount in other types of cases.

Children without special opportunities present a different kind of issue for the court. Because of changing social conditions, it is no longer possible to say that a child living in a village will be saved from future economic loss by traditional forms of support. With all parts of the country changing rapidly, it is impossible to predict whether a child presently growing up in a village would, because of economic changes, become part of the urban wage economy. In addition, economic changes produce social changes, which may weaken the ability of people to call upon the traditional

means of support to the same degree as in the past.

Finally, even if such support is available, the court has not adequately come to terms with the "group" character of Papua New Guinean society. It is not enough to hold that other members of a group will support an injured person, without recognizing at the same time that an injury to one member of the group results in a loss to the entire group. If the court admits that the group supports an injured member, then logic requires the court to reimburse the group for this extra burden, caused by a member's injury, and for the additional loss of his future earnings and contributions to the group. But, Western tort law does not permit compensation to be awarded outside narrowly defined limits.[64] It must be adapted to accommodate wider obligations, and, for such major change in the law, legislation will probably be necessary.

B. Assessing Loss in a Subsistence Economy

The second series of problems have involved persons, both husbands and wives, from a village environment. Since villagers produce most of their own necessities, their money income may be quite small. Thus, if compensation for economic loss is based solely on their money earnings, it will be very nominal. Yet such injuries or deaths do produce real economic loss to the injured person or surviving relatives in two ways: first, the person is no longer able to work in the gardens, the source of food for consumption and sale; second, the injured person may be prevented from leaving the village to earn more money in the urban sector.

In such cases, the difficulties in assessing future economic loss could be overcome by basing the award upon loss of earning capacity rather than on a projection of actual past earnings. The amount of future economic loss may be uncertain, either because of changing social conditions or because the injured person presently lives outside the money economy, but

---

64 The *Law Reform (Miscellaneous Provisions) Act 1962*, s.10(2), provides, in the case of the death of a Papua New Guinean, that "persons who by native custom were dependent upon the deceased immediately before his death" may sue for damages. This provision recognises the needs of the extended family. However, it has been little used to date, and is not applicable where a plaintiff was merely injured.

it is certain that the person's ability, either actual or potential, to earn has been reduced. Recovery based upon loss of earning capacity would allow the person to recover "not merely because his earning capacity has been diminished but because the diminution of earning capacity is or may be productive of financial loss."[65]

The present situation in Papua New Guinea is analagous to the housewife in Western society who has never been employed outside the home yet wishes to take a job. If an injury prevents her from doing so, it is impossible to estimate her future economic loss since there is no previous basis for calculation. Yet she has lost the capacity to earn which is an economic loss. Similarly, in Papua New Guinea a villager may have little or no previous cash employment but nevertheless have a capacity for future earnings, which is diminished by his death or injury.[66]

---

65 *Graham* v *Baker* (1961) 106 CLR 340, 347.

66 An alternative solution to the problem would be to recognize - as counsel for the plaintiff suggested in the *Ogan Bal* case - that food and other goods harvested for home consumption have a cash value. That is, if villagers could not grow their own crops, they would have to purchase their equivalent in the market. The Papua New Guinea government recognizes that subsistence gardens form part of the total wealth of the nation by including an estimate of the value of subsistence produce in its annual compilation of the country's gross national product. Thus, if injury or death will prevent a person from working in the gardens or in other activities necessary to the maintenance of his family or village, he or his survivors should be awarded the cash equivalent of these activities. Estimates for ascertaining this sum exist. For example, the government's Central Planning Office has determined that each subsistence gardener in Papua New Guinea produces approximately $150 worth of food annually. To assess future economic loss, the court need merely multiply this figure, with a slight increment for inflation, by the party's expected lifespan. This method, however, ignores the possibility that the party might, but for the accident, have left the village for a job with a higher income.

C. Return to the Village

The final set of problems have involved persons living in an urban environment at the urban standard of living, who return (or whose relatives return) to the village. The recent cases of *Raquel* v *Smerdon* and *Gugi* v *Stol Commuters* have rejected the earlier notion that village support mitigates the amount of economic loss. Instead, the court now recognizes that the plaintiff might have preferred not to return to the village standard of living, and bases its award on the actual loss of present and potential earnings in the cash economy.

Cases requiring an assessment of future economic loss present difficult problems of reconciling Western tort law both to customary practices and to changing economic and social conditions. In formulating its awards, the court must recognize and apply customary practices where necessary, yet also recognize that changing conditions make the continued application of some customs detrimental to the plaintiff. Whether the law of damages can be made relevant to Papua New Guinea depends upon how the court strikes this balance.