

CONCERNS WITH THE “PERSONAL CONSUMPTION PERCENTAGES IN AUSTRALIA - CURRENT TABLES FOR 2018”

Section I Introduction

- 1 Forensis Accounting has significant concerns about the approach proposed in the paper entitled “Personal Consumption Percentages in Australia - Current Tables for 2018” dated 25 January 2018 by Michael Lee and Julia Bossert of Vincents Chartered Accountants and Corey Plover of Cumpston Sarjeant (“**the PCP Paper**”), and in particular the manner in which the deceased’s personal consumption percentages are quantified.
- 2 The consumption percentages determined in the PCP Paper have been included in the recently published 5th edition of the text *Assessment of Damages for Personal Injury and Death* by Professor Harold Luntz and Dr Sirko Harder, (“**5th Edition**”) (page 864), in place of the dependency percentages in Table 9.1 of the 4th edition of the same text (“**4th Edition**”). The 5th Edition (pages 865 to 867) also includes discussion of, and rebuttals to, our objections (expressed in August 2017 and May 2019).
- 3 Since the date of the second letter to Professor Luntz (5 May 2019) (footnote 264 at page 863 of the Luntz 5th Edition), and the earlier version of this paper, our opinions on dependency loss quantification have progressed, however we continue to have significant concerns with the approach presented in the PCP Paper.
- 4 In the table below, we have summarised the four main issues we have in relation to how the consumption percentages have been calculated in the PCP Paper. We have also shown indicative weightings for each issue which is based on an analysis of expenditure for households with income in the 5th quintile (highest income). These four issues are discussed in Sections II to IV below.

Issue	Updated Dependency Percentages	PCP Paper	Weighting in the 5th quintile
Allocation of savings	67.1% to the dependants	100% to the dependants	36%
Allocation of motor vehicle expenditure (before any adjustment)	Assume deceased and spouse each operated a motor vehicle	Assume deceased and spouse shared one vehicle (adjustment required if not)	31%
Allocation of superannuation and life insurance	Equal between deceased and spouse	100% to the dependants	24%
Allocation of several small expenditure items (eg holiday)	See paragraph 36 below		10%

- 5 A discussion in relation to the approach to quantifying dependency on a deceased's superannuation (another key difference between the approach in the PCP Paper and our approach) is set out in Section V below.

Section II Our approach

- 6 To a large extent, our views on how to quantify financial dependency have been informed by the following paragraph from the 4th Edition (our emphasis in bold type):

*[9.3.4] Other matters to be taken into account. ... what the deceased would have earned at that date provides the starting point for the calculation of future loss... From the probable earnings of the deceased are deducted tax, the expenses of earning the income and what the deceased would have spent on himself or herself and on other non-claimants, if any. Any contributions the deceased was making to a superannuation fund should not be deducted unless the proportionate share of the survivors in the ultimate benefit is separately added, since **in the long run both the deceased and the family could be expected to have benefited from the superannuation.** [refer footnote 150 below] Account should also be taken of the benefits likely to have been enjoyed by the survivors from, a superannuation fund to which the deceased's employers would have contributed. If the deceased were unlikely to have spent any money on other things that were not ultimately for their benefit, this method of calculation would lead directly to the ascertainment of the loss of the claimants as a whole. **Where the income exceeded what was necessary for support, the family are entitled to claim also what the deceased would have saved and ultimately, left to them.** If the deceased was thrifty and devoted to the family, to deduct the deceased's own expenses from the earnings and allow the balance to the family is sometimes seen as a shortcut to the same solution. This is certainly convenient, but it is not strictly accurate, since it assumes that the dependants would immediately have enjoyed that **part of the deceased's earnings set aside for savings, whereas any such enjoyment would have been postponed** and would have been contingent on factors such as the survival of the particular claimant.*

Footnote 150: "...**Proportionate expenditure on superannuation contributions is included in the dependencies shown in Table 9.1.**"

- 7 In our view, which we believe is consistent with the above paragraph and footnote, dependency should be quantified according to the following underlying principles:
- (i) the cost to support the deceased (**step 1**) should be calculated before the dependants' expected benefit is calculated (**step 2**);
 - (ii) the cost to support the deceased includes consumption of asset accumulating expenditure such as superannuation and savings; and

(iii) any accumulated benefits, such as savings and superannuation, would not have been of benefit to the dependants immediately.

8 The equivalent paragraph in the 5th Edition differs from the above quotation from the 4th Edition, and our discussion on the changes, and how they impact our views on quantifying financial dependency, are set out in Section VI below.

Section III General methodology in the PCP Paper

9 A primary issue we have with the approach presented in the PCP Paper is that when deriving the personal consumption percentages, statistical expenditure data for an adult individual (obtained from the Household Expenditure Survey published by the Australian Bureau of Statistics (“HES”)) is divided by statistical household income in the HES (ie consumption % = expenditure ÷ income). There is a significant unexplained imbalance between household income and expenditure at many of the income quintiles and deciles in the data presented in the HES. The manner in which the approach adopted in the PCP Paper deals with this imbalance implies that many households generate “savings” (ie monies invested or saved for future use), and that 100% of the savings are treated as being for the direct and sole benefit of the dependants.

- 10 In the top two quintiles¹ of households, income exceeds expenditure, and in the bottom three quintiles, expenditure exceeds income, as set out in the table below.

Quintile	1 st	2 nd	3 rd	4 th	5 th	All households
Gross mean income	464	962	1,612	2,481	4,928	2,086
Total expenditure	711	1,089	1,719	2,466	4,444	2,080
Imbalance	-247	-127	-107	15	484	6

- 11 On this issue, the ABS say in the notes to the HES:

*“... it would be **misleading** to regard the difference between average weekly income and the sum of the items of average weekly expenditure as shown in the tables in this publication **as a measure of savings**” [our emphasis in bold type]*

- 12 Regarding this issue, Mr Corey Plover, one of the authors of the PCP Paper, states the following (taken from Mr Plover's “peer review”² of an earlier version of the PCP Paper dated 9 February 2016):

“While it may be misleading to regard the difference as a measure of savings there is merit in treating this component as an asset accumulating, or non-divisible, item.”

By treating the “difference” as non-divisible, under the PCP Paper approach, it is allocated entirely to the dependants.

¹ The PCP Paper refers to deciles, but the data is not publically available (it was obtained by the authors of the PCP Paper directly from the ABS).

² Mr Plover's review of an earlier version of the PCP Paper, is not, in our view, a peer review in the true and technical sense, because in the review document, Mr Plover is attributed as a co-author of the consumption tables.

- 13 We find it difficult to understand Mr Plover's position regarding savings. It appears that, although he is of the opinion that it may be misleading to use the HES data as a measure of savings, he also believes that there is merit in doing so. We cannot see how there is merit in doing something that is misleading.
- 14 The PCP Paper approach to "savings" delivers especially problematic results for median to low income households because it implies that these households have negative savings, that is they spend more than they earn. This implication leads to a reduction in the dependency for median and low income households because the "negative savings" is allocated entirely to the dependants. The approach in the PCP Paper delivers illogical results, as we have demonstrated below.

Low income households

- 15 Earlier versions of the consumption percentages tables (in papers similar to the PCP Paper) showed consumption percentages for all deciles and all household compositions. However, the PCP Paper shows no percentages for any household composition in the 1st and 2nd deciles, and in the 3rd decile, the PCP Paper only has a consumption percentage for households with no children.
- 16 In the document entitled "*Agreed statistical tables for loss of financial dependency in Australia*" dated 9 February 2016 (prepared by the authors of the PCP Paper), the consumption percentage (44.3%) provided for the 1st decile suggests that there is very low financial dependency on a deceased at this income level (less than \$251 per week, before tax), when each of the deceased and the spouse earn an equal amount (demonstrated in the table below).

1st Decile dependency	
Agreed statistical tables for loss of financial dependency in Australia	
Spouse's income after tax, per annum	\$6,550
Deceased's income after tax, per annum	\$6,550
Household pool of income after tax, per annum	\$13,100
Deceased's personal consumption (\$13,100 x 44.3%)	\$5,803
Spouse's loss (\$6,550 - \$5,803)	\$747
Spouse's dependency on the Deceased (\$747 ÷ \$6,550)	11%

- 17 The above result is in contrast to the more logical level of dependency indicated by adopting the Updated Dependency Percentages for the same circumstances, as demonstrated in the table below:

1st Quintile dependency	
Table 1 of the Updated Dependency Percentages	
Spouse's income after tax, per annum	\$6,550
Deceased's income after tax, per annum	\$6,550
Spouse's dependency on the Deceased (from the 100% section of Table 1 of the Updated Dependency Percentages)	41.5%
Spouse's loss (\$6,550 x 41.5%)	\$2,718

- 18 The Updated Dependency Percentages for a couple with equal income have been calculated on the basis that when a surviving spouse earns the same as a deceased, but for the deceased's death, they would each have met their personal expenditure from their own income, and continue to jointly contribute to the household's non-divisible expenditure (such as rent). This is the reason why, even where a deceased has a low income, a material level of dependency exists (that is half of the non-divisible expenditure).

- 19 In our opinion, unless particular circumstances are present in a case at hand (eg one party paying for a certain category of expenditure), it is reasonable to assume that a couple with equal income would jointly contribute to their household's non-divisible expenditure. That is, regardless of the level of income, if a couple earn the same, they would contribute equally to a fixed expense, such as rent.
- 20 The result produced at the low income deciles in the "*Agreed statistical tables for loss of financial dependency in Australia*" dated 9 February 2016 is impacted by the implicit assumption that the household has "negative savings" and that all of the negative savings are attributed to the dependants. This is the main reason why the dependency for a household in the lowest decile is so low.
- 21 In our opinion, the inability of the approach in the PCP Paper to produce reliable results for the 1st to 3rd deciles is mainly due to the "negative savings" issue that is inherent in its methodology, rather than "ABS survey limitations" or household compositions. In our view, it follows that, if the methodology in the PCP Paper is flawed for some households, it must be flawed for all households.
- 22 In our opinion, if it is established on the evidence that there would have been household savings, it should be assumed that those savings would have benefited the dependants in the same proportions as determined by the dependency percentage applied during the deceased's working life. For example, if the dependency percentage is 70%, then it should be assumed that the dependants would have been dependent on the deceased's savings, if any, at the same rate of 70%. In our view, the attribution of negative savings to dependents caused by applying the consumption percentages to households with low income is regressive and prejudicial. It is unfair to penalise dependents from low income households by virtue of the manner in which the difference between income and expenditure is treated in the PCP Paper.

23 If it is accepted that:

- (i) a deceased would benefit from their savings; and
- (ii) that the Deceased would benefit from their savings in the same proportions as determined by the dependency percentage,

there is no requirement to calculate the level of savings by reference to the Household Expenditure Survey, as the overall level of dependency would remain the same, regardless of the amount of savings.

PCP Paper's critique of "expenditure approach"

24 The PCP Paper refers to our preferred approach (consumption expenditure as a proportion of total expenditure) as the "expenditure approach". In the PCP Paper, the following is stated:

[after discussing the expenditure approach] "Such an approach implicitly assumes that a household consumes all of its income and does not save. This is often referred to as a "constant" consumption approach.

We strongly disagree with the implicit assumption that in every instance, every additional dollar earned by a household will be consumed ...

The latest statistical data continues to support this proposition"

The PCP Paper then includes a graph showing food consumption expenditure as a proportion of household after tax income, at each of the ten income deciles.

*"The above graph demonstrates that as income increases, food consumption as a percentage of household income decreases. That is, food consumption is **not** a constant percentage of household income.*

... Accordingly, in our opinion the adoption of a "constant" consumption percentage across all income levels is contrary to available empirical data and therefore an inappropriate basis for the calculation of personal consumption / loss of dependency percentages."

- 25 Contrary to what the PCP Paper states (per the above quotes) the “expenditure approach”, which underlies the percentages in Table 1 of the Updated Dependency Percentages, does not assume that:
- (i) a household consumes all of its income and does not save. In Table 1 of the Updated Dependency Percentages, it is assumed that the ultimate expenditure of surplus income (ie income that is not expended at the time it is derived) will be in the same proportion, with respect to a deceased's personal consumption and the dependants' benefits, as the identified expenditure; and
 - (ii) food consumption is a constant percentage of household income – refer to the following paragraph.
- 26 Contrary to what the PCP Paper says about the “expenditure approach” in terms of food, the graph below demonstrates that food consumption as a percentage of household expenditure decreases (similar to how Graph 1 of the PCP Paper shows that food consumption as a percentage of household income decreases). This graph also demonstrates that as the proportion of expenditure spent on food costs decreases, the proportion spent on recreation costs increases.



- 27 In our opinion, the reasons propounded in the PCP Paper to refute the so called “expenditure approach” have no merit because they are not factually correct.

Section IV Allocation of expenditure

Assumptions

- 28 The dependency percentages published in the 4th Edition are based on a set of underlying assumptions regarding the allocation of expenditure between the deceased and the dependants. The dependency percentages published in earlier editions of Prof Luntz's text *Assessment of Damages for Personal Injury and Death*, appear to be based on the same assumptions. It is not clear who developed the assumptions, however, the earliest statement of the assumptions we have located is included with the percentages compiled by Mr John Crocker, Consulting Actuary, in the 2nd edition of the text (published in 1983). The key assumptions are set out below (hereafter referred to in this paper as the “**Dependency Assumptions**”):

“expenditure on current housing costs, fuel and power and on household equipment and operation will be the same regardless of the number of members of the household (eg mortgage and household insurance costs do not depend on the number of people in the household). It has also been assumed that expenditure on alcohol and tobacco relates to adults only in equal shares and that all other expenditure relates to all members of the household, twice as much being expended on each adult as on each child”

- 29 Since the Dependency Assumptions were first adopted (in 1983), the HES has been expanded to include more expenditure categories. This has meant that updating the dependency percentages in a manner consistent with the Dependency Assumptions requires some further assumptions to be made regarding the allocation of new expenditure categories. In the Updated Dependency Percentages, we have not departed from the underlying principles of the Dependency Assumptions. In contrast, the PCP Paper makes assumptions that differ from the Dependency Assumptions in many ways. This departure has led to an increase in the effective dependency rate that is not attributable solely to updates in the HES data.
- 30 To compare the changes in consumption brought about by changes in the underlying HES expenditure data, below is summarised the consumption amounts derived using:
- (i) the Dependency Assumptions and the HES data from the 1998/1999, 2003/2004, 2009/2010 and 2015/2016 editions; and
 - (ii) the allocation assumptions used in the PCP Paper of 25 January 2018 (excluding adjustment for motor vehicle expenditure).

HES Issue	1998/1999	2003/2004	2009/2010	2015/2016	2015/2016
Approach	Dependency Assumptions				PCP Paper ³
Deceased's consumption	\$262	\$320	\$464	\$517	\$328

³ The consumption amounts derived using the assumptions of the PCP Paper are calculated by multiplying the consumption percentage for all households of 19.2% by disposable income for all households of \$1,706.

- 31 It is apparent from the table above that the consumption amount derived by adopting the consumption percentage in the PCP Paper is significantly lower than what is derived when using the Dependency Assumptions. It does not accord with common sense that a person's expenditure in 2015/2016 is about the same as it was in 2003/2004 when dependency claims were dealt with in accordance with dependency percentage tables in the 4th edition of Prof Luntz's text. It is evident that there is a material increase in the level of dependency if the approach in the PCP Paper is adopted. The main cause of the difference in the amount of consumption is the PCP Paper's assumptions about the consumption patterns of a hypothetical deceased person.

Superannuation and life insurance

- 32 Superannuation and life insurance expenditure does not include employer superannuation contributions (which are dealt with as a separate head of loss, and commented on later in this paper). Superannuation and life insurance expenditure represents personal expenditure on superannuation (in terms of additional contributions for investment) and life insurance.
- 33 In our view, it is reasonable to assume that the cost to support a deceased includes consumption of asset accumulating expenditure such as superannuation and savings. On this basis, we have assumed that expenditure on superannuation and life insurance would have benefited the deceased and the spouse in equal proportions. We understand that the dependency percentages set out in the 4th Edition adopt a similar assumption (see footnote 150 on page 502).

Motor vehicle expenditure

- 34 The consumption percentages set out in the tables in the PCP Paper are applicable to households that incur expenditure on only one motor vehicle. The PCP Paper indicates that, where there is more than one motor vehicle in a household, and one vehicle was used by the deceased, the consumption percentages need to be increased by 4.3% (eg a consumption percentage per the PCP Paper of 15% should be increased to around 19%, being an increase of around 30%). In our experience, the requirement to make a manual adjustment to the percentages in the PCP Paper in circumstances where a household had two vehicles (pre-death) is often overlooked by users of the PCP Paper tables.
- 35 The average Australian household has more than one vehicle⁴. Accordingly, it is our position that it would be more reasonable to publish tables which more closely represent the data from which they are derived, that being households with more than one vehicle. It is also our opinion that, if percentages are to be provided for households with one vehicle, those percentages should be calculated by reference to data from households with only one vehicle, so that any increase in other transport expenditure (such as on public transport) by one car households will be taken into account. The HES does not reflect such data.

⁴ 2016 Census, Australian Bureau of Statistics

Other smaller expenditure categories

36 In our opinion, there are number of expenditure items within the HES which have been classified by the authors of the PCP Paper (for the purpose of determining the consumption percentages in the PCP Paper) as either non-divisible or less divisible than we consider reasonable. Although the impact of the classification of each expenditure item appears insignificant in isolation, when all differences are added, the impact can be material to a loss calculation. We have not dealt with the individual differences and the reasons for our allocation treatment in this paper.

Section V Superannuation and post retirement consumption

37 The table below summarises the key differences between how dependency on superannuation is quantified under each of the approaches prescribed by the Updated Dependency Percentages (ie our preferred approach) and the PCP Paper.

Element of calculation	Updated Dependency Percentages	PCP Paper
Allocation of superannuation	67.1% to the spouse (the rate would be higher if children would have been dependent at retirement)	100% to the dependants
When dependants would have access to Deceased's superannuation	Upon deceased's retirement	Weekly
Post-retirement consumption	Calculated from deceased's retirement until spouse's retirement	Calculated from deceased's retirement to deceased's death "but for"

- 38 Consistent with our views expressed at paragraph 7 above, we assume that:
- (i) the cost to support the Deceased includes consumption of asset accumulating expenditure such as superannuation and savings; and
 - (ii) any accumulated benefits, such as savings and superannuation, would not have been of benefit to the dependants immediately at the point of investment.
- 39 Our approach to quantifying the loss of dependency on a deceased's superannuation benefit differs to our approach to quantifying an injured plaintiff's loss of superannuation benefit. In the latter, absent of any statutory measures of damage, the loss comprises the present value of the lost contributions. In the former:
- (i) it is assumed that the deceased's superannuation will be shared between the deceased and the dependants (that is, the dependants will receive a benefit from a deceased's superannuation entitlement); and
 - (ii) the deceased's retirement date is the earliest date upon which the dependants would have received a benefit from the deceased's superannuation.
- 40 In contrast, we have seen reports by Mr Lee of Vincents (ie one of the authors of the PCP Paper) that quantify dependency on superannuation by reference to the entirety of the deceased's superannuation contributions, after tax, discounted weekly, during the course of the deceased's employment. Typically, in employee matter (as opposed to self-employed matters), Mr Lee quantifies the potential savings in the deceased's post retirement consumption for the duration of his/her life expectancy, but for his/her death, but does not deduct this amount in the overall loss quantification.

- 41 The PCP Paper implies (in the text quoted below) there is a causal link between the notional receipt of employer superannuation contributions and the possibility that there may be savings made as a result of not having to maintain the deceased in retirement:

"As noted in our previous papers we do not agree with any approach that applies a dependency percentage to superannuation contributions. Instead we propose that to the extent that a portion of the deceased's income was being used to fund their own retirement, it may be appropriate to make an allowance for the savings in the deceased's personal consumption from the date of their retirement to their notional life expectancy."

There does not appear to be any explanation in the PCP Paper as to why the authors disagree with an approach which applies a dependency percentage to superannuation contributions.

- 42 In our view, it is illogical to imply that there is some kind of link between pre-retirement superannuation contributions and post-retirement consumption. It is self-evident that, whether or not any contributions would have been made to a deceased's superannuation fund, maintaining that person in their retirement would involve expenditure.

- 43 Our position is that:

- (i) pre-retirement remuneration is dealt with in the pre-retirement period;
- (ii) the deceased's pre-retirement superannuation contributions, if any, do not determine whether there will be any savings of post-retirement consumption. Therefore, self-employed people, who are often assumed not to make superannuation contributions, are treated in the same manner as employees for whom employer contributions are made. The opposite is true of the approach propounded in the PCP Paper;

- (iii) assuming that a deceased would have derived a benefit from some part of their superannuation contributions does not preclude a deduction of post-retirement consumption in circumstances where the surviving spouse would have worked beyond the deceased's retirement (see (iv) below), because the existence of pre-retirement superannuation contributions does not determine the existence or quantum of post-retirement consumption (we note that an author of the PCP Paper, Mr Corey Plover, appears to have adopted a similar approach to ours in a recent report whereby he assumed that the deceased would have consumed a part of their superannuation and that the spouse had also made a saving in the deceased's post-retirement consumption); and
- (iv) a saving in post-retirement consumption should only be calculated during periods when the spouse would have retired later than the deceased, as once both the deceased and surviving spouse are assumed to have retired, the calculation of post-retirement consumption is fraught with uncertainty (see below for further discussion).

44 The calculations of post retirement consumption we have seen in practice have typically been subject to a significant amount of guess work. Also, when the deduction has not been made, often reasons are not given. We assume that "educated guesses" are made because the estimation of post retirement consumption requires accurate estimates of parameters such as (and not limited to):

- (i) the amount and type of retirement assets;
- (ii) eligibility for the Age Pension;
- (iii) the likelihood of access to other sources of retirement income; and

- (iv) the intended lifestyles of both the deceased person and relevant dependants.

We consider that these factors are almost impossible to predict with any level of certainty, and as a result, the calculation of post-retirement consumption beyond that immediately after a deceased's retirement while the surviving spouse continues to work, is likely to be of little probative value.

Section VI Comments on the 5th Edition

45 A rebuttal to our previously expressed concerns with the approach prescribed by the PCP Paper is included in the 5th Edition. Our comments on that rebuttal are set out in the following paragraphs.

Attribution of views

- 46 The discussion set out at pages 864 to 867 of the 5th Edition:
- (i) contains two statements that are identical to statements in various versions of the PCP Paper: (1) footnote 265 on page 865 of the 5th Edition regarding "international studies" and footnote 36 of the PCP Paper; and (2) part of the text concerning "Unallocated consumption" at page 865 compared with point 3 of the "*Agreed statistical tables for loss of financial dependency in Australia*" dated 9 February 2016);
 - (ii) is initially written in third person, but then changes to first person: "*The table uses similar methodology to previous papers of Michael J Lee*" (page 864) compared with "*we qualify and do not give figures*" (page 865);
 - (iii) includes a demonstration of legal expertise (see discussion of "*Higher income deciles*" and footnote 268 at page 866) and also accounting or actuarial expertise (see discussion of "*Allowance for immediate receipt*" at page 868).

- 47 In our view, with all due respect, it is not clear to whom the views set out at pages 864 to 867 of the 5th Edition are attributed.

Changes in text

- 48 Paragraph [10.3.16] of the 5th Edition appears to be the updated version of paragraph [9.3.4] of the 4th Edition (reproduced at paragraph 6 above). Part of paragraph [10.3.16] is reproduced below [our emphasis in bold type]:

*[10.3.16] Other matters to be taken into account. ... what the deceased would have earned at that date provides the starting point for the calculation of future loss... From the probable earnings of the deceased are deducted tax, the expenses of earning the income and what the deceased would have spent on himself or herself and on other non-claimants, if any. By including in the percentage of income representing personal consumption only a relatively small proportion of contributions the deceased was making to a superannuation fund, **Table 10.1 assumes that in the long run the family could have expected to have benefited from the superannuation...***

- 49 There are significant differences between paragraph [10.3.16] of the 5th Edition and the comparable paragraph of the 4th Edition, viz:
- (i) in the 4th Edition “**the deceased and the family could be expected to have benefited from the superannuation**” whereas, in the 5th Edition the text has changed to “*Table 10.1 assumes that in the long run* **the family could have expected to have benefited from the superannuation**”; and
 - (ii) the comments in the 4th Edition about the deferred receipt of savings have been omitted in the 5th Edition.

- 50 We recognise that the legal position on superannuation and the deferred receipt of benefits may have changed since the 4th Edition. In this regard, footnote 270 in the 5th Edition includes reference to a case that was decided in 2010, *Thornton v Lessbrook Pty Ltd* [2010] QSC 308. In that case, the dependency on superannuation was calculated using a rule of thumb whereby the loss of dependency on the deceased's salary was multiplied by the rate of the deceased's employer superannuation contributions (see paragraphs 72, 104, 106, 113 and 122). As the loss of dependency on the deceased's salary was stated net of the deceased's support, it is implied that the deceased in that matter would have consumed a part of their superannuation contributions.
- 51 In our view, reference to *Thornton v Lessbrook Pty Ltd* does not appear to explain why, in the 5th Edition, the **“the family could have expected to have benefited from the superannuation”** whereas in the 4th Edition, **“both the deceased and the family could be expected to have benefited from the superannuation”**.
- 52 The “rule of thumb” referred to above does not take account of the fact that the deceased's superannuation would not have been accessible until retirement “but for”, therefore, reference to *Thornton v Lessbrook Pty Ltd* may explain why the text concerning the deferred receipt of accumulated benefits such as savings or superannuation has been omitted from the 5th Edition. Nonetheless, we do not understand how a deferred receipt of a benefit by a dependant can be ignored, and the benefit attributed to the dependant on a weekly receipt basis.

Savings

- 53 The 5th Edition includes discussion on savings and mentions a case that was decided following the 4th Edition, viz:

"[10.3.15] they [the authors of the PCP Paper] made the assumption that, though there might be some increase in personal expenditure as income rose, it did not rise proportionately. This was one of the reasons for the view that the balance would be saved and ultimately be for the benefit of the other members of the household the courts in fact do generally make a similar assumption."

Footnote 268: *"De Sales v Ingrilli (2002) 212 CLR 338; 193 ALR 130; [2002] HCA 52 at [96] ('judges and juries almost automatically assume that the relatives have had the benefit of the residue of the net income of the Deceased')"*

- 54 The complete paragraph from the *De Sales v Ingrilli* decision referred at footnote 268 of the 5th Edition is as follows:

"In most cases, the starting point of the inquiry will be the income of the deceased at the time of death and how much of that income went to the benefit of the relatives. Unless the income of the deceased was very high, the evidence showing the relatives' benefit at the time of death will probably be determined by taking the deceased's income and deducting an amount to cover the cost of the deceased's food, clothing and personal expenditure. Such evidence may range from that of the surviving spouse painting a picture of the deceased as a frugal, shabbily dressed, selfless provider for the family to more sophisticated evidence, based on Household Expenditure Surveys of the Australian Bureau of Statistics. Once the cost of the deceased's support is deducted, judges and juries almost automatically assume that the relatives have had the benefit of the residue of the net income of the deceased. To this residual sum will be added a sum for any services, measurable in money, which the deceased provided for the family. Thus, there is room for large errors even in the relatively simple task of estimating the financial dependency of the family at the date of death. But the scope for error at this stage is almost insignificant compared to the scope for error in determining the benefits that the family would have received if the deceased had survived."

55 In our view, the above text is consistent with our approach and the text at paragraph [9.3.4] of the 4th Edition. The text in paragraph 96 of *De Sales v Ingrilli*:

- (i) indicates that the quantum of the deceased's consumption is often determined by reference to the spouse's evidence or estimates derived from the HES;
- (ii) the process of calculating financial dependency has two steps: step 1 – determine the cost to support the deceased; and step 2 calculate the dependants' expected benefit;
- (iii) does not provide instruction as to how to calculate the cost to support the deceased; and
- (iv) does not state that a deceased would not consume any of their savings (as is assumed in the PCP Paper).

56 In our view, the statement in *De Sales v Ingrilli* that “judges and juries almost automatically assume that the relatives have had the benefit of the residue of the net income of the Deceased” concerns step 2 (as described at paragraph 55(ii) above). We cannot see how the above quote addresses how to quantify a deceased's support (step 1) or how it can be interpreted as a basis for making the assumption that a deceased would not consume any of their savings.

57 In our opinion, absent of specific evidence in a particular matter, it is unlikely that statistics can provide any indication as to the appropriate allocation of savings and superannuation as between a deceased and his/her dependants. We are open to adjusting our approach if it is clear that the legal position is that, absent of specific evidence in a particular matter, it should be assumed:

- (i) a deceased would not benefit, in any way, from their superannuation or savings; and

- (ii) contrary to what is likely to have been the position, but for the death, no account should be taken of the deferral of the assumed receipt of accumulated benefits, such as savings and superannuation.

At the time of writing, we are not aware of any such legal authority.

International studies

- 58 The 5th Edition states at p865 “ ... which is consistent with the findings of international studies on this issue”. The PCP Paper, at page 18 of the pdf document, refers to “numerous studies undertaken in Australia, the United States and Canada”. Appendix 2 to the PCP Paper quotes tables from three North American studies. As we understand it, the quantification of dependency is guided by legal principals relevant to the jurisdiction of the matter. We assume there are differences in the legal principles around dependency quantification as between Australia and the United States, and within the United States itself. In any event, the PCP Paper does not refer to any studies from the United Kingdom, nor does it recognise that the “conventional method” is adopted in that country (refer paragraph [10.3.14] of the 5th Edition).

Clarification

- 59 The first bullet point on p867 of the 5th Edition states “*the old approach ... accounts for post retirement consumption via the dependency percentages*”. This statement has been obtained directly from our correspondence with Prof Luntz. It has come to our attention that other expert accountants have interpreted our position on post retirement consumption to be that it is possible using the “old approach” to quantify post retirement consumption. This requires clarification.

60 As we understand it, the measure of financial dependency is the value of the financial benefit that a dependant reasonably expected to benefit. The application of a dependency percentage to income is how the benefit is calculated. In our view a saving such as post retirement consumption is not a component (albeit negative) of the benefit but rather it may represent a gain to be brought to account as a separate deduction (in a similar way to how the deduction of any accelerated benefit is made). At present, we are still unsure of whether such a deduction is likely to be accepted at law, or whether the remoteness and uncertainty associated with such a saving prevents the saving from being taken into account.

Personal superannuation contributions

61 We have reproduced parts of paragraphs [10.3.16] and [10.5.12] of the 5th Edition below:

“By including in the percentage of income representing personal consumption only a relatively small proportion of contributions the deceased was making to a superannuation fund, Table 10.1 assumes that in the long run the family could have expected to have benefited from the superannuation...” [10.3.16]

“Table 10.1 makes allowance for the deceased’s own contributions in the average dependency, but not contributions by the employer, which have to be calculated as a separate head of damages” [10.5.12]

62 We do not believe these statements are accurate. As we understand it, none of the deceased’s personal superannuation contributions are included in the expenditure that comprises the consumption percentages set out in Table 10.1 of the 5th Edition and the PCP Paper. To our knowledge, the PCP Paper treats superannuation as asset accumulating expenditure. This treatment means that the deceased would not have consumed any of their personal superannuation contributions.