THE COURT OF APPEAL

Finlay Geoghegan J.
Peart J.
Hogan J.

Appeal No. 2014/362

[Article 64 Transfer]

BETWEEN/

GRACE DAVOREN

Plaintiff/Respondent

AND

HEALTH SERVICE EXECUTIVE, JOHN LEE AND OLIVER MCANENA

Defendants/Appellants

Judgment of the Court delivered on the 18th day of February 2016 by Ms. Justice Finlay Geoghegan

1. This is an appeal brought by the defendants against an award of €1,591,957.70 made to the plaintiff by the High Court (O'Neill J.) pursuant to a reserved judgment delivered on the 21st December, 2011, *Davoren v. Health Service Executive* [2011] IEHC 460.

2. The plaintiff, Grace Davoren, is the widow of Michael Davoren, who, unfortunately, died at the age of 47 on the 31st August, 2003. The plaintiff in the High Court alleged that the death of Michael Davoren was caused by the negligence and breach of duty of the defendants, in medical and surgical treatment in 2003.

3. The claim is brought by Mrs. Davoren pursuant to Part IV of the Civil Liability Act 1961, as amended ("the 1961 Act"). It is central to the issues arising on appeal to emphasise that this is a statutory claim brought by Mrs. Davoren on behalf of all the dependents pursuant to ss. 48 and 49 of the 1961 Act, as amended. Liability was not contested in the High Court, in the sense that the defendants did not dispute that the death of Michael Davoren was caused by reason of their negligence or breach of duty. The issue for decision was the amount of the damages to which the dependants of Michael Davoren were entitled.

1961 Act

4. Section 48 of the 1961 Act, insofar as relevant provides:-

> "(1) Where the death of a person is caused by the wrongful act of another such as would have entitled the party injured, but for his death, to maintain an action and recover damages in respect thereof, the person who would have been so liable shall be liable to an action for damages for the benefit of the dependants of the deceased.
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> (2) Only one action for damages may be brought against the same person in respect of the death.
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> (3) . . .
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> (4) The action, by whomsoever brought, shall be for the benefit of all the dependants.
>
> (5) . . ."

5. The nature and extent of the damages recoverable in an action pursuant to s. 48 of the 1961 Act, are prescribed by s. 49 (as amended). Insofar as relevant it provides:-

> "(1)(a) The damages under section 48 shall be –
>
> (i) the total of such amounts (if any) as the judge shall consider proportioned to the injury resulting from the death to each of the dependants, respectively, for whom or on whose behalf the action is brought, and
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> (ii) subject to paragraph (b) of this subsection, the total of such amounts (if any) as the judge shall consider reasonable compensation for mental distress resulting from the death of each of such dependants.
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> (b) The total of any amounts awarded by virtue of subparagraph (ii) of paragraph (a) of this subsection shall not exceed thirty five thousand euros [increased since the date for this claim].
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> (c) Each amount awarded by virtue of paragraph (a) of this subsection shall be indicated separately in the award.
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> . . .
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> (2) In addition, damages may be awarded in respect of funeral and other expenses actually incurred by the deceased, the dependants or the personal representative by reason of the wrongful act.
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> (3) It shall be sufficient for a defendant, in paying money into court in the action, to pay it in one sum as damages for all the dependants without apportioning it between them.

(4) The amount recovered in the action shall after deducting the costs not recovered from the defendant, be divided among the persons entitled in such shares as may have been determined."

Background Facts and Evidence

6. The plaintiff married the deceased on 6th April, 1991. There were four children of the marriage, namely, Michael Davoren, born on 23rd April, 1993, Gráinne Davoren, born on 27th October, 1994, Eleanor Davoren born on 2nd February, 1999, and Rebecca Davoren born on 13th April, 2002. The deceased was also survived by one sister Mary O'Regan (neé Davoren) who was born on 8th October, 1959. The deceased's mother, Maura Davoren, who was born on 29th September, 1928, was also a dependent within the meaning of Part IV of the 1961 Act when the action commenced, but she died on 6th August, 2009.

7. The deceased was a farmer by occupation since he was a teenager. He had grown up on his parent's farm near Ballyvaughan in County Clare. That farm was known as Ballyalben. When the deceased left school, he took up fulltime occupation on his father's farm. His father (who was also named Michael Davoren) died on 2nd October, 1991 and was then in his 80s and had been in poor health for some time. For several years prior to the death of his father, the deceased had taken over the running of the family farm at Ballyalben in conjunction with his mother.

8. Some time prior to his death Michael Davoren Snr. had given the deceased a farm known as Ballycahill, which adjoined the farm at Ballyalben. The two farms were in fact separated simply by a road. At the time the deceased acquired the Ballycahill farm it was principally scrubland and he devoted a considerable amount of his time to reclaiming that land. The Ballycahill 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.

9. In addition to running the Ballycahill farm the deceased also continued to run the Ballyalben farm with his mother following the death of his father. This farm was an extensive one amounting to 623 acres, although approximately 500 acres of that was winterage on the Burren. The Ballyalben farm was stocked with approximately 40 cows. When the deceased set up a separate farm in Ballycahill it was necessary for him to apply for a separate herd number. It appears, however, that for the purposes of gaining entitlement to agricultural grants and subsidies it was expedient and indeed, apparently, necessary for him to lease from his mother 316 acres of the Ballyalben farm.

10. As O'Neill J. found, 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."

11. The plaintiff, Mrs. Grace Davoren, is a full time resource teacher working at Kinvara National School nearby. Since the untimely death of her husband in 2003 she had found herself obliged to reduce considerably the scale of the farming enterprise. Immediately after the deceased's death 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. She also sold the farm machinery accumulated by her late husband because it was no longer necessary. At the time of the death of the deceased none of his four children had indicated any particular interest in farming.

12. Prior to the deceased's death in 2003, there had been a very close relationship between Maura Davoren and her son and his family. The deceased 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. The plaintiff still lives in this house with the children.

13. After the deceased's death, there appears to have been a falling out between the plaintiff and her mother-in-law. Mrs. Maura Davoren apparently conceived the quite untenable belief that the plaintiff, her daughter-in-law, was in some way responsible for the death of her son.

14. At the time of her son's death in August 2003 Mrs. Maura Davoren's then will provided that her estate should devolve to the deceased. Subsequent to his death Mrs. Davoren altered her will on two occasions. In the first will executed after her son's death she provided that her estate should principally pass to her grandson, Michael (i.e., the son of the deceased and the plaintiff). She later altered that will in 2007 to provide that her estate should pass to her daughter, Mrs. Mary O'Regan. This proved to be her last will and testament. The Ballyalben farm subsequently passed to Mrs. O'Regan.

High Court Decision

15. The trial judge determined the amounts recoverable by the plaintiff as damages pursuant to s. 49 of the 1961 Act, under three headings:-

A.	Solatium and funeral expenses		€44,975.79
B.	(i)	Loss of support	€275,000.00
	(ii)	Value of accelerated receipt of estate of the deceased to be deducted	€535,777.00
	(iii)	Net loss of support	Nil
C.	Loss of inheritance of Ballyalben		
	(i)	Loss of income from Ballyalben	€184,271.00
	(ii)	50% of loss of rental income from family home	€50,436.00
	(iii)	Loss of capital value of Ballyalben (Discounted for accelerated receipt)	€1,312,275.00
	Total		€1,546,982.00

16. The trial judge awarded a total amount of damages of €1,591,957.70 being the sum of A and C above. Certain of the above

figures were agreed but their treatment in determining the amount of the damages to be awarded to the dependants is disputed.

17. The trial judge made certain findings of fact and also reached conclusions as to what as a matter of probability would have happened in particular in relation to the Ballyalben farm if the deceased had continued to live. These are considered below.

Appeal
18. There is no appeal against the award at A of €44,975.79. That aggregate amount was awarded pursuant to s. 49(1)(a)(ii) and (b) of the 1961 Act and is not in dispute. The remaining amounts at B and C were awarded pursuant to s. 49(1)(a)(i). The issues on appeal, having regard to the written and oral submissions may be summarised as follows:-

> (i) Is the plaintiff entitled to recover any sum in respect of the loss of inheritance of Ballyalben?
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> (ii) If the plaintiff is so entitled to recover, is she entitled (as was awarded) to 100% of the agreed amounts for loss of income (€184,271.00 and €50,436.00) and capital value of Ballyalben discounted for accelerated receipt (€1,312,275.00); or only a proportion of each to take account of contingencies?
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> (iii) If the plaintiff is entitled to recover any sum in respect of the loss of inheritance of Ballyalben is such sum to be reduced by the amount by which the accelerated receipt of Ballycahill (measured at €535,777.00) exceeds the agreed loss of support of €275,000, i.e., €260,777.00 ?
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> (iv) Was it permissible for the trial judge to measure the use and enjoyment of Ballycahill from the date of death to the date of trial at €98,000.00 and if not what order should now be made on that issue?

Revised Appeal Issues
19. As already noted, the claim with which the Court is concerned on this appeal is a claim by the plaintiff for damages for the benefit of the dependents of the deceased pursuant to ss. 48 and 49 of the 1961 Act. However the High Court judgment and initial submissions, both written and oral of both parties before this Court in relation to the damages to be awarded proceeded, for the most part, upon the basis of the applicability of the standard tort principles of forseeability of loss, remoteness, *novus actus interveniens* and loss of chance with reference to the breach of the duty of care owed by the defendants to the deceased.

20. Subsequent to the oral hearing of the appeal, the Court, following its deliberations, queried whether this was the correct assumption or basis for the determination of the amount of damages. As this had not been in issue in the High Court or, indeed, on appeal, the Court decided that it would be appropriate to give the parties an opportunity, if they wished, to make further submissions as to whether or not the standard tort rules as to foreseeability of loss, remoteness and *novus actus interveniens* and loss of chance apply to the determination by a court of the amount of damages to which the plaintiff on behalf of the dependents of the deceased is entitled pursuant to s. 49 of the 1961 Act. The Court issued a memorandum to the parties to this effect, referring to certain authorities and texts. The parties availed of the opportunity to make further submissions in writing, followed by a short supplementary oral hearing addressed solely to this issue.

21. At the second hearing, following the written submissions of the parties, the approach to the interaction between standard tort principles and the dependants' claim for damages pursuant to ss.48 and 49 of the 1961 Act differed from the earlier submissions. It is now accepted that the correct position is that the dependents must establish, pursuant to s. 48 of the 1961 Act that the deceased would, but for his death, have been able to maintain an action and recover damages against the defendants in respect of the wrongful act which caused his death. If that liability issue is in dispute, then it must be determined in accordance with standard tort and/or contract principles. Once, however, that liability question is admitted or proved, then standard tort or contract principles do not govern the separate issue of either the nature or quantum of the damages which may be recovered by the dependents in accordance with ss. 48 and 49 of the 1961 Act. To put it another way: the dependents are not necessarily either entitled to or limited to the damages which the deceased could have recovered from the defendants. The nature and extent of their damages are governed by s. 49 of the 1961 Act and the relevant case-law relating thereto. Counsel for the appellants submitted that certain of the applicable principles are to similar effect to those which apply in particular to quantification of damages for breach of a duty or a tort. This is considered further below.

22. The proper approach to the award of damages pursuant to s. 49 was considered by the Supreme Court in *Murphy v. Cronin* [1966] I.R. 699, where Kingsmill Moore J. (with whom Ó Dálaigh C.J., Haugh and Walsh JJ. agreed) stated at p. 708:

> "Under s. 49, sub-s. 1(a), of the Civil Liability Act, 1961, the damages (apart from compensation for mental distress) are to be 'the total of such amounts (if any) as the jury or the judge, as the case may be, shall consider proportioned to the injury resulting from the death to each of the dependants, respectively, for whom or on whose behalf the action is brought . . .' This section reproduces s. 4, sub-s. 1, of the Fatal Injuries Act, 1956, and a similar phrasing 'damages . . . . proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought' was used in the Fatal Accidents Act, 1846, commonly known as Lord Campbell's Act.
>
> The general principles governing the award of damages under these words have been laid down in numerous decisions and were recently considered by this Court in *Byrne v. Houlihan*. What has to be ascertained as accurately as possible is the net pecuniary loss incurred by the dependants in consequence of the death of the deceased. In arriving at the sum the loss of a 'reasonable expectation of pecuniary benefit . . . . from the continuance of the life' must be taken into account as well as the pecuniary benefit which can be demonstrated to have been lost: *Franklin v. South Eastern Railway Co.*; *Dalton v. South Eastern Railway; Pym v. Great Northern Railway Company*. But 'the damages . . . . must take into account any pecuniary benefit accruing to that dependant in consequences of the death of the deceased. It is the net loss on balance which constitutes the measure of damages' - *Davis v. Powell Duffryn Associated Collieries Ltd*. A reasonable possibility of benefit accruing from the death must also be taken into account in reduction of damages. *Byrne v. Houlihan*."

23. In O'Sullivan v. C.I.E. [1978] I.R. 409, Murnaghan J. in the High Court relied upon the above passages from *Murphy v. Cronin.* In the Supreme Court Griffin J. delivered the only judgment (with whom Henchy and Parke JJ. agreed) upholding the decision in the High Court. Having referred to the terms of s. 49(1)(a) (in relation to a future loss) Griffin J. put the matter thus at p. 421:

> "Accordingly, the damages are to be based on the reasonable expectation of pecuniary benefit or other benefit which can be reduced to a monetary value."

24. Counsel for the appellants submitted that a court in deciding a claim for damages pursuant to s. 49(1)(a) based upon a reasonable expectation of pecuniary benefit must address two separate questions identified in particular by the judgment of Meredith J. in *Horgan v. Buckley* [1938] I.R. 115. First, the court must decide if the plaintiff has established a reasonable expectation of a pecuniary benefit of which the dependants have been deprived by the death. The requirement of a "reasonable" expectation means that it must not be merely speculative. Second, if a court on the evidence is satisfied such a lost reasonable expectation of a pecuniary benefit is proved then it must value the lost benefit taking into account all relevant contingencies and chances. Counsel further submitted that where there are multiple contingencies the Court must consider whether they are such that the claim is pressed to extinction and, if not must discount the value by reference to the multiple chances or contingencies.

25. *Horgan v. Buckley* was an appeal from a jury award under the Fatal Accidents Act 1846, in respect of which pursuant to authority the damages were also to be calculated by reference to the reasonable expectation "of pecuniary benefit . . . if the life continued." The Supreme Court held that there was evidence on which the jury was entitled to assess damages, but that the award of damages should be set aside as excessive and a new trial directed on the issues of damages.

26. In one of the two judgments delivered, Meredith J. having considered the evidence stated at p. 138:

> "To my mind there was unquestionably in the present case the initial basis of fact necessary to justify the jury arriving at the conclusion that, had the life of the deceased not been cut short by the accident, a future state of affairs was reasonably to be expected from which the respective parties might reasonably anticipate a pecuniary advantage of which they have been deprived by the death."

Later at p. 139 he continued:

> "The next question is: once a loss reasonably to be anticipated is shown, what evidence is to be required to entitle a jury to value the prospects? . . . the evidence required cannot be more than that of which the case from its nature admits. In a valuation of prospects that depends on an estimate of probabilities the knowledge and experience of the jury must frequently be allowed to furnish the basis of assessment that could only be adequately supplied by statistics that are not procurable, and which, if procurable, would only give a general average which the jury might think was misleading in the particular case."

Having considered further the evidence at p. 140 he continued:

> "Lastly, there is the question of the amount of damages awarded. For myself I do not regard the amount as so excessive as to indicate perversity, but, . . . I find no real doubt in my mind that the jury treated what were only reasonable expectations as if they were moral certainties and so acted on a wrong principle."

27. By reason of that wrong principle he concurred that there should be a new trial on the question of damages.

28. The above approach is applicable to the determination of damages to be awarded pursuant to s. 49. The Court must address two separate questions on the facts. First, whether the plaintiff has established a loss, of a reasonable (not merely speculative) expectation of pecuniary benefit if the life had continued. This must be decided on the balance of probabilities. Second, if satisfied such a loss is established it must then assess the quantum of such loss. In assessing or computing the amount of the loss, the Court must take into account the contingencies relevant to the expectation of the particular pecuniary benefit. Depending on the nature of the losses claimed, it may require to approach the losses alleged to have occurred prior to date of trial and capable of proof on a balance of probabilities on the one hand and future losses dependant on multiple contingencies on the other in a different manner

29. These are the principles which the Court must apply to the appeal against the amounts awarded by the trial judge to the plaintiff on behalf of the dependents in respect of losses of income from the Ballyalben farm if it was inherited by the deceased and capital loss of inheritance by the plaintiff and dependents of the Ballyalben farm if the deceased had continued to live, inherited from his mother and died thereafter.

30. Prior to turning to this there is one other question of principle to which the Court wishes to draw attention. The Court in considering the authorities in relation to the assessment of damages pursuant to ss. 48 and 49 has noted certain references to a requirement deriving from the express words of s. 49(1)(a) of the 1961 Act to consider the loss of each dependent on whose behalf the claim is brought. In this case, both in the High Court and on appeal, the claim of the dependents was considered and dealt with collectively. The Court is aware that this approach accords with current practice and is done in many fatal claims. There are, in many instances, practical difficulties in doing otherwise. The Court however, wishes to make clear that it is not expressing any view as to whether or not such an approach is in compliance with the statute.

Loss of inheritance of Ballyalben

31. The findings of fact made by the trial judge in relation to the Ballyalben farm and the inferences drawn from the evidence and facts found as to what would have occurred as a matter of probability if Michael Davoren had not died in 2003 are not disputed on appeal. It is rather the legal treatment of both the findings of fact and inferences drawn.

32. The background facts and relevant evidence are already set out. The inferences drawn and conclusions reached by the trial judge on the facts and evidence are summarised in paras. 33 and 34 of his judgment:-

> "33. As a consequence of the wrongful death of the deceased, it is highly probable to the point of certainty that Michael Davoren, 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 Davoren to Michael Davoren, deceased, is a loss to the dependents of the deceased, Michael Davoren."

33. The trial judge awarded three separate sums claimed in respect of loss suffered by the dependants in respect of the loss of inheritance by the deceased of Ballyalben from his mother if his life had continued. The first two losses relate to a pecuniary benefit of which the dependants, or some of them, had a reasonable expectation during the continued life of the deceased after inheritance from his mother. The third was the capital loss of an inheritance, in turn, of Ballyalben from the deceased.

34. The trial judge allowed a sum of €184,271 which was the agreed amount of the loss of the dependants from an increased income

of the deceased from the Ballyalben farm after he inherited same from his mother. The evidence was that during his lifetime he was working the farm with his mother, but not receiving any income therefrom.

35. The trial judge concluded that if the deceased had not died in 2003, he would in 2009 have inherited Ballyalben from his mother. On the facts, the trial judge found this to be highly probable to "the point of certainty". He based that principally upon the evidence given of the working history of the deceased, his age, normal life expectancy, relationship with his mother and his mother's will in his favour in 2013. The agreed income figure presumably was up to the date of trial when the claim for the capital loss was crystallised.

36. On those facts the trial judge was correct in concluding that the plaintiff had a reasonable expectation of a pecuniary benefit, flowing from an increased income of the deceased following his inheritance of the Ballyalben farm on his mother's death if he had continued to live. The remaining question is whether or not the trial judge was correct in awarding the total of the agreed amount or whether he should have made a deduction by reason of relevant contingencies.

37. Whilst it is clear from the authorities referred to above that a court must take into account reasonable contingencies in valuing losses suffered by the dependants, nevertheless, where on the facts a judge forms the view that the facts which underlie the claim to the pecuniary benefit which the dependents would have received if the deceased had continued to live are such that he justifiably concludes that they would occur as a matter of "virtual certainty", it remains open to the trial judge to value the lost reasonable expectation of a pecuniary benefit at 100% of its monetary value. A trial judge is not obliged to discount by reason of purely speculative contingencies. On the facts of this case for the reasons given by the trial judge, he was justified in reaching a conclusion that as a matter of virtual certainty the deceased, if he continued to live, would have inherited Ballyalben from his mother in 2009 and was entitled to award 100% of the agreed value of loss flowing from the increased income the deceased would have then enjoyed.

38. Second, the trial judge awarded €50,436.00 being 50% of loss of rental income from the family home of the plaintiff and Michael Davoren. The Court was informed that this figure was agreed upon the basis that if Michael Davoren had lived and inherited Ballyalben, then he and the plaintiff would have moved into his mother's prior home on Ballyalben and that for a period of approximately ten years they might have rented out the current family home until such time as it was needed by probably their son Michael. Again, for the reasons already stated, and given the limited period of time and the fact that a 50% discount was already applied to the total loss of rental income this appears to be a figure which did not require to be further discounted.

39. The third award was the value of the loss of inheritance by the dependents if the deceased had continued to live, inherited Ballyalben from his mother in 2009 and died thereafter. Different considerations apply to this award. There is no dispute that €1,312,275 was the capital value at the date of trial of Ballyalben discounted for accelerated receipt by the dependents. Counsel for the appellants, even at the second oral hearing submitted that, in accordance with the principles relating to computation of losses to which contingencies or chances are relevant, where, as in this instance, there are a number of contingencies, the court should first conclude that the contingencies are such that they press to extinction the plaintiff's reasonable expectation of a pecuniary benefit in relation to a potential inheritance by the dependents of the Ballyalben farm if the deceased had continued to live after 2003.

40. The Court does not accept that submission on the facts herein. Whilst it accepts that there a number of contingencies which ought to be taken into account and which should be reflected in a proportionate reduction of the full agreed capital value (already discounted for accelerated receipt) the contingencies are nevertheless not such as to press to extinction the plaintiff's reasonable expectation of a pecuniary benefit flowing from an inheritance by the deceased of the Ballyalben farm if he had continued to live after 2003.

41. As was pointed out by Kingsmill Moore J. in *Murphy v. Cronin,* in considering whether or not the loss is one consequential on the death of the deceased consideration must be given to a "reasonable expectation of pecuniary benefit . . . from the continuance of the life". The trial judge on the facts and evidence before him reached a conclusion that it was "highly probable to the point of certainty" that the deceased (presumably if he continued to live) would have inherited his mother's estate and that as a matter "of high probability" in due course pass 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.

42. The appellants did not challenge his findings as to the probable inheritance by the plaintiff and the other dependents of the Ballyalben farm if the deceased had not died before his mother. The evidence was that the deceased otherwise had a normal life expectancy and, accordingly, as a matter of probability would have outlived his mother. Further, the trial judge considered each of the contingencies referred to by counsel for the defendants but on the facts and for reasons stated concluded that he was "quite satisfied that the dependents of the deceased would, as a matter of probability, have succeeded to the estate of Maura Davoren were it not for the wrongful death of the deceased".

43. On those findings the trial judge was correct in deciding that the dependents of the deceased suffered a loss of a reasonable expectation of a pecuniary benefit in the form of an inheritance of the Ballyalben farm following the deaths of both the deceased and his mother by reason of the premature wrongful death of the deceased.

44. The Court accordingly upholds the decision of the trial judge that as a matter of principle the dependents were entitled to recover damages in respect of the pecuniary loss suffered by them in relation to their loss of inheritance of the Ballyalben farm.

45. The next issue therefore is the quantification of the amount of damages to be awarded in respect the loss of capital value of the inheritance by the dependants of Ballyalben from the deceased if he had continued to live until after his mother's death. There is now no dispute that €1,312,275 is the appropriate amount at the date of trial for the value of Ballyalben discounted for accelerated receipt by the dependents. Counsel for the appellants submits that the trial judge erred in failing to apply any discount by reason of the contingencies.

46. Submissions were made to the trial judge as to the need to discount. Whilst in part they were erroneously based upon claims in tort for damages for a lost chance which it is now accepted do not apply, nevertheless submissions were also made as to the need to discount by reason of contingencies. The trial judge accepted as a matter of principle that discounts should be made where a loss is dependent upon multiple contingencies or future chances. However, having considered the facts relating to the three principal contingencies identified (i) that Michael Davoren would inherit Ballyalben from his mother; (ii) that Michael Davoren would preserve Ballyalben intact during his lifetime and (iii) that the plaintiff and her children would inherit Ballyalben from Michael Davoren if he had survived his normal life expectancy. The trial judge concluded at para. 56 of his judgment:-

> "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 Davoren 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 Davoren were it not for the wrongful death of the deceased Michael Davoren."

47. As already stated, counsel for the appellants does not dispute on appeal the conclusion reached by the trial judge that as a matter of probability the plaintiff and her children would have succeeded to the estate of Maura Davoren were it not for the wrongful death of Michael Davoren. However, he submits that the trial judge fell into error in determining that once he concluded that such would occur as a matter of probability it followed that the amount of the loss to be awarded should be 100% of the discounted capital value and other income.

48. Counsel for the appellants submits that on the findings and inferences drawn by the trial judge whilst he has concluded that the dependents would inherit as a matter of probability, nevertheless it is only as a matter of probability and not certainty and that there are contingencies which should be taken into account and in respect of which a discount should be applied. He relied upon the approach already referred to in *Horgan v Buckley* and also by analogy with the approach of the courts to the quantification of future loss of earnings in accordance with the principle in *Reddy v. Bates* [1983] I.R. 141. Such an approach to a claim under s. 49 is warranted by the terms of the section itself. The court must compensate by awarding the amount it considers "proportioned" to the injury or loss resulting from the death.

49. It appears correct in principle that where, as in this case, the trial court is satisfied as a matter of probability that the dependents have been deprived of a pecuniary benefit by reason of the wrongful death of the deceased, the future receipt of such would have been dependent upon a number of contingencies, which cannot be considered as purely speculative, the court should ask itself the question and determine whether or not it is appropriate to make a discount from the full value of the loss in order to take account of these contingencies. Whether a court should or should not make a discount would appear to depend upon the facts, as would the appropriate amount of any discount. The court should not treat as a certainty matters which, although probable or even highly probable, are nevertheless dependant on contingencies which are not merely speculative.

50. On the facts and evidence of this case and the findings and inferences drawn by the trial judge the Court has concluded that a discount of 25% ought to have been applied to the full accelerated value. The trial judge concluded that as a "virtual certainty" Michael Davoren would have inherited Ballyalben from his mother. That step in the inheritance link does not, for the reasons already given, require any discount to be applied. If, however, he had survived, Michael Davoren would have been 52 years old when his mother died. The evidence that he would have continued during his lifetime working the Ballyalben farm upon which he was brought up is admittedly strong. There are, nevertheless, uncertainties created by the normal vicissitudes of life and farming such that one could not objectively form the view that, as a matter of certainty, he would have preserved the entire of the Ballyalben farm intact up to the date of his death. Similarly, whilst again there was evidence in favour of the farm being kept within the family and being left to his wife and children, nevertheless given the young ages of the children and evidence to the effect that none of them had to date shown a particular interest in farming the inheritance by them of the entire farm could not be considered a certainty. The trial judge took the view that it would occur as a matter of probability.

51. The Court has considered the submission that the discount to be applied to each contingency should be separately determined. However, it does not appear that such approach is mandatory. Each relevant contingency must be taken in to account, but it is not possible mathematically to determine the discount or the reduction to be applied. Hence, it appears open to the court having taken into account the multiple contingencies to determine the overall discount or reduction to be applied. The discount to be applied in any case is dependant on the facts and assessment to be made by a court of the relative strengths of the contingencies and cannot be reduced to a mathematical formula. There may be cases where it would be appropriate to identify discounts to be applied to separate contingencies before reaching the overall discount but this does not appear to be such a case.

52. The Court has concluded that the amount which ought to have been awarded by the trial judge in respect of the capital loss of inheritance should be €984,206.25 (75% of €1,312,275)

Deduction of benefits

53. In *O'Sullivan v. C.I.E.* [1978] I.R. 409, the Supreme Court considered as well settled that assets of the deceased which passed to the dependents must be taken into account in determining the amount of damages to be awarded pursuant to s. 49(1)(a)(i) of the 1961 Act. The trial judge applied this principle to the claim for loss of support of €275,000.00 and as he valued it the accelerated receipt of the estate of the deceased (principally the Ballycahill farm) at €535,777.00. He did not, however, deduct the remaining value of the inheritance from the estate of the deceased from the damages he proposed awarding in respect of the loss of inheritance of the Ballyalben farm. He appears to have taken the view that an appropriate deduction had already been taken into account insofar as the agreed figure of €1,312,275.00 was the discounted value of the Ballyalben farm inheritance. It is, however, accepted on behalf of the plaintiff that the discounted value of the Ballyalben inheritance is a discount only to take account of the accelerated receipt.

54. The Court has concluded that the trial judge was in legal error in not deducting the total benefits received by the dependents from the estate of the deceased, i.e., on his value €535,777.00 from the total amount of the damages he proposed awarding under s. 49(1)(a)(i) of the 1961 Act, in respect of loss of dependency. This latter amount was the aggregate of the loss of support of €275,000.00 and his total award of €1,546,982.00 in respect of the loss of inheritance of Ballyalben. The decision of the Supreme Court in *O'Sullivan v. C.I.E.* makes clear that what the dependents are entitled to recover as loss of dependency under s. 49(1)(a)(i) of the 1961 Act is the net loss to them caused by the death of the deceased. Accordingly, in assessing that loss, all assets of the deceased which passed to the dependents upon his death must be taken into account for this purpose, save insofar as they are excluded expressly by s. 50 of the Act of 1961.

Value of Benefits received at date of trial

55. In the High Court the defendants had contended that as at the 23rd July, 2010, (which appears to have been accepted as the date to be used for the value to be determined at the hearing in the High Court) the appropriate capital value of the accelerated receipt of the estate of the deceased was €757,905. This was arrived at by considering the value of the net deductable assets in the estate as of the date of death, the plaintiffs two third entitlement and the application of a factor of 0.56 (by reference to her age) which gave a figure of €424,577.00 as the capital value of the accelerated benefit as of the date of death of Michael Davoren. There is and was no dispute in relation to that figure. What appears to have been partly in dispute in the High Court - albeit that the plaintiffs actually recognised that the defendants' approach was standard practice - was the manner in which the defendants' actuary proposed that the date of death figure be increased to reflect the fact that the plaintiff had the use and enjoyment of the Ballycahill farm since the date of date of the deceased up until the 23rd July, 2010.

56. The defendants' actuary increased the figure of €437,777 by the addition of 8% compound interest for the period from the date of death to the 23rd July, 2010. The evidence was that 8% was taken from the Courts Act interest and it was standard practice to use

this figure and also to compound the interest.

57. The plaintiff's actuary, whilst accepting that it was standard practice amongst actuaries to increase a date of death value to a date of trial value in this manner to reflect use and enjoyment in the intervening period, also gave evidence that the income from the Ballycahill farm in the intervening period was an amount of €100,000.00. He had done that, it would appear, in a context where he was contending that this was the only amount which should be deducted from the financial loss and not the accelerated capital value of the inheritance. The trial judge also had evidence of the profit derived from the Ballycahill farm in the years 2004 to 2008 respectively.

58. The trial judge rejected the approach of the actuaries in increasing the date of death value by 8% compound interest to the date of trial. He did so on the basis that "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".

59. The trial judge then considered the individual figures he had for profits earned in years 2004 to 2008 and excluding two years which had both a very high and very low profit, and determined that an average annual profit was €12,924.00. He then concluded that in the absence of any evidence of any increase in the value of land over the period a fair measure of the benefit derived from the land during the period was the profit derived from the land. He took an average of €14,000.00 based upon the figures he had, which gave an aggregate for the seven years of €98,000.00. In the part of his judgment dealing with this he does not make reference again to what he had earlier recorded as being the evidence of Mr. Byrne, the actuary for the plaintiff, of the aggregate income or €100,000.00. However as appears the two figures are almost identical.

60. Counsel for the appellant submits that it was never put to the defendants in the High Court that the trial judge was proposing to approach the increase in the value from date of death to date of trial in this manner. He submits that there was a lack of fair procedures and that they should have been given an opportunity of making submissions on such an approach. However, in doing so he does not seek to defend the application of 8% compound interest as being appropriate. The trial judge was in the Court's view correct in determining that it was not an appropriate or reasonable manner in which to reflect the benefit which the plaintiff had obtained from the use and enjoyment of these lands from 2003 to 2010. Further, the appellants have not made any sustainable submission against the reasonableness of the approach of the trial judge.

61. It is not disputed that the trial judge had the evidence of Mr. Byrne and the individual profit figures for five years. It is not suggested that there was evidence of any significant increase in the value of these lands between 2003 and the date of trial. Whilst recognising that it would have been preferable that the defendants had an opportunity of considering and making submissions on the proposed approach of the trial judge, it does not appear on the facts of this case that there was any injustice to the defendants in the figure used by the trial judge. It could not be justified on those facts to allow the appeal against this figure when the appellants submit that the only order which the Court could make if it allowed the appeal on that ground would be to remit the matter now to the High Court. It is desirable that there be finality in this litigation relating to the death of Michael Davoren in 2003.

Conclusion

62. Accordingly, the Court will allow the appeal in part and will vary the total amount of damages awarded by the trial judge to a figure of €1,003,112.04 made up as follows:-

A.	Solatium and funeral expenses (agreed)	€44,975.79
B.	Loss of support (agreed)	€275,000.00
C.	Loss of inheritance of Ballyalben	
	(a) Loss of income from Ballyalben	€184,271.00
	(b) 50% of loss of rental income from family home	€50,436.00
	(c) Loss of capital value of Ballyalben	€984,206.25
Total B + C		€1,493,913.25
Less value of accelerated receipt of estate of the deceased to be deducted		€535,777.00
		€958,136.25
Total		€1,003,112.04

63. The Court has noted from the order of the High Court of 11th January 2012 that a payment on account of €750,000.00 was ordered and apportioned amongst the dependents by the trial judge. The Court will hear counsel as to whether this Court should apportion the balance of the sum now awarded or remit that issue to the High Court.