The widow's portion

HB Klopper
BA LLD
Professor in the Department of Mercantile Law, University of Pretoria
Practising Attorney

OPSOMMING

Die weduwee se deel

Wanneer skadevergoeding vir die verlies van onderhoud weens die onregmatige en skuldige dood van 'n broodwinner beraam word, is daar verskeie faktore wat in ag geneem moet word, onder andere daardie gedeelte van die inkomste wat die oorledene aan die onderhoud van sy afhanklikes bestee het. Hierdie gedeeltes word deur ons howe in breukdele uitgedruk en het so gevestig geraak dat sulke toedelings amper as regsbeginsels beskou word. Dit laat die vraag ontstaan: watter rol speel die geykte toedelings van inkomste? Is dit reël of riglyn? Is die 50% toedeling altyd toepaslik in geval van 'n oorlewende weduwee of wewenaar sonder eie inkomste en enige afhanklike kinders? Hierdie vrae kan aan die hand van drie ondersoeke beantwoord word, naamlik deur eerstens die begrip "onderhoud" te ontleed, tweedens te bepaal of die toedelings reëls of riglyne is en laastens of die toedeling in geval van 'n oorlewende gade sonder eie inkomste en enige afhanklike kinders altyd 50% moet wees.

'n Ontleding van die regsbegrip "onderhoud" in die familie- en deliktereg toon aan dat alhoewel die deliktereg die familieregtelike onderhoudsbegrip as 'n beginsel vir 'n eis vir verlies aan onderhoud gebruik, die delikteregbegrip veel wyer is en alle nadeel insluit wat 'n afhanklike as gevolg van die dood van sy broodwinner ly. Dit is nie net tot basiese lewensbehoeftes beperk nie.

Uit 'n ontleding van die regspraak oor toedeling word dit duidelik dat die breukdele wat gebruik word, bloot 'n metode is wat die howe gebruik om 'n ingewikkelde probleem op te los. Dit het skynbaar sy oorsprong in aktuariële aannames wat die howe gebruik om redelike en billike beramings van verlies aan onderhoud aan individuele afhanklikes te maak. 'n Oorsig van die Engelse, Kanadese en Australiese reg toon dat die proporsionele gedeeltes in hierdie jurisdiksies hoër is as in Suid-Afrika. In geval van 'n oorlewende gade met geen eie inkomste en kinders of onafhanklike kinders nie word 66.6% aan die oorlewende gade toegeken. Uiteindelik is die breukdele nie onveranderlikes nie, maar toedelings wat in die uitoefening van die wye diskresie van die howe by die beraming van skadevergoeding gedoen word om 'n redelike en billike resultaat op die feite en in die omstandighede van 'n bepaalde saak te bereik. Daar is niks wat 'n hof verhoed om in geval van 'n oorlewende gade sonder eie inkomste en kinders of afhanklike kinders 'n hoër toekenning as 50% te maak nie. By die oorweging van die toedeling is dit op die spoor van oorsese voorbeeld verkieslik dat daardie deel wat die oorledene uitsluitlik op homself uitgegee het eers bepaal word. Dit kan ook die probleme ten aansien van onveranderlike gemeenskaplike huishoudelike uitgawes uitskakel. Wanneer hierdie gedeelte bepaal word, kan oorsese riglyne aangewend word. Die gedeelte wat oorbly, is waarskynlik (onderworpe aan die feite van elke geval) daardie gedeelte wat die oorledene aan sy afhanklikes bestee het. Die eiser het 'n plig om voldoende feite voor die hof te lê ten einde die hof in staat te stel om in die lig daarvan 'n toekenning te maak wat hy onder die omstandighede as redelik en billik beskou. 'n Eiser loop die gevaar van die toepassing van die geykte breukdeelverdeling as hy nie aan hierdie plig voldoen nie omdat die bestaande breukdeelverdelings die enigste wyse is waarop 'n hof in die afwesigheid van die nodige

feite 'n beraming kan doen. Eisers en in die besonder weduwees (ook wewenaars) sonder eie inkomste en kinders of met onafhanklike kinders moet sodanige feite voorlê om die hof in staat te stel om 'n korrekte beraming van hulle skade te kan maak anders sal hulle hul regmatige deel verloor.

1 INTRODUCTION

Where damages for the loss of maintenance of a deceased breadwinner's dependants are assessed, the following facts are taken into account:

- the period during which the deceased breadwinner would have had a duty to maintain the particular plaintiff;
- the income of the deceased or breadwinner taking into account the effects of inflation;
- the *pro rata* share of the deceased breadwinner's income which he allocated to the support of the particular plaintiff;
- amounts that accrued to the plaintiff as a result of the breadwinner's death;
- the personal appearance, health or age of the breadwinner's spouse in order to determine the chances of remarriage;
- the income of the spouse in relation to the claims of dependent children;
- the age and personal appearance of nubile children in order to determine the chances of marriage;
- particulars of the growth potential of the deceased's estate in order to determine the potential inheritance of his heirs;
- the social status of the deceased;
- other relevant factors that may have an influence on the assessment.[1]

In cases where the *pro rata* share spent by the deceased from his income on the support of the plaintiff has to be determined, the deceased's available income is generally apportioned between the deceased, his surviving spouse and the deceased's dependent children.[2] In determining the appropriate apportionment the following factors apply:

- the relationship between the deceased and the plaintiff;[3]
- the amount spent by the deceased on the support of the plaintiff prior to the deceased's death;[4]
- the needs of the deceased and the plaintiff;[5]

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1 See Corbett and Buchanan *The quantum of damages in bodily and fatal injury cases* Vol I (1985) (C and B I) 85–87; Davel *Die dood van 'n broodwinner as skadevergoedingsoorsaak* (LLD thesis UP 1984) (*Broodwinner*) 519ff; Davel *Skadevergoeding aan afhanklikes* (*Afhanklikes*) (1987) 100–104; Visser and Potgieter *Law of damages* (1993) 377; Klopper *Law of third party compensation* (2000) 193.

2 See C and B I 87–88; Davel *Afhanklikes* 109–112; Koch *Damages for lost income* (1984) 192ff; Klopper 199; *Legal Insurance v Botes* 1963 1 SA 608 (A).

3 *Legal Insurance* (fn 2).

4 *Jameson's Minors v CSAR* 1908 TS 575; *Hulley v Cox* 1923 AD 234; *Smart v SAR & H* 1928 NPD 361; *Trimel v Williams* 1952 3 SA 786 (C); *Nochomowitz v Santam Insurance* 1972 3 SA 640 (A); *Milns v Protea Insurance* 1978 3 SA 1006 (C).

5 *Legal Insurance* (fn 2); *Milns* (fn 4).

- circumstances that may have an influence on the allocation of income by the deceased;[6]
- the amount utilised by the deceased for his own upkeep;[7] and
- the income of the surviving spouse and his or her contribution to the joint household.[8]

In the case where a deceased breadwinner is survived by only his spouse (there are no children or all the children born from their marriage are self-sufficient) and the spouse has no independent income, the proportion spent by the deceased on the support of his spouse is usually taken at fifty percent.[9] The principle of the proportional allocation of the deceased's income has become trite law – possibly even to the extent that the proportions usually allocated are in practice almost accepted as immutable rules of law rather than guides used by the courts to assess this type of damage *ex aequo et bono*. This raises the question: what is the exact role and function of apportionment of income in the assessment process? Is it a guide or is it a rule of law? This question can best be answered by dealing with the following topics:

- The nature and extent of the damages suffered by a dependant as a result of the loss of his or her breadwinner.
- Apportionment of income: Rule or guide?
- Apportionment of income in respect of a surviving spouse as a sole dependant: Is the apportionment of fifty percent always applicable, appropriate and currently still justifiable?

2 NATURE AND EXTENT OF DAMAGES SUFFERED RESULTING FROM DEATH OF BREADWINNER

2 1 Introduction

A fundamental principle in the assessment of damages is to place the plaintiff in the same position as he or she was prior to the commission of an unlawful and negligent or intentional act. This is simultaneously the function of any award of damages.[10] It follows that if an assessment is done on a basis which negates this fundamental principle, such assessment is potentially flawed, inequitable and unjustifiable.[11] It is therefore important to de-limit the damages recoverable in the case of the untimely demise of a breadwinner.

In this respect the notion may arise that the loss occasioned by such demise is limited to what is commonly understood to be maintenance or support. In this regard, maintenance or support is capable of two interpretations:

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6 *Peri-Urban Areas Health Board v Munarin* 1965 3 SA 367 (A).
7 *Boonzaaier v Provincial Insurance* C and B I 87.
8 *Milns* (fn 4).
9 *Ibid.* By implication this means that the deceased spent 50% of his available income on himself and 50% on his wife.
10 See Visser and Potgieter 147.
11 See C and B I 5; Visser *Kompensasie en genoegdoening volgens die aksie weens pyn en lyding* (LLD thesis Unisa 1980) 328–332 en "Kompensasie vir nie-vermoënskade" 1983 *THRHR* 43ff; Klopper 144; *Collins v Administrator, Cape* 1995 4 SA 83 (C); *Geldenhuys v SAR & H* 1964 2 SA 230 (C); *Parity v Hill* C and B I 680; *Marine & Trade v Katz* 1979 4 SA 961 (A) 983 and esp *Southern Insurance v Bailey*1984 1 SA 98 (A) 118ff.

- an interpretation that accords with the coinciding concept within family law; and
- an interpretation that ranges further than the foregoing to include all negative consequences that stem from the death of the plaintiff's bread-winner, whether patrimonial in nature or not.

2 2 Family law concept

The family law concept of support or maintenance relates to the relationship of family members who reciprocally or otherwise owe a duty to support. It is the actual content of the duty which is of interest. In *Oosthuizen v Stanley*[12] the court, with reference to Roman-Dutch authority, characterised support as including the following: food; clothing; accommodation; medical care; education; and even payment of legal fees and bail.[13]

As far as husband and wife are concerned, the reciprocal duty of support includes accommodation; food; clothes; medical and dental services; and all other reasonable needs.[14]

The extent of this duty is determined with reference to social position, financial means and style of living of the spouses[15] and is not limited to necessities in the strict sense of the word.[16]

In view of the preceding elements indicating the content of the duty of support, it can be said that the family law concept of support essentially reflects the *inter partes* legal relationship between family members who owe and are owed a legal duty of support, and in essence encompasses the basic necessities of life in the case of children and their parents[17] and the further elements referred to above in relation to husband and wife.[18] This view of the duty to support is clearly limited in scope and if unconditionally accepted as a true reflection of the content of "support" for purposes of a delictual claim for loss of support, has the potential of restricting recoverable damages. This is the case because the law of delict, although utilising the duty to support as its premise for a claim for damages based on loss of support, [19] seeks to effect restitution to a position prior to the commission of the delict.[20] This fundamental principle of the law of delict seems

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12 1938 AD 322. This case dealt with the question of whether there was a duty on a child to maintain his or her parent, and not with an action for loss of maintenance.

13 *Caldwell v Erasmus* 1952 4 SA 43 (T) 45.

14 See Hahlo *The South African law of husband and wife* (1985) 135; *Oberholzer v Oberholzer* 1947 3 SA 294 (O) 298; *Hartman v Krogscheepers* 1950 4 SA 421 (W); *Judaiken v Judaiken* 1978 1 SA 784 (W) 789 (C); *Coetzee v Higgins* 1887 5 EDC 352; *Mason v Bernstein* 1897 14 SC 504; *Brudo v Chamberlain* 1912 CPD 131; *Gammon v McClure* 1925 CPD 137; *Ex Parte Hugo* 1960 1 SA 773 (T).

15 See *Gammon v McClure* (fn 14); *Shanahan v Shanahan* 1907 28 NLR 15; *Oberholzer* (fn 14); *Schuurman-Stekhoven v Schuurman-Stekhoven* 1951 1 PH B1 (C).

16 Hahlo 135; *Young v Coleman* 1956 4 SA 213 (D).

17 See also in this respect *Van Vuuren v Sam* 1972 2 SA 633 (A) 642 643F.

18 See fn 14.

19 See *Steenkamp v Juriaanse; Union Government v Warneke* 1911 AD 688; *Young v Hutton* 1918 WLD 90; *Waterson v Maybery* 1934 TPD 210; *Oosthuizen* (fn 12); *Gildenhuys v Transvaal Hindu Educational Council* 1938 WLD 260; *Glaser v Millward* 1949 2 SA 853 (W); *Vaughan v Santam* 1954 3 SA 667 (C); *Santam v Fondo* 1960 2 467 (A); *Evins v Shield; Santam v Henery* 1999 3 SA 421 (SCA); *Amod v MMF* 1999 4 SA 1319 (SCA).

20 See fn 11.

to predicate a somewhat wider and more liberal approach to the concept of "support". In order to be able to fulfil the restitutory function of damages within the law of delict one may be compelled to include "losses" other than those indicated by the content of support as found in family law.[21]

2 3 Delictual concept

From the analysis of the concept of "support or maintenance" within family law, it is apparent that the adoption of the limited understanding of this concept may lead to potential prejudice. An analysis of the approach in the law of delict to this concept is required to determine whether the family law concept is valid and applicable when dealing with a claim based on the unlawful and negligent killing of a breadwinner.

From the case law it appears that the concept of loss of maintenance or support is ostensibly wider than that found in family law. The latter concept in essence only relates to the basic necessities of life. In *Jameson's Minors v CSAR*[22] the court said the following in relation to damages for loss of maintenance:

> "There only remains the question of damages, and it is one of the most difficult points in this case. The general principles which should guide us are plain. I need only refer to Voet, who lays down the rule very clearly. He says (9,2,11): 'According to the modern practice the scope of the action' . . . that is, an action by the widow or children of a man who has been killed through the default of another . . . 'has been extended, in as far as it is now allowed to the wife and children of any husband or father killed through another's default, for such damages as the equity of the judge will determine, account being taken of the maintenance which the deceased would have been able to supply, and had usually supplied, out of his labour, to the wife and children, or to other near relatives.' *I do not think that Voet intended to restrict, or that we should restrict the word 'maintenance'* . . . victus *. . . to the supply of mere necessities of life. It must include all the material advantages, conveniences, comfort, support, which the father would have afforded the claimants, but for his death. The language used shows that the Court must pay regard to what the deceased had been used to supply in the past – that is, to the station in life of the parties, and the comforts, conveniences and advantages which they had been accustomed*."[23]

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21 Including such matters such as loss of status, loss of potential inheritance and other benefits enjoyed by dependants by virtue of their association with the deceased. See in this respect Newman and Mc Quoid-Mason *Lee and Honoré's The South African law of obligations* (1978) 278; Anders "Damages for human life" 1909 *SALJ* 214. See also *Legal Insurance* (fn 2) 614: "The Roman-Dutch jurists felt that this could be accommodated within the extended framework of the Roman Aquilian action by means of an *utilis actio*. The remedy has continued its evolution in South Africa – particularly during the course of this century – through judicial pronouncements, including judgments of this Court, and it has kept abreast of times in regard to such matters as benefits from insurance policies. The remedy relates to material loss 'caused to the dependants of the deceased man by his death'. It aims at placing them in as good a position, as regards maintenance, as they would have been in if the deceased had not been killed. To this end material losses as well as benefits and prospects must be considered. The remedy has been described as anomalous, peculiar, and *sui generis* – but is effective. In assessing the compensation the trial judge has a large discretion to award what under the circumstances he considers right."

22 (Fn 4) 602.

23 My emphasis.

This interpretation was seemingly not accepted in *Van Vuuren v Sam*.[24] In this case the mother of a seventeen-year-old boy (born from a previous marriage) claimed damages for loss of support after her son died as a result of the unlawful and negligent act of the defendant (respondent). In order to succeed the plaintiff (appellant) was called upon to prove that her son was unlawfully and negligently killed by the defendant; and that the deceased son contributed to her support because he was legally obliged to do so. The deceased was employed and received a salary of R250 per month. The plaintiff's husband was clearly in financial difficulties to the extent that he was hard-pressed to maintain his family of which the plaintiff was a member. The deceased during his lifetime gave some of his salary to his mother. According to the evidence it was not proven what the exact amount was. The plaintiff's entire case was based on the fact that her deceased son had a duty to support her. According to the principles of family law, parents are owed a duty of support by their children only if they can show that they are indigent and incapable of providing for themselves.[25] It is in order to determine whether the plaintiff was in fact indigent and consequently was owed a duty of support, that the court was compelled to determine in what respects the plaintiff should be indigent. The question therefore was not what the plaintiff had lost in the form of support, but what should she lack in order to be found indigent so that the duty of her deceased son to support her could be established. In order to establish whether the plaintiff was lacking in basic needs, the court was compelled to investigate the measure which has to be applied in order for the support duty of a child to exist. In arriving at a decision that such duty did not exist, the court held that a parent is not entitled to support on the basis that the parent lacks that which he or she was accustomed to, but only when he or she is lacking the basic necessities of life.[26]

2 4 Reconciling the concepts

A study of the relevant case law underscores the principle that concepts utilised in different legal disciplines such as family law and the law of delict are not capable of wholesale and unconditional adoption. Although superficially exhibiting some common elements, each of the concepts is used to achieve varying objects: in the case of family law to establish whether a duty to maintain may exist or even to determine the extent of the duty of support. It is precisely for this reason that the family law concept of support is inapplicable within the sphere of the law of delict. As far as the law of delict is concerned "loss of maintenance or support" includes considerations that do not strictly fall within the understanding of the same concept in family law, and rather generically denotes all the negative consequences suffered by a dependant arising from the death of his or her breadwinner.[27] Davel is to be supported when she states that the findings in *Van Vuuren v Sam*[28] cannot be applied to restrict the damages to which a dependant may be entitled when his breadwinner is unlawfully and negligently killed.[29] It can

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24 1972 2 SA 633 (A) 642.
25 *Oosthuizen* (fn 12); *Jacobs v Cape Town Municipality* 1935 CPD 474.
26 *Van Vuuren* (fn 24) 641–643E.
27 See fn 21; *Laney v Wallem* 1931 CPD 360; *Wigham v British Traders Insurance Co Ltd* 1963 3 SA 151 (W).
28 Fn 24. Including the cases on which it was based such as *Oosthuizen* (fn 11).
29 See Davel *Broodwinner* 409–411. See also fn 21.

be limited only by the discretion of the judge assessing such damages to the extent of what he considers to be fair and reasonable under the circumstances of each case.[30]

3 APPORTIONMENT OF INCOME: RULE OR GUIDE?

3 1 Introduction

The apportionment of the deceased's income among his surviving dependants is but one of the steps in the assessment of damages for loss of a breadwinner. It is therefore important to determine the overriding assessment criterion in order to establish the appropriate approach to the apportionment of a deceased's income.

3 2 Overriding assessment criterion

The assessment of damages based on future loss such as is the case with loss of maintenance can never be an exact science:

> "The general principles are not in doubt. Mental suffering and stress cannot be taken into account; compensation is only awarded in respect of material loss caused to the dependents of the deceased man by his death. Some authorities consider that the calculation should be based upon the principle of an annuity (see *Grotius* 3.33.2 *Matthaeus de Criminibus* 48.5.11). *Voet* on the other hand favours a more general estimate. Such damages, he thinks, should be awarded as the sense of equity of the judge may determine, account being taken of the maintenance which the deceased would have been able to afford and had usually afforded to his wife and children (*Ad Pand. 9.2.11*). That would seem the preferable view as giving a greater latitude to deal with varying circumstances. It is at any rate desirable to test the result of an actuarial calculation by a consideration of the general equities of the case. As pointed out in *Jameson's Minors v C.S.A. Railways*, where the whole question was fully investigated, 'maintenance is not confined to the mere necessities of life. The dependants are entitled to be compensated for the pecuniary loss involved in a reduced income and restricted provision for the supply of what they have been accustomed to'."[31]

In the assessment of damages for loss of maintenance, actuarial calculations are but one of the considerations taken into account by the court to arrive at an equitable amount under the circumstances of each case.[32] Actuarial calculations in themselves are not conclusive proof of the damages suffered but are merely an attempt to arrive at an approximation of the damages sustained using scientific methods. Actuarial assessments dealing with future loss of maintenance must of necessity be based on facts and assumptions. The accuracy of such facts may drastically influence the reliability, cogency and relevance of the ultimate conclusions in an actuarial report.[33] The overriding criterion remains what the court deems to be reasonable and equitable under the circumstances of each case. In arriving at its ultimate conclusion the actuarial assessment may be a point of departure or even the basis of the court's findings.[34]

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30 See the passage from *Jameson's Minors* (fn 22) above and the quote from the judgment in *Legal Insurance* in fn 21.

31 *Hulley v Cox* 1923 AD 234 243. See also *Waring and Gillow Ltd v Sherborne* 1904 TS 340.

32 See *Hulley* (fn 31) 243: "It is at any rate desirable to test the result of an actuarial calculation by a consideration of the general equities of the case."

33 See in this regard *Lebona v Presidentversekeringsmaatskappy* 1991 3 SA 395 (W).

34 See Davel *Broodwinner* 516 fn 574; *Maasberg v Hunt, Leuchars and Hepburn* 1944 WLD 2; *Munarin* (fn 6); *De Jongh v Gunther* 1975 4 SA 78 (W); *Milns* (fn 4); *Lebona* (fn 33). It

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3 3 Plaintiff's duty to adduce sufficient facts to enable the court to assess damages suffered

The plaintiff is expected to prove such facts as to enable the court to assess fair and reasonable damages under the circumstances of the case. Should a plaintiff prove insufficient facts, there is no loss of action but the court is compelled to follow a conservative approach which is to the plaintiff's disadvantage.[35]

3 4 Principles governing apportionment of deceased's income

3 4 1 Survey of case law: Widow and children were involved

The principle regarding apportionment of the income of the deceased was first applied in *Jameson's Minors v CSAR*.[36] The court approached the problem of apportionment of income as follows:

> "Then comes the question, how much of this would he have spent on his children? Here again accurate calculation is quite out of question. He would, of course have spent a certain amount upon himself. Would he have devoted to the education, maintenance, advantage and comfort of his daughters more than £900 per annum? I think that he would. He spent £988 on them while they were in England, in the ten months preceding his death; and I think he would have devoted appreciably more than that to their interests had he lived. There is the authority of *Pym v Great Northern Railway Co* . . . for holding that we are justified in considering the probability that had he lived he would have saved something more for the ultimate benefit of his children. Had it not been for that decision, I should have been inclined to think that the possibility of such savings was too remote a factor to be taken into consideration. But the other view has apparently been adopted in England in similar enquiries, and there is no authority to justify us in adopting it here also. But, again, Dr. Jameson might, after his daughter's education was completed, have spent less on them than he did before; he might have taken interest in other pursuits and spent money upon them. *No settlement was ever made upon his daughters; nothing was fixed or determined; and under these circumstances we can only*

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is submitted that actuarial calculations which accord with the court's findings in relation to the facts, are usually the basis of a court's decision while actuarial calculations based on unproven, doubtful facts and/or assumptions, only serve or can only serve as points of departure. The function of an actuarial assessment is aptly stated by Howroyd and Howroyd "Assessment for compensation for loss of support" 1958 *SALJ* 64 82: "The purpose of an actuarial assessment is not, however, to deprive the court of its right to bring its sense of equity to bear upon the question of the amount of damages, but to assist the court by enabling it to exercise its judgment in detail, and by enabling it to concentrate its attention upon the factors which are essentially matters requiring judgment free from the many technical problems of converting the detailed judgments into a complete assessment."

35 See Davel *Broodwinner* 442; *Milns* (fn 4); *Arendse v Maher* 1936 TPD 162 165: "The last question is the quantum of damage. The material we have is extremely scanty. No actuarial expert evidence has been put before us, and in my opinion evidence of this kind is of very great assistance to the Court. The Court is not bound by this evidence – its discretion and its assessment of certain contingencies is still necessary. But in a fundamental question such as assessing how much capital must be paid at this stage to enable that person to have a fixed sum per month for life, the evidence of an expert is invaluable . . . It remains therefore for the Court, with the very scanty material at hand, to try and assess the damage. We are asked to make bricks without straw, and if the result is inadequate then it is a disadvantage which the person who should have put proper material before the Court should suffer."

36 Fn 4.

> *estimate a lump sum which we think under all the circumstances will meet the requirements of the case*."[37]

In *Hulley v Cox*[38] the court *a quo* apportioned two thirds of the deceased's income as income used by the deceased to support his surviving widow and daughter. In his judgment, Innes CJ takes the facts of the case into consideration and concludes that the proportion "was higher than the somewhat meagre facts contained in the record would seem to warrant". In considering the income spent by the deceased on the maintenance of his dependants, the following were taken into account:

- the amount given by the deceased towards household bills and clothing ("£30 or more"); and
- the amount of rent and services paid by the deceased.[39]

In *Smart v South African Railways and Harbours*[40] the court took the following into account when determining the portion of his income which the deceased spent on the maintenance of his dependants:

- the amount which the deceased spent on himself;[41]
- the deceased's spending and other habits;[42]
- the manner in which he dealt with his income;[43]
- the amount saved;[44]
- the type of clothing he wore;[45]
- the amount given by the deceased for family expenses;[46] and
- extraordinary purchases.[47]

The court then reached the conclusion that the deceased spent two thirds of his income on the maintenance of his dependants.

The factors taken into account in order to determine the proportionate share spent by the deceased in *Trimmel v Williams*[48] are the following: the rent paid for the family home;[49] housekeeping allowance;[50] and household expenses.[51] No

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37 605 (my emphasis).
38 Fn 4.
39 245.
40 Fn 4.
41 364–365: "It is clear that Mr. Smart was a man who did not spend any appreciable amount upon himself."
42 365: "He had no expensive habits. He was a teetotaller and did not indulge in any games or sports."
43 *Ibid*: "He is described as a very domesticated man who gave practically all his money to be expended by his wife as she thought best in the running of the house and the family."
44 *Ibid*: "and in the result there was no saving."
45 *Ibid*: "He was not an extravagant man as regards his clothing, indeed his working clothes were made by his wife."
46 *Ibid*: "The evidence might certainly have been more definite and precise than it is, and the wife's estimates going to show that she received as much as £45 per month towards family expenses certainly in some respects – indeed she has admitted it – appears to be too high."
47 *Ibid*: "The only luxury he seems to have indulged in was a family one, in the shape of a car which he purchased on the instalment system shortly before the accident."
48 1952 3 SA 786 (C).
49 792.
50 *Ibid*.
51 *Ibid*.

actual proportion appears from the judgment, but the calculation of the actuary was reduced in view of the evidence.

Portions assigned to the individual dependants was one of the questions raised in *Van Heerden v Bethlehem Town Council*[52] where the court had to decide whether a tender made was justified on the basis of a proportional split of four tenths to the deceased, four tenths to the widow and one tenth on each child. It was submitted in argument that the ratio depended on the facts.[53] The court did not reject this submission but responded by allowing one third to the wife and one sixth to each of the children as being a fairer split.[54]

In *Roberts v London Assurance Company Limited*[55] an actuary assumed the division of the deceased income on the basis of one third share to the deceased and the plaintiff and one sixth share to each of the two minor dependants.[56] The court used this as a guide in arriving at its ultimate judgment. The court in opting for a higher award did take cognisance of the judgment in *Maasberg v Hunt Leuchars and Hepburn*[57] thereby making provision for the payment of indivisible household expenses by the deceased.

The ratio of apportionment was part of the judgment in *Bester v Silva Fishing Corporation*.[58] An actuary made a calculation on the assumption that one third should go to each of the parents and one sixth to each of the children until the elder child turned 16 years of age and then two fifths to each of the parents, and then one fifth;[59] and ultimately that each parent would receive half of the income. In dealing with the allocation, the court made the assumption that the deceased would have spent one third on himself.[60] The court decided to allocate one sixth to each child in line with the actuary's assumptions.

In *Legal Insurance Company Limited v Botes*[61] the court had to consider whether the apportionment made on the basis of actuarial evidence of two fifths to the deceased, two fifths to the widow and one fifth to the child was justified. In arriving at its conclusion that the apportionment did not warrant interference, the court took into account the accommodation provided by the deceased and the child's needs compared to that of an adult.[62]

The court was called upon to determine the proportions allocated to each dependant in *Snyders v Groenewald*.[63] In this matter, differing actuarial calculations were presented as evidence by both the plaintiffs and the defendant. In resolving

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52 1936 OPD 115.
53 116: "As to the apportionment of the sum tendered as between wife and children the ratio depends on the facts. In *Hulley v Cox (supra)* it was 5 to 2 or 7/12 of the income. See also *Smart v S.A. Railways and Harbours* 1928 NPD 361. In *Hesselson v S.A. Railways and Harbours* (1921 T.P.D. Sep 2, unreported) the ratio was 2 to 3 (between two children) or 5/12 of the income."
54 117.
55 1948 2 SA 841 (W).
56 849.
57 1944 WLD 2 15.
58 1952 1 SA 589 (C) 599–600.
59 After the youngest turned sixteen.
60 600.
61 Fn 2.
62 616.
63 1966 3 SA 785 (C).

the discrepancies between these calculations the court used the facts at its disposal.[64] The division of the available income was based on actuarial assumptions. In considering these assumptions the court declined to make individual adjustments stating that this would "complicate an already complicated computation still further".[65] On the facts and applying its discretion, the court apportioned one share to each parent and half a share to each child.[66]

3 4 2 Survey of case law: surviving widow

Based on the facts adduced by the plaintiff, the court ruled in *Maasberg v Hunt, Leuchars & Hepburn* that the deceased spent half of his available income on the upkeep of his surviving widow.[67]

In *Nochomowitz v Santam Insurance Company Limited*[68] the court had to deal with a variety of issues relating to the assessment of the plaintiff widow's claim including the determination of that portion of the deceased's income dedicated to the plaintiff's upkeep.[69] In dealing with the determination of the appropriate apportionment the court proceeded as follows:

> "As I see the position, the proportion of the joint income which is to be allocated to the plaintiff in the calculation of the value of her loss of support, is a matter which is incapable of mathematical calculation. There are too many imponderables to be taken into account. However, I must endeavour, as best I can, to assess on what basis of apportionment the plaintiff is likely to be placed in as good a position, as regards maintenance, as she would have been but for the death of the deceased. To this end the following considerations appear to be relevant. According to the plaintiff's evidence, which I believe, the plaintiff was a wonderful husband who did not begrudge her anything. Although, therefore, in the last year of his life he only spent R3 739 in maintaining his household, which amount included the expenses of a holiday in South America, and the maintenance of his son and the partial maintenance of his daughter, it seems highly probable that, upon his son becoming independent, and as his own earnings increased, he would have expended substantially more on the support of his wife, enabling her to enjoy more of the luxuries of life than had been possible before. There seems to have been no particular pattern in the excess of the deceased's net profits over his actual earnings over the years from 1964 to 1968, and in some years his drawings exceeded his profits. However, the fact that there were these savings is one of the factors that I must bear in mind, as also the fact that it appears from the evidence that the deceased had during his lifetime, made capital sums available to the plaintiff out of the profits of his business for her own use. I also bear in mind that there is the distinct possibility that as

64 787Hff.
65 789H.
66 In arriving at this result the court referred to *Boonzaaier v Provincial Insurance Ltd* (fn 6) and confirmed that this was reasonable under the circumstances.
67 1944 WLD 2 12: "I think that the evidence of the plaintiff shows that she and her husband dealt with his income as a common fund on which both drew for their requirements. The fair division to make in the circumstances is that she enjoyed half, and he enjoyed half. She has therefore lost from his earnings £202 per annum. In addition the pension which he shared with her has been reduced from £115 4s. to £8s. per annum. Her half would have been £57 12s. so that she has lost under this head £31 4s. per annum, bringing the total to £233 4s. per annum."
68 1972 1 SA 718 (T).
69 724.

> the earnings of the deceased increased, and after his son had become self-supporting, and possibly after his daughter had left the joint household, he would have endeavoured to put away more substantial savings in order to provide for his old age after retirement. I consider that I am also entitled to take into account the possibility that, upon the deceased's death in the normal course of events, the plaintiff would have inherited his savings, she having been his heir under his will . . . In this particular case, I use this consideration only in a general sense in order to determine an equitable proportion which is to be allocated to the plaintiff. I must also of course give effect to the contingency that the deceased might have changed his will before his death, a contingency which, on the evidence of the happiness of the marriage between the plaintiff and deceased, seems to be remote in so far as the total exclusion of the plaintiff from the deceased's estate is concerned, but which is less remote as far as the possibility is concerned that the deceased might later in his life have wished to leave some part of his estate to his children. There is also a possibility that the plaintiff may have died before the deceased. A further consideration which I must bear in mind is that some proportion of the deceased's income at the time of his death, the exact amount of which I am able to ascertain from the evidence, would have been used for indivisible items of household expenditure which would have remained constant, except for increases in the cost of living in spite of the deceased's death. In this respect a detail of which account should also be taken is that the bond on the house in which the parties were living at the time of the deceased's death had been paid off shortly prior to his death.
>
> Having regard to all the foregoing considerations, and the facts and circumstances of this case generally, I have come to the conclusion, in the exercise of the large discretion which I have to award what I consider to be right . . . it would be just to allocate 50 per cent of the anticipated net joint income of the plaintiff for the purposes of calculating the value of her gross loss of maintenance. In view of the fact that this apportionment is not based upon any exact arithmetical calculation, I do not consider that it is necessary to make any special adjustment, in respect of the period from the deceased's death to August, 1970, for the fact that his son was a dependant during that period.
>
> I accordingly rule that the actuaries should assess the plaintiff's damages on the basis of a 50 per cent allocation of the anticipated net joint income of the plaintiff for the whole of the relevant period as from the date of the deceased's death."[70]

The court was called upon in *Milns v Protea Insurance Company Limited*[71] to consider the amount of deductions to be made from the award by the court *a quo*. The apportionment of one share to each parent and a half share to each child was common cause and was not considered by the court. The allocation of income was ostensibly an assumption made by the actuaries acting on behalf of the parties. There is no apparent basis on which they arrived at this apportionment. Dealing with the apportionment of income between husband and wife,[72] the court stated:

> "Mr. Williamson, on the other hand, submitted that what the Court had to assess was the value of the right which she has lost. If she would have worked, and did

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70 725–726. The judgment was taken on appeal in *Nochmowitz v Santam Insurance* 1972 3 SA 640 (A). One of the points of appeal was the fact that the court did not give due regard to the indivisible household expenses in finding that an apportionment of 50 per cent should be applied (see 647). Due to the fact that the plaintiff's unreliable testimony regarding these expenses and the appeal court's reluctance to interfere with the trial court's exercise of its discretion, the 50 per cent allocation was maintained.

71 Fn 4.

72 1011. Within the context of what deductions should be made from the widow's claim if she is employed.

work, until 30 September 1976, which was in fact the case, the value of the right up to that date was not necessarily one half of the husband's earnings.

In my view the answer to this question depends largely on the facts of each particular case. It is primarily the husband's duty to support his wife, and the law expects the wife to perform her traditional role of managing the household . . . If, however, the husband is unable to do so there is a reciprocal duty upon the wife to support him, or to assist in their joint support if his income is insufficient by itself to do so. The spouses will normally decide between themselves upon the standard of living which they wish to adopt and if the husband's income is by itself more than sufficient to meet the cost of that standard he will normally meet the cost out of his income. If his income is just sufficient to do so and he is killed then the value of the wife's right to support is, roughly speaking, the value of one half of his income, and this would be so even though the wife chose in her spare time to earn money herself. If, however, the husband's income is insufficient to provide the necessary support the wife would go out to work in order to supplement his income. In these circumstances if the husband is killed the value of the right lost by the wife through his death would not be the value of one half of his income, but the value of what he contributed towards her support.

The difficulty of the present case is that the plaintiff has failed to place before the Court sufficient evidence upon which an accurate assessment of the value of the right she lost on 30 September 1976 can be made."[73]

3 5 Apportionment of income in respect of selected foreign jurisdictions

3 5 1 English law

3 5 1 1 Generally

English common law does not acknowledge a claim based on the death of a person. This aspect is largely regulated by the Fatal Accidents Act of 1976.[74] Although statutorily regulated, the assessment of the actual damages recoverable in terms of this Act is mostly left to the discretion of the courts. In such assessment the English courts are required to determine the proportionate loss of each dependant. In doing so, a common practice has developed to allocate the bulk of the award to the surviving spouse. This is based on the premise that part of the allocation to the surviving spouse (parent) will be used to support the dependent children of the deceased.[75] The allocation seems to be a question which in the main is judged on the facts of each case: "There is no real sound basis other than pragmatism for approaching the problems of apportionment of the amount of money representing the lost dependency in this particular way."[76]

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73 1011–1102 (my emphasis). It is submitted that this particular view of the relationship between married persons has been overtaken by social developments. In modern society the wife is no longer primarily concerned with "perform(ing) her traditional role of managing the household". It is clear that a generalisation of this nature cannot be accepted and that each case *has to be approached on its own facts.* This accords with the manner in which the court prefaces the general principle: "In my view the answer to this question depends largely on the facts of each particular case."

74 Popularly known as Lord Campbell's Act. Compensation for death of a breadwinner may also be awarded in terms of the Criminal Injuries Compensation Scheme contained in the Criminal Injuries Compensation Act of 1995.

75 See McGregor *McGregor on damages* (1997) 1163–1164; Kemp and Kemp *The quantum of damages* Vol 1, (loose-leaf) 29041.

76 *R v Criminal Injuries Compensation Board, ex parte Barrett* [1994] PIQR Q44. Latham J stated the following: "As far as principle is concerned, the principle appears to me to be

continued on next page

In applying apportionment, varying fractions have been used and no clear pattern is distinguishable. In *Robertson v Lestrange*[77] the court awarded two fifths to the surviving parent (widow) and one fifth to each of the three dependant children. In *Sanderson v Sanderson*[78] four children received two thirds of the award between them and in *Bulmer v Bulmer*[79] six children each received one eighth. In other instances higher and lower fractions (depending on the facts of each case) have been awarded.[80]

3 5 1 2 Widow(er)'s portion

In the case where the breadwinner is survived by his spouse without any own income and children or where children were born from the marriage but were independent at the time of the death of the deceased breadwinner, the proportion to which the surviving spouse will be entitled, is greater.[81] English courts accept that under these circumstances the surviving spouse is entitled to 66,66% of the breadwinner's net income if such survivor has no own income.[82] Should the surviving spouse have an own income, the proportion is decreased.[83]

3 5 2 Canadian law

3 5 2 1 Generally

In Canada loss due to death is, as is the case in English law, dealt with as a statutory claim where an apportionment of damages to each dependant is required. There is a tendency to calculate the dependants' loss as an actuarial percentage of the net disposable income. In determining the amount of the net income utilised for the support of the deceased's dependants, the following considerations are taken into account:

- the amount that the deceased saved during his lifetime;
- charitable donations and expenditure on persons other than members of the household of the deceased; and
- the deceased's personal expenses for his or her sole benefit.[84]

The deduction of the income spent by the deceased on himself determines the rate of dependency. It is generally accepted that a breadwinner spends approximately 30% of his income on himself. This is subject to exception, should it be shown that the deceased in fact spends less.[85] The Canadian courts tend to hold that the rate of dependency in the case of heterosexual families is as follows:

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clear. The principle is that each person who can be described as a dependant is entitled to the value of his or her dependency. The value of that dependency will obviously depend upon, so far as the children are concerned, their age and the financial circumstances in which the family may be at any given time."

77 [1985] 1 All ER 950.

78 (1877) 36 LT 847.

79 (1883) 25 ChD 409.

80 See Kemp and Kemp 29044.

81 McGregor 1167 and the cases cited there. See also the cases quoted by Kemp and Kemp 29043–29044.

82 McGregor 1150–115.

83 *Idem* 1167.

84 See Cooper-Stephenson *Personal injury damages in Canada* (1996) 669; *Davies Estate v Robertson* (1984) 5 OAC 393 396–397 (CA).

85 In *Davies* (fn 84) the court held that a dependency rate of 78% of net income was applicable.

- Family with one child: 26% expenses, 70% for the surviving spouse and 4% for the child.

  Family with two children: 22% expenses, 70% to the surviving spouse and 4% to each dependent child.

  Family with three or more children: 18% expenses, 70% to the surviving spouse and 4% to each of the dependent children.[86]

However, this apportionment is not a hard and fast rule and remains subject to the facts of each case.[87]

3 5 2 2 Widow(er)'s portion

From the preceding discussion it is clear that where there are no dependent children and no independent income, the widow(er) receives 70% of the income.[88]

3 5 3 Australian law

3 5 3 1 Generally

Under Australian law, a lump sum representing the loss of support has to be calculated and then apportioned to each dependant. In arriving at a lump sum, the probable income of the deceased after tax is taken and from this is deducted what the deceased would have spent on himself for food, clothing and entertainment. Rent or mortgage payments that benefit the family as a whole are not taken into account. Australian courts seem to follow the guidelines set by English courts. The apportionment is as follows:

- No children: 33.33 % to the deceased and 66.66% to the surviving spouse without independent income.
- Children: 25% to the deceased and the balance to his dependants.[89]

Some judgments follow a table prepared by the Australian Bureau of Statistics that is based on expenditure surveys. The table is reproduced by Lunz[90] and is as follows:[91]

Percentage of dependency of surviving parent and children				
Income of spouse as % of income of deceased	Number of children	Spouse	Child	Total
0%	0	65.6% (*50%*)		65.6% (*50%*)[92]
0%	1	43.8% (*40%*)	20.8% (*20%*)	71.9% (*60%*)[93]

continued

86 *Ibid*.
87 *Ibid.* See Cooper-Stephenson 670.
88 Cooper Stephenson 696–670.
89 Lunz *Assessment of damages for personal injury or death* (2002) 498–499.
90 *Idem* 501.
91 Prepared by Mr Richard Cumpston of Cumpston Sarjeant Pty Ltd from *ABS Household Expenditure Survey 1998–1999*, Summary of Results, Cat no 6530.028, June 2000 9. For the purpose of comparison I have added the italicised figures in brackets to indicate the apportionment by South African courts.
92 *Milns* (fn 4) *Maasberg* (fn 34).
93 *Legal Insurance* (fn 2).

Percentage of dependency of surviving parent and children				
Income of spouse as % of income of deceased	Number of children	Spouse	Child	Total
0%	2	34.4% (*33.3%*)	20.8% (*16.66% × 2*)	76.0% (*66.64%*)[94]
0%	3	28.9%	16.7%	79.0%
0%	4	25.1%	14.0%	81.1%
0%	5	22.3%	12.1%	82.8%
100%	0	31.2%		31.2%
100%	1	23.9%	19.8%	43.7%
100%	2	20.8%	15.6%	52.0%
100%	3	18.5%	13.1%	57.8%
100%	4	16.6%	11.4%	62.2%
100%	5	15.1%	10.1%	65.6%

It represents the average of expenditure of all quintiles, there being little difference between the quintiles. The percentage for each survivor adds to the total dependency for the whole family. In determining the percentages of dependency the following assumptions were made:

- expenditure on current housing costs, mortgage repayments and other capital housing costs, fuel and power, and on household equipment and operation, will be the same irrespective of the number of members of the household;
- expenditure on alcohol and tobacco relates only to adults, in equal shares;
- all other expenditure relates to all members of the household, twice as much being expended on each adult as on each child; and
- superannuation and life insurance relate only to adults, in equal shares.

Cases where the income of the surviving spouse was not equal to that of the deceased can be dealt with by linear interpolation. For example, if the survivor of a family with three children had income equal to 70% of the deceased, the dependency of the surviving family could be estimated as:

70% of 57.8% (the dependency of a family with equal incomes)	40.5%
plus 30% of 79% (the dependency of a one-earner family)	23.7%
dependency of a family with spouse income of 70% of deceased	64.2%

3 5 3 2 Widow(er)'s portion

Australian law essentially follows English law and apportions 66% of the deceased's income to his widow where there are no dependent children and no own independent income.[95]

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94 *Roberts v London Assurance Co Ltd* 1948 2 SA 841 (W); *Van Heerden v Bethlehem Town Council* 1936 OPD 115; *Bester v Silva Fishing Corporation* 1952 1 SA 589 (C).

95 Lunz 501.

4 CONCLUSION

4 1 Proportions generally

It is clear that the principle of delictual claims that a plaintiff must be placed in the same position as he or she was prior to the commission of the unlawful, culpable act is an important determinant when assessing damages for loss of support. This principle determines the extent of a plaintiff's claim for loss of support which, as a result of the application thereof, is not restricted to life's necessities. It follows that where damages for loss of support have to be assessed, one cannot oversimplify the process by reducing the claim to a formula. In this respect the following statement by Koch[96] must be supported:

> "For all the advantages of precedent it must be used with caution lest formalisms of calculation, appropriate in limited circumstances, become enshrined by precedent and blindly elevated to the status of universal principle. When a court emphasises that its decision is based on the facts of the case it would seem to be a warning that the method of calculation is a formalism, a useful rule-of-thumb, to be applied with circumspection. Such precedent is permissive not compulsive. Subsequent courts may, in their discretion, adopt the method of calculation, but they are not compelled to do so."

The analysis of South African cases dealing with the apportionment of income show that apportionment is based on the facts of each case and as such does not create any legal principle. It has its origins in actuarial assumption[97] and is applied by actuaries and the courts to simplify a complicated issue.[98]

From a purely practical point of view, the blind and unqualified adherence to fixed proportions cannot be accepted. It is clear that a person with limited income will spend a higher proportion of his income on support than his affluent counterpart. This is also true of a deceased breadwinner who has five children compared to the breadwinner who has one or no child. This reasoning can be tested conversely by the following example: Where a millionaire has an income of R500 000 per month, does this automatically mean that he spends R250 000 (50%) a month on the support of his spouse where there are no dependent children?[99] The difficulty created by a blind adherence to fixed proportions is reflected in the criticism of and by the exceptions created in respect of the accepted ratio of apportionment applied by our courts.[100]

There is a duty on the plaintiff to place sufficient facts before the court to enable the court to assess his or her damages. A plaintiff who does not comply with this duty runs the risk of being subjected to the formalistic approach and possible loss of damages which may have accrued because the application of already established proportions is the only avenue open to a court in reaching a reasonable and equitable result on the facts of that particular case.[101] In addition, it is clear that by not providing evidence of what the deceased spent exclusively on him- or herself may result in prejudice.[102] It follows logically that the personal expenditure of the deceased for his or her own exclusive benefit should be the

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96 *Damages for lost income* 3.
97 See *Jameson's Minors*; *Hulley v Cox* (fn 4).
98 See *Snyders* (fn 63) 787H.
99 See *Roberts* (fn 94).
100 See Davel *Afhanklikes* 548–550.
101 See para 3 3 and fn 35.
102 See *Maasberg* (fn 34).

point of departure in determining what the deceased actually had available and/or used to support his dependants.[103] In doing so, the difficulty recognised in *Maasberg* in respect of common indivisible household expenditure can be avoided.[104] In determining the amount spent by the deceased on himself, the following factors have to be considered:

- The amount that the deceased saved during his lifetime.[105]
- Charitable donations and expenditure on other persons other than members of the household of the deceased.
- The deceased's personal expenses for his or her own exclusive benefit[106] in particular
  - the deceased's spending and other habits and activities;
  - the manner in which he dealt with his income;
  - the type of clothing he wore; and
  - extraordinary purchases.[107]
- Expenditure incurred by the deceased to the joint benefit of the deceased and his dependants is disregarded.

In the absence of direct evidence, the guide used by English, Canadian and Australian courts may be employed as a point of departure. This means that an average of twenty to thirty-three percent is usually utilised by a breadwinner for his own exclusive expenditure[108] – the remainder (80% to 66%) is then to be applied as support for his dependants to be allocated in such proportions as the circumstances and facts of each case may dictate.

4 2 Widow(er)

Three cases in South African law deal with the position of the surviving spouse where there was no independent income to be considered.[109] An analysis of these cases shows that

- a 50% proportional allocation was made;
- the allocation was not made as or meant to be a rule; and
- in each instance the allocation was made on the available facts.[110]

It is clear that in South African law there is no bar to a court awarding more than 50% in these instances. It is the duty of a plaintiff to supply the court with sufficient information to enable the court to make a just and equitable assessment of the right which the plaintiff lost.[111] In all the cases where the plaintiff sought to recover more than 50%, there was either no evidence or the evidence that was available was either insufficient or unreliable.[112] However, it is submitted that

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103 See Davel *Afhanklikes* 551; Howroyd and Howroyd 70.
104 *Ibid*.
105 Including provision for pension, insurance premiums and the like.
106 See para 3 5 3 1 and the considerations taken into account in *Smart* (fn 4) 792.
107 *Smart* (fn 4) 792.
108 See paras 3 5 1 to 3 5 3 and especially the Australian table of household expenditure.
109 See *Maasberg* (fn 67); *Nochomowitz* (fn 68) and *Milns* (fn 71).
110 See para 3 4 2 above and in particular fn 73.
111 See *Milns* (fn 71) and the final italicised portion of the judgment quoted in paras 2 4 3.
112 See *Nochomowitz* (fn 68).

the allocation of 50% under these circumstances is out of line with English, Canadian and Australian jurisdictions where 66.66% is the basis. This figure recognises that the indivisible joint household expenditure is supported by empirical research[113] and in my view proceeds from the correct point of departure in that the deceased's own expenses are first determined. It follows that once this is determined it can be accepted (depending on the facts of each case) that the balance was in all probability allocated to the maintenance of the plaintiff. It is therefore of the utmost importance for plaintiffs who have suffered loss and who seek to avoid a rule-of-thumb allocation[114] to supply sufficient facts to enable the court to assess their loss.[115] Such facts could include:

- The amount that the deceased saved during his lifetime.
- Charitable donations and expenditure on other persons other than members of the household of the deceased.
- Deceased's personal expenses for his or her own exclusive benefit in particular:
  - the deceased's spending and other habits and activities;
  - the manner in which he dealt with his income;
  - the type of clothing he wore; and
- Extraordinary purchases.

Facts indicating the amount actually spent by the deceased on his or her spouse can also be used as a control for the amount retained by the deceased for his own use. These can *inter alia* be the amounts spent by the deceased on accommodation (including rent, bond repayments, rates and taxes and maintenance); water and electricity; the family vehicle (including insurance, maintenance and fuel) or other transport costs; domestic and garden assistants; groceries, meat and vegetables; clothing; entertainment and vacations; medical expenses (including pharmacy accounts); telephone; television service subscriptions; and short term and other insurance.

Failure to supply such information is to the prejudice of the widow(er) and may result in him or her not receiving his or her rightful portion of a deceased breadwinner's income.[116]

It is unusual to find lawyers, let alone those with a commercial practice, actively running prostitutes; but in June 2000 Toronto lawyer Gary Patterson went to prison for 7 years for doing just that.

Convicted on 10 charges including kidnapping and uttering death threats as well as living off the proceeds of prostitution, he had been controlling a 19-year-old ex nanny whom he was trying to persuade not to give evidence against her former pimp with whom Patterson was associated.

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113 See the table by the Australian Bureau of Statistics reproduced in para 3 5 3 1.
114 Be it 50% or 66,6%.
115 See text to fn 105ff *supra* regarding the facts that should be included.
116 See fn 35.