Neutral Citation Number: [2011] IEHC 460

THE HIGH COURT

2006 3235 P

BETWEEN

GRACE DAVOREN

PLAINTIFF

AND

THE HEALTH SERVICE EXECUTIVE/WESTERN AREA, JOHN LEE

AND OLIVER MCANENA

DEFENDANTS

JUDGMENT of O'Neill J. delivered on the 21st day of December, 2011

1. The plaintiff in this case is the widow of Michael Davoren deceased, who died on 31st August, 2003, and she sues on behalf of the dependents of the said Michael Davoren for damages pursuant to the provisions of Part IV of the Civil Liability Act 1961. In the action, the plaintiff alleges that the death of Michael Davoren was caused by the negligence and breach of duty of the defendants and either of them in the medical and surgical treatment of the plaintiff in the period between 18th July, 2003, and 31st August, 2003. When the action came on for hearing, the defendants did not contest liability and the matter proceeded as an assessment of damages only.

2. Michael Davoren, the deceased, was born on 25th December, 1956. The plaintiff, who was born on 7th August, 1960, married the deceased on 6th April 1991. They had four children, namely, Michael Daveron, born on 23rd April 1993, Grainne Daveron, born on 27th October 1994, Eleanor Daveron born on 2nd February 1999, and Rebecca Daveron born on 13th April 2002. Michael Daveron was also survived by one sister Mary O'Regan (nee Daveron) who was born on 8th October 1959. His mother Maura Daveron, who was born on 29th September 1928, was a dependent within the meaning of Part IV of the Civil Liability Act 1961 when the action commenced, but she died on 6th August 2009.

3. Michael Daveron was a farmer by occupation since the age of approximately sixteen years. He and his ancestors were well known as farmers in North County Clare. He grew up on his parent's farm near Ballyvaughan in County Clare. This farm was known as Ballyalben. When Michael Daveron left school, he took up fulltime occupation on his father's farm. His father also Michael Daveron, died on 2nd October, 1991 and was then in his 80s and had been in poor health for some time before that. It is clear that for several years prior to the death of his father, Michael Daveron had taken over the running of the family farm at Ballyalben in conjunction with his mother.

4. Some time prior to his death Michael Daveron Snr. had given Michael Daveron Jnr. deceased, a farm known as Ballycahill, which adjoined the farm at Ballyalben. The farm at Ballycahill was separated from the Ballyalben farm by a road. The Ballycahill farm was at that time scrubland and the deceased Michael Daveron, devoted a considerable amount of his time to reclaiming that land. This farm contained 269 acres. In due course the deceased succeeded in making the Ballycahill farm a successful enterprise and at the time of his death in 2003 he had a suckler herd of 80 cows on it.

5. In addition to running the Ballycahill farm the deceased Michael Daveron, continued after the death of his father to also run the Ballyalben farm with his mother. This farm was an extensive one amounting to 623 acres, although approximately 500 of that was winterage on the Burren. The Ballyalben farm was stocked with approximately 40 cows. When Michael Daveron deceased set up a separate farm in Ballycahill it was necessary for him to apply for a separate herd number and for the purposes of gaining entitlement to grants and subsidies it was expedient and indeed, apparently necessary for him to lease from his mother 316 acres of the Ballyalben farm. This lease continues but will expire in 2012. It was apparent from the evidence that the deceased was devoted to farming and enthusiastic about everything to do with his farming activities and the development of that enterprise. He maintained a large stock of agricultural equipment as he did not engage contractors and did all of the work on both farms himself. He was keen to develop his farming enterprise and in that regard planned setting up a trekking business. He was passionate about food and grew all his own vegetables and was an accomplished cook.

6. Since his death the plaintiff, who is a fulltime resource teacher now working in Kinvara National School, has been obliged to greatly scale down the farming enterprise. Immediately after the death of Michael Daveron in 2003 his mother appointed a manager to look after the Ballyalben farm. The plaintiff with the assistance and generous support of her neighbour Mr. Droney, was able to keep the farming enterprise at Ballycahill going, but on a much reduced scale, having cut the herd down to approximately 26 cows. She also sold the farm machinery accumulated by her late husband because it was no longer necessary and because of her apprehension that it could be abused and in particular because there was an expectation that her son Michael Daveron would start driving a tractor.

7. Prior to the death of Michael Daveron in 2003, there had obviously been a very close relationship between Maura Daveron and her son and his family. Michael Daveron spent a great deal of his working time on the Ballyalben farm and after he got married, a barn or outbuilding on the Ballyalben farm was converted into a dwelling house in which he lived with the plaintiff and their children and where the plaintiff still lives with the children. This converted barn became jointly owned by Michael Daveron and the plaintiff and is located quite close to the dwelling house on the Balllyalben farm.

8. Unfortunately, after the death of Michael Daveron, there appears to have been a falling out between the plaintiff and Michael Daveron's mother, brought on it would seem by a belief on the part of the deceased's mother that in some way or another the plaintiff was responsible for the death of her son and exacerbated or heightened by the sale by the plaintiff of the farm machinery which had been kept on the Ballyalben farm.

9. The damages claimed in this case, with one exception, fall under predictable headings and the following damages have been agreed:

(i) Solatium €25,400.00

(ii) Funeral expenses €2,919.29

(iii) A headstone €5,200.00

(iv) Hospitality at wake and funeral €6,000.00

(v) Cost of administration €2,799.50

(vi) Travelling and incidental expenses €2,657.00

(vii) Capital value of financial dependency losses €275,000.00

Total: €319,975.79

10. The plaintiff also claims as a loss resulting from the wrongful death of her husband, damages in respect of the loss to the dependents of Michael Daveron deceased, of the inheritance by him of his mother's estate which, in due course would have been inherited by the dependents of Michael Daveron. In respect of this claim, certain figures are agreed without any admission of liability and they are as follows:

(i) Loss of income from farming the Balyalben farm after the

death of Maura Daveron €184,271.00

(ii) Half the rental income from renting the dwelling of the

plaintiff and Michael Daveron €50,436.00

(iii) Loss of the value of the inheritance of the estate

of Maura Daveron €1,312,275.00

Total: €1,546,982.00

11. As mentioned, damages to be paid in respect of the financial loss of support to the dependents of Michael Daveron have been agreed in the sum of €275,000. Controversy however prevails as to the correct approach to the valuation of benefits or advantages accruing to the dependents arising from the death of the deceased.

12. In this respect, Michael Daveron died intestate and his estate devolved under the normal Intestacy rules, namely two-thirds of the estate went to the plaintiff and one-third to be divided equally between his four children. Because of his early untimely death the plaintiff and the four children find themselves inheriting his estate many years earlier than would otherwise have been the case. As a consequence of this, it is commoncase that an advantage or benefit has been conferred upon them in the form of the value of the accelerated receipt of that estate. The defendants contend that the capitalised value of that accelerated receipt is a benefit or advantage accruing to the dependents arising from death which must be taken into account in assessing the losses resulting from the wrongful death of the deceased. The capitalised value of this is not seriously disputed by the plaintiff's actuary and the figure put forward by the defendants' actuary, Mr. Tennant in this respect was the sum of €757,905.00. This figure was based on the actual value of the estate derived from the Inland Revenue affidavit as of the date of death of €1,780,000. From this figure there is deducted a sum of €700,000 to reflect the value of the family home which, in the first place, was jointly owned by the plaintiff and secondly had been enjoyed by her in any event, prior to the death of the deceased, resulting in a sum of €1,080,000. Added to this were farm assets i.e. machinery of €91,000, a sum of €1,052.65 in an Ulster Bank account, €40,000 from a sale, but deducting from this an overdraft of €32,316.40, an AIB debt of €12,042.01 and a legal bill of €968, leaving net deductible assets of €1,166,726.24. Mr. Tennant then took two-thirds of that sum as being in respect of the plaintiff's two-thirds entitlement and multiplied it by a factor of .56 to arrive at the actuarially calculated value of the accelerated receipt by her of the inheritance as of the date of his calculation, which was in July 2010. This produced a figure of €425,577. This figure Mr. Tennant explained, did not include any allowance in respect of the fact that the plaintiff had the use and enjoyment of the Ballycahill farm since the date of death of the deceased up until 23rd July, 2010. In his evidence, he said that to cater for that, the actuarial factor moved from .56 to .97 which produced the figure of €757,905. What pushed up the figure to that level from €437,777 was the addition of compound interest at 8% for the period from the date of death of the deceased until 23rd July, 2010, and the addition of that compound interest is the sole ingredient altering the actuarial factor from .56 to .97.

13. Whether one takes the correct approach as represented by the higher figure of €757,905 or €437,777, it is apparent that either of these figures exceeds by a long way the €275,000 agreed as the capital value of the loss of support to the dependents.

14. Mr. Joseph Byrne, the actuary called for the plaintiff, took a very different approach to this problem. He acknowledged that traditionally, the practice had been when dealing with assets of the kind involved here, namely, a farm, to deduct as the benefit accruing to the dependents the value of the accelerated receipt of the land, actuarially calculated from the value of the land as of the date of death. In recent times, because of the exceptionally high value of land as against relatively low income derived from land, a practice had grown up amongst actuaries of deducting only the capitalised value of the loss of income from the land, because deducting the capitalised value of the accelerated receipt of the land had the effect of wiping out entirely, dependency claims. In circumstances where a farm would never be sold anyway, and where the farm income bore no relation to the actual value of the farm, dependents would be greatly disadvantaged by taking the full deduction for the accelerated value of the farm. Mr. Byrne calculated the capital value of the future farm income after the date of death of the deceased as amounting to €100,000 and he made a deduction of that sum from the plaintiff's financial dependency claim.

15. Mr. Byrne did not seriously take issue with Mr. Tennant's calculation of the value of accelerated receipt of the Ballycahill farm i.e. the sum of €757,905. However, an issue nonetheless developed in the course of Mr. Tennant's evidence arising out of cross-examination of him and also questions asked by the court as to the content of or basis of the difference between the actuarially calculated factor of .56 as against .97. Mr. Byrne did not dispute that the approach taken by Mr. Tennant in this regard was standard practice.

16. As to which of these two approaches is the correct one, it was submitted by Mr. Eoin McCullough S.C. for the defendants that not only was the approach adopted by Mr. Tennant the standard actuarial practice for many years, it was underpinned, and indeed, mandated by the decision of the Supreme Court in the case of O'Sullivan v. C.I.E. [1978] I.R. 409.

17. That case, like this one, was a claim under Part IV of the Civil Liability Act 1961, on behalf of the dependents of a deceased person for compensation, inter alia, for loss of support by the dependents owing to the wrongful death of the deceased. In that case, the deceased was a farmer and was killed in a road traffic accident when he was driving his tractor on the highway and was struck by a lorry driven by a servant of the defendants. The deceased, in that case, at the time of his death, was 37 years old and farmed 44 acres of land and was in the process of acquiring an additional 12 acres from the Land Commission. In that case, in the High Court, the learned trial judge had made a deduction from the gross loss of the sum of £23,566 in respect of the assets left by the deceased and inherited by the dependents. On appeal to the Supreme Court, Griffin J. with whom Henchy and Parke JJ. agreed in disallowing the appeal, said the following at p. 424:

> "*The plaintiff submitted that no deduction should have been made in respect of the value of the assets inherited by the plaintiff and the children. In computing the loss suffered by the dependants, the actual pecuniary loss of each individual entitled to sue can only be ascertained, as stated (p. 612) by Lord Wright in Davies v. Powell Duffryn Associated Collieries 6 [1942] A.C. 601. , by balancing, on the one hand, the loss to him of the future pecuniary benefit and, on the other, any pecuniary advantage which comes to him by reason of the death. It is well settled that the assets of the deceased which pass to the dependants must be taken into account. Section 50 of the Act of 1961 provide that, in assessing damages, account should not be taken of any sum payable on the death of the deceased under any contract of insurance or of any pension, gratuity or any other like benefit payable under statute or otherwise in consequence of the death of the deceased. This section is identical in terms with, and replaced, s. 5 of the Fatal Injuries Act, 1956. In Byrne v. Houlihan 2 [1966] I.R. 274. at p. 278 of the report, Kingsmill Moore J. said:—'That in computing the 'injury resulting from the death' gains are in general to be set off against losses is shown by s. 5 [of the Fatal Injuries Act, 1956] which, by specifically excluding from such computation certain benefits by way of insurance monies and pensions, implies that benefits not so expressly excluded must be taken into account*'. His observations apply equally to s. 50 of the Act of 1961.

However, in the case of a farm or a family business, the value to be put on deductible assets can present some difficulty. In the instant case, if the deceased had lived out his normal span and had been survived by the plaintiff, it is reasonably certain that the farm would have gone to the plaintiff or to the plaintiff and some, at least, of the children. In any event, by surviving the deceased the plaintiff would have been entitled to one third of his estate pursuant to s. 111, sub-s. 2 of the Succession Act, 1965. Therefore, there was acceleration in the timing of the receipt of the inheritance and it is only that acceleration which should be taken into account in valuing deductible assets. According to the valuation of the acceleration made by the plaintiff's actuary, almost the entire of the £29,458 should be deducted from the gross loss to obtain the net loss . . . It is to be noted that the value of the house and the curtilage of 2 acres was very properly excluded from the deductible assets. The house was the family home; if it were sold, the plaintiff would have to find another house so there is no element of 'gain' to the family in inheriting the house: see *Heatley v. Steel Company of Wales*."

18. There can be no doubt but that this case establishes unequivocally the principle that in arriving at damages to compensate for loss of support as a result of a wrongful death, benefits or advantages which accrue to the dependents arising from the death must be taken into account and deducted so that the ultimate compensatable loss is the net loss giving credit for the benefits or advantages that have accrued from death.

19. As the asset in issue in the O'Sullivan case was a farm, it is difficult to resist the force of Mr. Eoin McCullough's submission to the effect that this case is on all fours with the O'Sullivan case, and therefore the reasoning adopted in the O'Sullivan case applies with equal force to the circumstances evidenced in this case.

20. Nevertheless, it is clear that the issue raised in this case arising out of the approach adopted by Mr. Byrne did not arise and was not considered in the O'Sullivan case, and it being well settled that what is not considered is not decided, in my view, the O'Sullivan case can be distinguished on that basis, leaving it open to this Court to consider, untrammelled by binding authority, whether it is correct, in circumstances such as are evidenced in this case, to ascertain the correct deduction to be made in respect of agricultural land, on the basis of the income derived from land, rather than the capitalised value of the early receipt of the land.

21. It is of course apparent that the reason this issue arises in the first place was because of a relatively short period in our history when the value of agricultural land ascended to levels which bore no relationship whatever to the potential income that could be derived from farming the land. At any time earlier in our history, since the enactment of the Civil Liability Act 1961, this problem did not arise because of a realistic balance between the value of land and the income that could be derived from it. Thus, whether one approached the quantum of the deduction from the point of view of the capitalised value of the income from the land or the capitalised value of the early receipt based on the value and as of the date of death, it was likely that there would not be a great deal of difference between the two. For example, in the O'Sullivan case, it can be seen that the capitalised value of the income from the farm, even taking it at the lower level accepted by the Court, was in excess of the capitalised value of the early receipt of the land.

22. Now that land values are returning to what might be considered to be, in historical terms, more normal levels, it is difficult to see why, in general, a different approach such as that advocated for the plaintiff in this case should replace the approach clearly endorsed in the O'Sullivan case, by the substitution of the capitalised value of the future income from a farm for the capitalised value of the early receipt of the farm.

23. It can, of course, be argued, as it has been done in this case, that deducting the capitalised value of early receipt based on the very high land values of the recent past can produce an injustice in the sense that an undoubted financial loss to the dependents, as in this case, by reason of the wrongful death of the deceased, does not attract any compensation because it is far exceeded by the capitalised value of the early receipt of land, but in circumstances where the land is never likely to be sold.

24. Whilst it is undoubtedly the case that a great deal of land in Ireland, including in County Clare, is passed from generation to generation within the same family, this tradition does not in any way exclude or even impair the fundamental right of every landowner to dispose of land as he or she sees fit. Having regard to the higher standard of education generally achieved by young persons today, as compared to previous generations, the shift of the Irish economy from agriculture to industry and services where incomes significantly in excess of incomes derived from farming can be achieved, the traditional pattern of land transfer within families is unlikely to persist.

25. In this case, the plaintiff is a fulltime teacher in the National School in Kinvara, earning a good salary and has been in that occupation all of her adult life. She does not come from a farming background and it is clear that she does not intend to take on the role of a fulltime farmer. None of her children, and in particular, her son, Michael have evinced, so far, any interest in farming, although, apparently, Michael does have an interest in horses. It is noteworthy that in the course of her evidence, the plaintiff did not disavow any intention of selling the land.

26. In light of the evidence in this case, it cannot be said, in my view, that the land inherited from the deceased will not be sold in the foreseeable future. In short, the plaintiff has been put in possession by way inheritance of an asset which is readily disposable, and it is a matter of personal choice on her part, as she sees fit, whether or not she retains the land or disposes of it. Hence, I cannot see any good or sufficient reason for excluding the capitalised value of the accelerated receipt of the land, as a benefit to the dependents, accruing from the death of the deceased. Thus, I am satisfied that in applying the principle as set out in the O'Sullivan case, to the effect that benefits must be deducted to arrive at the compensatable loss to the dependents, the correct approach, in general and in the specific circumstances of this case, as set out in the O'Sullivan case, is to deduct the capitalised value of the accelerated receipt of the land in question.

27. This brings me to the computation of the appropriate figure to be deducted in this regard. As discussed earlier, the cross-examination of Mr. Tennant revealed that from 23rd July, 2010, the appropriate actuarial factor to ascertain the capitalised value of the accelerated receipt was €56 per €100 passing or .56, but because that figure did not take account at all of the use and enjoyment of the land from the date of death of the deceased up until 23rd July, 2010, compound interest the rate of 8%, namely, Courts Act interest, was included, and this brought the actuarial factor up to .97 or raised the figure from €437,777 up to the final figure of €757,905. This results in a charge of €320,128 in respect of the use and enjoyment of the land from the date of death until 23rd July, 2010. It is apparent that this figure is the result of a calculation, no doubt habitually done by actuaries in these situations to include a necessary charge to reflect the use and enjoyment of the asset since the date of death, and undoubtedly, resort to Courts Act interest is a very convenient way of addressing the need to find some measure to reflect the value of that use and enjoyment. However, it is clear that certainly in the circumstances of this case, the application of Courts Act interest had no connection whatsoever to what was happening insofar as this land was concerned, either in terms of the income derived from the land during the period from the date of death until July 2010, or what was happening in relation to the value of the land.

28. The evidence in this case establishes that the profit derived from the land over five of these years was as follows:

2004: €15,550

2005: €13,367

2006: €1,914

2007: €35,781

2008: €9,855

There was no evidence of the profits in the years 2009 and 2010. The total profits then for the five years in question came to €76,467 or an average of €15,293. The figures for 2006 and 2007 are somewhat anomalous insofar as the figure of €1,914.00 for 2006 is very low and the figure of €35,781for 2007 is very high by comparison to the other years. If one excludes these two figures and takes an average of the remaining three, one arrives at an average annual profit of €12,924. It would seem to me that if one were to take an average of €14,000 over the seven years from the date of death of the deceased up until July 2010, that would be fair to both parties. That would result in total profits for that period coming in at €98,000. In the absence of any evidence of any increase in the value of the land over that period, it would seem to me that a fair measure of the benefit derived from the land during that period is the profit derived from its use, and thus, I would disallow the addition of the compound interest at 8% over that period amounting to €320,128 and substitute for that figure the sum of €98,000 resulting in the deduction to reflect the accelerated receipt of the land coming in at €535,777. As is apparent, that sum exceeds the agreed loss of €275,000 and hence no compensatable loss has been proven by the plaintiff in this respect.

29. This brings me to the plaintiff's claim for the loss of the inheritance of the estate of Maura Daveron, the deceased's mother. She died on 6th August, 2009, and by her will left her entire estate to her surviving daughter, Mary O'Regan.

30. The evidence of Mr. Niall Sheehy, solicitor, who had acted for Maura Daveron for many years, establishes beyond any doubt that as of the date of death of Michael Daveron, there was in existence a will made by Maura Daveron in which she left her entire estate to her son, Michael Daveron. After his death, she made a new will in which she benefited her grandson, Michael Daveron, but subsequently changed her will and made a new will leaving her entire estate to her daughter, Mary O'Regan, and it was that will that took effect after her death and was admitted to probate. I am quite satisfied that as a matter of probability, if not near certainty, had the deceased, Michael Daveron, not suffered wrongful death, as occurred, he would, as a matter of high probability, have survived his mother and I am quite satisfied, having regard to the terms of the will she made in his favour, but also bearing in mind the role he played in running the two farms; the Ballyalben farm, in very close cooperation with his mother, that he would have inherited his mother's estate which was essentially the Ballyalben farm.

31. The deceased, Michael Daveron, were it not for his wrongful death, had a normal life expectancy which means it is probable he would have survived for approximately 25 years after the date of death of his mother.

32. Having regard to his established interest in farming and his established connection to the Ballyalben farm, it is highly probable that he would have continued to farm both the Ballyalben farm and the Ballycahill farm for the rest of his working life. It is also probable, in my opinion, having regard to the established family tradition of farming in North County Clare, that he would have wanted to have handed on these farms to one or more of his children in due course. The plaintiff also has a normal life expectancy and was three years younger than her husband which means that it is probable that she would have survived him, had he lived out his normal expected lifespan. In that situation, she stood entitled, either by law or under the will of the deceased, if he made one, to inherit at least one-third of his estate. It would seem to me to be highly probable that the entirety of his estate would have been inherited by his wife and children i.e. the dependents under Part IV of the Civil Liability Act 1961.

33. As a consequence of the wrongful death of the deceased, it is highly probable to the point of certainty that Michael Daveron, deceased, would have inherited his mother's estate, and as a matter of high probability, in due course, passed this on, either in his lifetime or upon his death to his wife and children in such shares as were agreed between them or as he deemed fit.

34. Thus, the loss of the inheritance from Maura Daveron to Michael Daveron, deceased, is a loss to the dependents of the deceased, Michael Daveron.

35. The claim on behalf of the dependents in this regard is resisted on a number of legal grounds.

36. First, it was submitted by Mr. Eoin McCullough S.C. that the claim was, in essence, one in respect of the loss of a chance i.e. the loss of the chance of inheritance by Michael Daveron of his mother's estate, and thereafter, the loss of the chance by the dependents of Michael Daveron of inheriting that estate from Michael Daveron. In this regard, it was submitted that the law as it has developed in relation to loss of chance cases, limits recovery of damages to those cases in which the provision of the chance in question, was in fact the object of the duty, the breach of which gives rise to the cause of action pursued. In this regard, reliance was placed on the following passage from McGregor on 'Damages' (18th Ed.) at para. 8-039, where the learned author says the following apropos the leading case of Chaplin v. Hicks [1911] 2 K.B. 786 C.A.:

> *"The circumstances in which the law is prepared to recognise the loss of a chance as itself an identifiable head of loss, as itself constituting compensatable damage, are when the provision of the chance is the object of the duty that has been breached. This comes out clearly in Chaplin v. Hicks itself, where Fletcher Moulton L.J. emphasized that 'the very object and scope of the contract were to give the plaintiff the chance of being selected a prize-winner'. An alternative formulation is that it can be said that the essence of the breach of duty is that it deprives the claimant of the chance of opportunity of securing outcome. All this can be tested against the cases. Ms. Chaplin was deprived of the opportunity of winning the competition . . ."*

37. Mr. Eoin McCullough S.C. submitted that the nature of the duty owed by the defendants to the deceased was of a wholly different character and could not be said to include a duty to provide or protect the chances of his next of kin inheriting an estate which the deceased had yet to inherit.

38. I am not persuaded that there is merit in this submission, because I do not see the plaintiff's claim for the loss of the inheritance of the estate for Maura Daveron as falling into the category of cases considered as "loss of chance" cases, for the simple reason that the inheritance by Michael Daveron deceased, of his mother's estate was not a matter of chance, but was, as already said, an event that was highly probable and the succession to his estate by his dependents, either by gift or inheritance was also highly probable. Loss of chance cases deal with a probable loss of an opportunity to secure a less than probable benefit. In this case, the securing to the dependents of the deceased of the ultimate benefit of possession of the estate of Maura Daveron, is at all stages in that process, in the realm of high probability.

39. Next raised by Mr. Eoin McCullough S.C. was the question of novus actus interveniens. Mr. McCullough relied on the evidence that established, that after the death of Michael Daveron deceased, his mother Maura Daveron, made a will in which she left her estate to her grandson Michael Daveron, but then changed her will and ultimately left her estate to her daughter Mary O'Regan. He submitted that, notwithstanding the death of the deceased Michael Daveron, nonetheless, the estate of Maura Daveron was to go to one of the dependents i.e. Michael Daveron Jnr. and whatever changed that course, probably the falling out between the plaintiff and Maura Daveron, was the proximate cause of the dependents of the deceased Michael Daveron losing the inheritance of Maura Daveron's estate and thus, he submitted there was a *novus actus interveniens* between the wrongful death of Michael Daveron deceased, and it was that *novus actus interveniens* which was the proximate cause of the loss now claimed.

40. Mr. Denis McCullough S.C., for the plaintiff, resisted this submission on the basis that even if it were the case that the falling out between the plaintiff and Maura Daveron prompted or caused Maura Daveron to change her will, thus depriving the dependents of Michael Daveron of her estate, he submitted that this falling was itself the direct consequence of the wrongful death of Michael Daveron deceased, and was not a *novus actus interveniens*.

41. Even if Mr. Eoin McCullough S.C. was correct in his submission, that would only affect the position of one dependent of the deceased, namely, Michael Davernon Jnr. The other dependents, namely, the plaintiff and the other three children of the deceased Michael Daveron, were not at all affected by the will of Maura Daveron in which she benefited her grandson Michael Daveron, and thus, clearly their loss in this regard stemming from the wrongful death of Michael Daveron was not affected by any intervening event. I am also satisfied that there is merit in Mr. Denis McCullough's submission that if it were the case, as seems probable, that Maura Daveron changed her will because of the deterioration in relations between her and the plaintiff, that change in her state of mind was brought about directly by the wrongful death of the deceased and the sad consequences of the same.

42. I am quite satisfied that the loss of the estate of Maura Daveron to the dependents of the deceased Michael Daveron cannot be attributed to any intervening event occurring after the death of Michael Daveron deceased.

43. Mr. Eoin McCullough S.C. next raised the question of the remoteness of the loss of the inheritance of the estate of Maura Daveron to the duty owed by the defendants to Michael Daveron deceased and submitted that loss was not and could not be a foreseeable consequence of a breach of the duty owed by the defendants to Michael Daveron deceased.

44. Against this, it was submitted by Mr. Denis McCullough S.C. that it was entirely foreseeable, that in the event of the wrongful death of the deceased Michael Daveron as a result of a breach of duty on the part of the defendants, that loss would be caused to his estate and to the dependents of Michael Daveron and the loss of the inheritance of his mother's estate was of a type that could readily be envisaged as part of the foreseeable losses that were likely to ensue.

45. When a doctor is treating a patient, it would be wholly unreal to suggest that they should become acquainted in any detail with the financial circumstances of the patient or of the extended familial relationships and financial aspects of these. The same can be said, generally, of tortfeasors. For example, if a motorist negligently kills or injures another road user, be it a pedestrian or driver of another car, it could not be suggested that the tortfeasor should be able to foresee the financial consequences of the tort, in the sense of knowing anything of the financial circumstances of the person injured or killed, who would almost certainly be unknown to the tortfeasor. Whilst the relationship between a doctor and patient is obviously a much closer one than that between one road user and another, nonetheless, the proximity of that relationship does not involve acquaintance by the medical practitioner with knowledge of the patient beyond that which is necessarily relevant to the medical treatment under consideration. Thus, in my view, tortfeasors in these situations, including medical practitioners, must be deemed to take the victims of their tortious actions as they find them, including their myriad financial circumstances.

46. In this case, having regard to the fact that the deceased Michael Daveron was 46 years of age at the date of his death, that he was farmer, that his mother was still alive and had a farm adjacent to that of Michael Daveron deceased which he worked, and that as Maura Daveron had only one other child, namely, Mary O'Regan, the loss of the inheritance of the estate of Maura Daveron to the

dependents of Michael Daveron deceased was an entirely natural and predictable consequence of the wrongful death of Michael Daveron deceased.

47. I am satisfied, therefore, that the loss of the inheritance of this estate to the dependents of Michael Daveron deceased cannot be considered as being too remote to be compensatable in damages in an action for negligence against the defendants for the wrongful death of Michael Daveron deceased.

48. Mr. Eoin McCullough S.C. next submitted that even if the claim was maintainable, the number of contingencies existing, all of which would have to be resolved in favour of the plaintiff, were so great that no damages could realistically be awarded. The contingencies mentioned were as follows:

> (a) The deceased would have to have outlived his mother.
>
> (b) His mother would have had to leave the entire of her estate to the deceased.
>
> (c) It has to be assumed that the deceased would have preserved the estate avoiding all the vicissitudes of commercial life without selling any of the estate and without alienating any of it during his lifetime to any third party.
>
> (d) It has to be assumed that land values as of August 2009 would have been maintained, an assumption already untenable because of declining land values.
>
> (e) It has to be assumed that if the deceased had lived his normal span, he would have left the entire of his estate to his wife. This assumption is not one that can be made on the basis of the evidence before the Court because there was no evidence that the deceased had any such intention or even any such predilection.
>
> (f) It had to be assumed that if the deceased had lived his normal span and his wife predeceased him, he would have left the entire of his estate in the alternative to his children, an assumption that simply is not one that can be made based on the evidence heard by the Court.
>
> (g) It must be assumed that the plaintiff would leave the entire of her estate to her children, and specifically, that she would have left the inherited lands to her children. The plaintiff gave no evidence that this was her intention, even in relation to the lands that she did inherit.
>
> (h) It has to be assumed that the relationship between the plaintiff and the deceased would endure throughout the expected lifespan of the deceased.

49. In respect of all of these contingencies, it was submitted that where a discount has to be made in respect of more than one contingency, it must be done, as it were, on a compound basis. In other words, if the first contingency diminishes the chance to 80% and, second, diminishes the chances by 50%, in effect, the second diminishes the 80% down to 40%. In this regard, Mr. McCullough S.C. placed reliance on Magregor on 'Damages', where, at para. 8-091, the following is said:

> "Where in calculating the last chance, two discounts have to be made, it is now established that the proper method to use is to make the first discount and then, to the figure thus reached, to apply the second discount."

50. I would readily agree with Mr. McCullough S.C. that this is the correct approach where multiple discounts must be made in respect of a variety of contingencies or future chances.

51. Mr. Eoin McCullough S.C. then went on to submit that insofar as the plaintiff's case in this case was concerned, the number and the weight of the contingencies was so great that, in effect, the plaintiff's chance of ultimately succeeding to the enjoyment of the inheritance from Maura Daveron was reduced to disappearing point. In this regard, he cited the case of *Barnett v. Cohen* [1921] 2 K.B. 461, where McArdle J. said the following:

> *"Upon the facts of this case the plaintiff has not proved damage either actual or prospective. His claim is pressed to extinction by the weight of multiplied contingencies. The action therefore fails."*

52. I cannot agree that the contingencies relied upon by the defendants, either individually or collectively, have, as Mr. McCullough S.C. put it, the effect of pressing the plaintiff's case in this regard to extinction.

53. If one takes the contingencies as they are mentioned, the first of these is that the deceased would have had to outlive his mother. The deceased would have been 52 years of age when his mother died. But for his wrongful death, it is highly probable that he would have outlived his mother. The second contingency is that his mother would have had to leave the entire of her estate to the deceased. It is quite clear from the evidence of Mr. Sheehy and from the relationship between the deceased and his mother that it was virtually certain that on her death, on 6th August 2009, that the deceased Michael Daveron would have inherited her estate.

54. Next mentioned are the vicissitudes of commercial life which would have occurred during the expected lifetime of the deceased. Without doubt, he would not have been immune to these. Having regard to the fact that this was his home farm, where he grew up, that the evidence pointed to him being a very ambitious and indeed successful farmer, I think it is probable that he would preserved the estate of his mother intact during his lifetime. Next mentioned was the maintenance of land values. Undoubtedly, land values would fluctuate over the expected lifetime of the deceased, and by the time that Maura Daveron died on 6th August 2009, had already probably declined somewhat from their peak values and the valuation of the land in her estate was as of the date of her death. As, with the estate of Michael Daveron deceased, to establish the value of the accelerated receipt of the Ballycahill farm, the valuation of this as of the date of death was adopted as the only known realistic value, similarly the appropriate basis for calculating the value of the lost inheritance of the Ballyalben farm, was the valuation as of the date of death of Maura Daveron.

55. Next mentioned was the assumption that the deceased would have left his estate to his wife. At the time of his death, the deceased was 46 years old and his wife, the plaintiff, was 43. They had four children aged between ten and one years of age. The evidence of the plaintiff, which was not challenged, was that the deceased was devoted to his family, and apart from his farming activity, played a very large role in their lives, including being a good cook. There is nothing in the evidence to indicate any stability or any abnormality or anything that would point otherwise than to the plaintiff and the deceased living out a normal life together as husband and wife for the duration of their respective lifespans. As indicated earlier, I think it is highly probable that, having regard to the deceased's relationship with the two farms and the background of his family in agriculture in this area, it is highly probable that,

either by way of gift of inheritance, he would have passed on his own land and also the estate inherited from his mother to his own family, probably his wife initially, and then probably to one or more of his children in due course. It is very probable that the dependents of the deceased or some of them would succeed to the entirety of the estate of Maura Daveron. Similarly, there was not a shred of evidence to indicate that the plaintiff would dispose of this estate otherwise than in the normal and natural way to her own children, an outcome which would have to be regarded as a probability. I do not think that the fact that the plaintiff did not give specific evidence about her testamentary intentions in this regard diminishes that probability.

56. I am quite satisfied that all of the factors which were described by Mr. McCullough S.C. as contingencies are events or outcomes which, as a matter of probability, will resolve in favour of the dependents of the deceased insofar as the inheritance of Maura Daveron is concerned. None of these "contingencies" in my view, warrant being treated as "chances" in respect of which a mathematical discount should be made. All, in my view, are probabilities, and looking at the matter globally, I am quite satisfied that the dependents of the deceased would, as a matter of probability, have succeeded to the estate of Maura Daveron were it not for the wrongful death of the deceased Michael Daveron.

57. This brings me to an assessment of the appropriate damages for the loss of this inheritance.

58. The value of the estate of Maura Daveron, as revealed in the Inland Revenue affidavit filed for the purposes of extracting probate, was €2,673,984. Mr. Byrne, the plaintiff's actuary, dealt with this loss by calculating the loss under three headings, namely, the loss of the farm itself; the loss of the income from the farm from the date of death of Maura Daveron, and the loss of rental income in respect of the existing family home on the basis that the plaintiff and the deceased would have moved into the dwelling on the Ballyalben farm. In respect of the loss of this rental income, he attributed 50% of that loss to the plaintiff on the basis that the deceased would have enjoyed the other 50%. The sum actuarially calculated to reflect the plaintiff's loss in this regard and agreed by the defendants was the sum of €50,436. In respect of a loss of income from the Ballyalben farm, Mr. Byrne calculated a figure of €184,271 for that loss. This figure was also agreed. When giving his evidence, Mr. Byrne said that the capital loss in respect of the loss of the farm itself was the sum of €1,534,112. However, in opening the case, Mr. Denis McCullough S.C. gave to the Court a figure of €1,362,711 as representing the capital loss of the estate and also the 50% of the loss of rent. The total of the items making up the loss of inheritance, therefore, came to €1,546,982 as per Mr. McCullough's opening. I am inclined to think that Mr. Byrne's figure given in his evidence might have been an inadvertence. It clearly approximates the total of the three losses. The matter was not further explored in the evidence and I propose to proceed on the basis that the correct figures are as were given to me by Mr. McCullough in the opening.

59. Mr. Byrne's approach to calculating the capital loss of the inheritance was challenged by Mr. Eoin McCullough in cross-examination on the basis that Mr. Byrne had made no allowance in his calculations for the variety of contingencies which Mr. McCullough contended necessarily arose. Mr. Byrne acknowledged that he had not made any allowance for these contingencies or assumptions. He explained the reduction from the value of the estate as given in the Revenue affidavit to what would appear to be now a figure of €1,312,275 as being an actuarially calculated reduction to reflect the long timeframe before these assets would have passed to the dependents, and also to reflect the fact that these assets would not have passed until certain people had died. When questioned by me, he said he did not see any real difference between the notion of accelerated benefit and the kind of discount he made. Apart from allowing for accelerated receipt, the only additional factor allowed for in his calculations was the fact that the dependents would not get these assets until certain people had died.

60. It is apparent the relevant deaths in this regard were initially the death of Maura Daveron, deceased, then in due course, the death of Michael Daveron and then insofar as the children are concerned, the death of the plaintiff.

61. Notwithstanding the fact that the dependents have not received any asset in this regard arising from the death of Michael Daveron, the fact that they are now to be awarded compensation for the loss of inheritance of the estate of Maura Daveron, now, will amount, in effect, to a benefit to them, now arising from the death of Michael Daveron deceased. Thus, in my view, Mr. Byrne was correct to approach the assessment of the loss of this inheritance on the basis of deducting the value of the accelerated receipt by the dependents of that inheritance and discounting the value of the estate of Maura Daveron, deceased, as of the date of her death accordingly. Whilst I have found that it was highly probable that the dependents would, in due course, succeed to this estate, such further discounting as was done by Mr. Byrne to take account of intervening deaths, as an actuarial exercise, may be legitimate. In any event, the evidence does not disclose and discriminate between these factors so far as the discounting is concerned. It is apparent that the full discount is slightly in excess of 50% of the value of the estate of Maura Daveron deceased, as of the date of her death on 6th August 2009. When one compares that discount to the discount factor applied to the accelerated receipt of the Ballycahill farm, namely, .56 as of July 2010, the additional factor discounted, apart from accelerated receipt of the estate of Maura Daveron, deceased, becomes reasonably apparent and would appear to be given relatively modest weight. Having regard to the high level of probability that each relevant death would result in the estate of Maura Daveron moving towards the dependents of Michael Daveron the slightness of the actuarial weight attributed to this factor is appropriate.

62. In these circumstances, I am satisfied that the figures calculated by Mr. Byrne are a fair and reasonable assessment of the loss to the dependents of Michael Daveron deceased, of the estate of Maura Daveron deceased. I am quite satisfied that no additional discounting should be done to that figure to reflect any other contingency, as to do so would be to give undue weight to things that are unlikely to occur. It would be highly illogical, and indeed, unjust to the plaintiff to attach small mathematical weight individually to a variety of unlikely events and by the accumulation of all of these, to diminish or even wipe out compensation fairly attributable to the probable future outcome. I am therefore satisfied that the just measure of the compensation to be paid to the plaintiff and the dependents of Michael Daveron deceased in respect of the loss of the inheritance of the estate of Maura Daveron deceased is the sum of €1,546,982.

63. Thus, the total of the financial losses suffered by the dependents of the deceased is the agreed €275,000 in respect of loss of financial support from the deceased and the sum of €1,546,982, being the loss of the inheritance of the estate of Maura Daveron, making a total of €1,821,983.

64. This brings me to the final issue in the case, which is whether or not the gains or benefits that have accrued to the dependents of Michael Daveron deceased arising from his death can be set against the damages in respect of the loss of the estate of Maura Daveron. As discussed earlier, the value of the accelerated receipt by the dependents of the Ballycahill farm, in my determination, came to €535,777. As is apparent, that exceeds the agreed damages of €275,000 in respect of the loss of support of the deceased, the excess being €260,777.

65. The principle clearly set out in the O'Sullivan case is to the effect that all benefits or advantages accruing by reason of the death must be taken into account in arriving at the correct balance between gains and losses, the compensatable loss being the net loss, having deducted the gains.

66. There is, undoubtedly, a fundamental difference between the inheritance of the Ballycahill farm and what happened in relation to the Ballyalben farm. Insofar as the former is concerned, the dependents did, in fact, inherit that farm, and without doubt, the value of the accelerated receipt of that inheritance had to be taken into account. On the other hand, the dependents did not inherit but in fact lost the inheritance of the Ballyalben farm. Notwithstanding that, because an award of compensation to represent that loss is made to the plaintiff for the dependents now, a long time before that inheritance was likely to be received by any of the dependents of Michael Daveron deceased in my opinion, the damages thus awarded under this heading should be treated as if that inheritance had been received in the same way as the Ballycahill farm was, as being a benefit or advantage accruing from the death of Michael Daveron, deceased. As the value of the accelerated receipt of that inheritance has already been taken into account by Mr. Byrne in calculating the value of the loss of the inheritance, as discussed above, no further deduction under that heading is permissible. The question arises as to whether any further deduction should be made from the loss thus assessed, and in particular, should the balance of the accelerated receipt of the Ballycahill farm in excess of the agreed damages for loss of support be deducted from the damages assessed in respect of the loss of inheritance of the estate of Maura Daveron. In my opinion, there should not be such a deduction.

67. As said earlier, the damages in respect of the loss of the inheritance of the estate of Maura Daveron are to be treated in a similar fashion to the inheritance of the Ballycahill farm, namely, as assets to which the plaintiff and the other dependents were going to acquire in due course, so that the relevant gain or benefit to the dependents now is simply the accelerated receipt of these assets. Accordingly, the accelerated receipt of Ballycahill farm, I have determined to be €535,777 and the damages in respect of the loss of the estate of Maura Daveron discounted to allow for accelerated receipt, amounts to €1,312,275. Whilst it is appropriate to deduct the accelerated value of the receipt of the Ballycahill farm, to make any further deduction from the damages in respect of the loss of the estate of Maura Daveron would be a duplicated discount having already discounted the value of the estate of Maura Daveron as of the date of her death to reflect accelerated receipt. Any such further deduction would not correspond to any gain or benefit to the dependents, but would in fact be a reduction in the damages to which they are entitled after the gain or benefit to them from the death of Michael Daveron deceased, from the early receipt of the estate of Maura Daveron, had already been discounted in arriving at the figure of €1,312,275 in respect of that loss. Thus, to allow the excess of the value of the accelerated receipt of the Ballycahill farm over the agreed damages for loss of support of the deceased to be set off against the figure arrived at as the damages for loss of the estate of Maura Daveron would be a reduction of the damages for that loss for no good reason, and would be an unjustifiable reduction of the damages to which the plaintiff and the other dependents of Michael Daveron deceased are entitled to in respect of the loss of the estate of Maura Daveron.

68. Accordingly, I have come to the conclusion that the plaintiff is entitled to recover the following damages under Part IV of the Civil Liability Act 1961, on behalf of the dependents of the deceased, Michael Daveron:

A. (i) Solatium €25,400.00

(ii) Funeral Expenses €2,919.29

(iii) Headstone €5,200.00

(iv) Hospitality for the Wake and Funeral €6,000.00

(v) Cost to the Administration of Estate €2,799.50

(vi) Travel and Incidental Expenses €2,657.00

Total: €44,975.79

B. (i) Loss of Support of the Deceased €275,000.00

(ii) Value of Accelerated Receipt of Estate of the

Deceased €535,777.00

(ii) Net Loss Nil

C. Loss of the Estate of Maura Daveron

(i) Loss of Income from Ballyalben Farm €184,271.00

(ii) 50% of Loss of Rental Income of the Family Home €50,436.00

(iii) Loss of the Estate of Maura Daveron €1,312,275.00

Total: €1,546,982.00

D. Total Damages €1,591,957.70