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ALAN T. PROCTOR and FRANK L. FURMINGER, Executors of the last Will of HARRY W. STEWART, deceased, (PLAINTIFFS) ..... APPELLANTS;

AND

JOHN DYCK, WILLIAM DUNCAN and JAMES DUNCAN (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Damages—Fatal Accidents—Basis of entitlement—Reasonable expectation of deriving pecuniary benefits from deceased's remaining alive—Remedy not barred because amount of loss incapable of precise ascertainment—The Fatal Accidents Act, R.S.O. 1950, c. 132.

In an action before a judge and jury, two motorists were found liable under *The Fatal Accidents Act*, R.S.O. 1950, c. 132, for causing the death at the age of 55 years of a prosperous farmer and dairy operator. By consent of the parties the damages were assessed by the trial judge. The evidence was that at the date of death the deceased was in good health and that his life expectancy was 22.30 years and for the period of his life expectancy the present value of his annual savings was some $58,000, and of his average annual increase in net worth some $81,000. The deceased's will conferred substantial benefits out of the residue on the children hereinafter mentioned but the net estate, although substantial, was exhausted by specific devises and bequests so that they received nothing. The trial judge assessed the damages under the Act at $28,250 which he apportioned as follows: funeral expenses $250; to the widow $9,000; to a married daughter aged 30, $2,000; to two sons aged 28 and 22 respectively, $4,000 each, and to a third son aged 20, $6,000. The first two items were not questioned by the Court of Appeal but it varied the judgment at trial by reducing the damages awarded the youngest son to $2,000 and setting aside *in toto* the awards to the other children.

Held: 1. To entitle a claimant to damages under *The Fatal Accidents Act*, it is sufficient if it is shown that the claimant had a reasonable expectation of deriving pecuniary advantage from the deceased's remaining alive which has been disappointed by his death. In the case at bar the chance of the claimants receiving benefits from their father's estate was not as a matter of law too remote to be regarded as a reasonable expectation. *Pym* v. *Great Northern Ry. Co.*, 2 B. & S. 759; *Goodwin* v. *Michigan Central Ry. Co.*, 29 O.L.R. 422, followed.

2. The trial judge was right in deciding that the claimants had a reasonable expectation of receiving substantial benefits from their father's estate had he lived and should not be denied a remedy because the amount of their loss was incapable of precise ascertainment.

3. There was nothing to indicate that the trial judge in fixing the amounts to be awarded the claimants had applied any wrong principle of law, or that the amounts he awarded were so inordinately high as to be wholly erroneous estimates of the damage, and they should therefore stand. *Nance* v. *B.C. Electric Ry. Co.* [1951] A.C. 601, applied.

Decision of The Court of Appeal [1952] O.R. 95 reversed and judgment of the trial judge restored.

APPEAL by the (plaintiffs) appellants from an Order of the Court of Appeal for Ontario (1), which varied the judgment of the trial judge, Treleaven J., by reducing the damages awarded to the appellants.

H. E. Harris, Q.C. for the appellants.

J. L. G. Keogh, Q.C. for the respondents, Duncan.

The judgment of the Court was delivered by:—

CARTWRIGHT J.:—The late Harry W. Stewart, hereinafter referred to as the deceased, died on the 20th of December, 1949 as a result of injuries received on the 17th of December, 1949. This action was brought by his executors claiming damages under the provisions of *The Trustee Act* (R.S.O. 1950, c. 400) and of *The Fatal Accidents Act* (R.S.O. 1950, c. 132). The action was tried before Treleaven J. with a jury. It was agreed at the trial that all questions as to liability should be determined by the jury but that the damages should be assessed by the learned trial judge. All of the defendants have been found liable and such liability is not questioned on this appeal.

(1) [1952] O.R. 95.

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The learned trial judge assessed the damages as follows:

Damages under the provisions of *The Trustee Act*	$ 1,213.05
Damages under the provisions of *The Fatal Accidents Act*	25,250.00

apportioned as follows:—

To the plaintiffs for funeral expenses	250.00
To Elizabeth Stewart, widow of the deceased	9,000.00
To Frank William Stewart, a son of the deceased	4,000.00
To Robert George Stewart, a son of the deceased	4,000.00
To William Charles Stewart, a son of the deceased	6,000.00
To Margery Proctor, a daughter of the deceased	2,000.00

On appeal to the Court of Appeal the $1,213.05 damages under *The Trustee Act,* the $250 for funeral expenses and the $9,000 awarded to the widow were not interfered with but the judgment was varied by reducing the damages awarded to the son, William Charles Stewart, from $6,000 to $2,000 and setting aside *in toto* the awards to Frank William Stewart, Robert George Stewart and Margery Proctor. A cross-appeal, seeking to increase the damages, was dismissed.

In this court counsel for the appellants asks that the trial judgment be restored and does not ask any increase over the amounts awarded at the trial. Counsel for the respondents supports the judgment of the Court of Appeal and does not ask for any further reduction. In the result the questions which we have to determine are as to what damages, if any, should be allowed to Frank William Stewart, Robert George Stewart and Margery Proctor, not exceeding in any case the amounts awarded to them at trial, and whether the amount awarded to William Charles Stewart should be increased and, if so, to what amount not exceeding $6,000.

The facts relevant to these questions may be summarized as follows.

At the time of his death the deceased was fifty-five years of age and his widow was the same age. They had one daughter and five sons whose ages at the date of the deceased's death were, Margery Proctor, thirty, Frank, twenty-eight, Fred, twenty-six, James, twenty-four, Robert, twenty-two, and William Charles, twenty.

The deceased was married in 1916 and at that time neither he nor his wife owned any property. The wife received about $4,000 from her father which was used in acquiring some of the assets which the deceased owned. It does not appear whether she received this $4,000 at the time of her marriage or later. Apart from this all the assets of the deceased were acquired by his own efforts with the assistance of his wife and children.

No detailed inventory of the assets owned by the deceased at the time of his death was put in evidence nor was there any detailed statement of his liabilities. Certain summarized statements were filed indicating that the gross assets of the estate amounted to $119,897.18 (including $2,510.07 life insurance) and that the liabilities totalled $60,329.36.

The assets included seven farms. A statement, Exhibit 11, indicates that the total value of six of these farms, which were specifically devised, was $72,700 and that they were subject to mortgages totalling $30,841.85. It is not clear whether these mortgages are included in the liabilities of $60,329.36, mentioned above.

The witness Proctor, who is one of the appellants and is a chartered accountant, explained that the values of all the assets which are given in the statements filed are those placed thereon by the officials of the Succession Duty Department and he expressed the opinion that if the assets were sold they might well realize fifty per cent more than these values. If this fifty per cent were applied only to the values stated for the six farms it would increase the value of the gross assets by $36,350 and indicate that in the thirty-three years between the date of his marriage and the date of his death the deceased had increased his fortune from the $4,000 contributed by the wife to a figure in the neighbourhood of $100,000.

The deceased left a will dated 6th December, 1949. By it he devised one farm to his widow, two farms to his son

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James, and three farms to his son Fred. The seventh farm, which is said to consist of eighty acres and as to the value of which there is no evidence, fell into the residue. The farms devised to James and Fred were charged with an annuity in favour of the widow and with paying off the mortgage on the farm devised to her. An automobile and all household goods and furniture were bequeathed to the wife, certain cattle to James, certain other cattle and all the deceased's interest in the "Avondale Dairy" to Fred. A legacy of one thousand dollars was bequeathed to an employee of the deceased. All the residue was left to James and Fred, charged with the payment of debts "excepting mortgages and debts owing with respect to the Dairy business", with the payment of $20,000 to Robert, $20,000 to Frank, $10,000 to Margery Proctor and $5,000 to William, such payments to be made over a period of five years from the date of the testator's death at the rate of twenty per cent each year, and with the payment of any succession duties payable in respect of these payments to Margery, Robert, Frank and William.

It was common ground that the residue is insufficient to pay the debts of the deceased, that the deficiency must be made up out of the assets specifically devised and bequeathed, and that consequently Margery, Frank, Robert and William receive nothing from their father's estate.

There is evidence that all of the sons had grown up at home and had worked with the deceased and that he had expressed the intention of giving all of them a start in life, that he was on excellent terms with all his children, and that Margery Proctor had lived at home until her marriage and had done the book-keeping and worked in the dairy, receiving only board, clothes and spending money.

There was evidence that the deceased was astute in business matters and had a specialized knowledge of cattle breeding.

An actuary testified that the life expectancy of the deceased was 22.30 years. He was in good health. Mr. Proctor testified that he had prepared the deceased's income tax returns for the years 1946 and 1949 inclusive and filed a statement showing for those four years, average annual net taxable income of $7,120.84, average annual savings from income of $3,786.26 and average annual increase in

net worth resulting from savings plus capital profits of $5,250.76. There was evidence that the present value at the date of the deceased's death of the average annual savings for the period of his life expectancy was $58,459.85 and of the average annual increase in net worth was $81,071.73.

With the exception of William the children with whose claims we are concerned were not dependent upon the deceased. William was living at home and receiving spending money and money for his clothing from the deceased. As I understand the reasons of the Court of Appeal, the sum of $2,000 awarded to him by that court was to cover the pecuniary benefits which, in their opinion, it was reasonably probable William would have received from his father in the latter's lifetime. As has been mentioned this award is not now challenged. The argument of the appellants is that the additional $4,000 awarded to William and the sums awarded to Margery, Frank and Robert by the learned trial judge are reasonable, and indeed, conservative, estimates of the amounts which, but for his untimely death, they would in all reasonable probability have received from their father's estate.

To entitle a claimant to damages under *The Fatal Accidents Act* it is not essential that he should have been financially dependent upon the deceased or that the deceased should have been under any legal liability to provide for him or that he should have enjoyed any benefits from the deceased in his lifetime. It is sufficient if it is shewn that the claimant had a reasonable expectation of deriving pecuniary advantage from the deceased's remaining alive which has been disappointed by his death.

It is argued for the respondents that the chance of these claimants receiving benefit from their father's estate is as a matter of law too remote to be regarded as a reasonable expectation. I am unable to agree with this submission. I think that the contrary was decided in *Pym* v. *Great Northern Ry. Co.* (1). At page 768 Cockburn J., with the concurrence of Crompton, Blackburn and Mellor J.J. said:

> A fortiori, the loss of a pecuniary provision, which fails to be made owing to the premature death of a person by whom such provision would have been made had he lived, is clearly a pecuniary loss for which compensation may be claimed.

(1) (1862) 2 B. & S. 759.

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> It is true that it must always remain matter of uncertainty whether the deceased person would have applied the necessary portion of income in securing to his family the social and domestic advantages of which they are said to have been deprived by his death; still more, whether he would have laid by any and what portion of his income to make provision for them at his death. But, as it has been established by the cases decided upon this statute, that, if there be a reasonable expectation of pecuniary advantage, the extinction of such expectation by negligence occasioning the death of the party from whom it arose will sustain the action, it is for a jury to say, under all the circumstances, taking into account all the uncertainties and contingencies of the particular case, whether there was such a reasonable and well founded expectation of pecuniary benefit as can be estimated in money, and so become the subject of damages in such an action.

It is true that when this judgment was affirmed in the Exchequer Chamber (1), the passage just quoted was not expressly approved but nothing was said to indicate that it was wrong and, in my opinion, it correctly states the law.

The unanimous judgment of the Court of Appeal of Ontario in *Goodwin* v. *Michigan Central Railway* (2), is to the same effect. We have not been referred to any authority in which it has been dissented from and it should, I think, be followed. In coming to this conclusion I do not regard the decision of the Judicial Committee in *Nance* v. *B.C. Electric Railway* (3), as having decided the question as it appears from the report at page 614, that the case was argued on the assumption common to both parties that it was proper to award damages under this head.

There remains the question whether in the case at bar the evidence justified the finding of fact that the claimants had a reasonable expectation of pecuniary advantage from the continuance of their father's life to the extent of the amounts awarded by the learned trial judge.

The difference of opinion between the Court of Appeal and the learned trial judge does not appear to be as to the applicable rules of law but as to the effect of the evidence. I agree with the submission of counsel for the respondent that the findings of the learned trial judge do not depend on his view of the credibility of the witnesses. The primary facts are not in dispute. The learned trial judge was of the view that the proper inference to be drawn from these

(1) 4 B. & S. 396.
(2) (1913) 29 O.L.R. 422.
(3) [1951] A.C. 601.

facts was that the claimants had a reasonable expectation of receiving substantial benefits from their father's estate, had he lived, while the Court of Appeal concluded that such facts indicated nothing more than a speculative possibility of such benefits.

The evidence of the statements made by the deceased and the terms of his will established that it was his desire and intention to benefit the claimants substantially upon his death. There was nothing to suggest that he was likely to change his mind in this regard. The record of his financial progress since his marriage, his average annual savings and average annual increase in net worth in recent years shewed, in my opinion, a reasonable probability that his fortune would increase with the years, with the corresponding probability that the claimants would, as he intended, receive benefits from his estate. His death has destroyed this probability. I think that the learned trial judge was right in deciding that the claimants had lost a reasonable expectation of substantial pecuniary benefit and that they should not be denied a remedy because the amount of their loss is incapable of precise ascertainment.

It remains to be considered whether the amounts fixed by the learned trial judge should stand. In my opinion they should. The Court of Appeal, being of opinion that no loss was established, did not discuss the quantum of damages. The principles by which I think we should be guided in approaching this question of quantum are laid down by the Judicial Committee in *Nance* v. *B.C. Electric* (*supra*) at pages 613 and 614 in the following words:—

> Two distinct questions arise: (1) What principles should be observed by an appellate court in deciding whether it is justified in disturbing the finding of the court of first instance as to the quantum of damages; more particularly when that finding is that of a jury, as in the present case.
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> (1) The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or a jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then, before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low

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or so inordinately high that it must be a wholly erroneous estimate of the damage (*Flint* v. *Lovell* (1)), approved by the House of Lords in *Davies* v. *Powell Duffryn Associated, Ld.* (2).

I find nothing in the reasons of the learned trial judge to indicate that he applied any wrong principle of law, and I find myself quite unable to say that the amounts which he has awarded to the claimants are so inordinately high that they must be wholly erroneous estimates of the damage.

For the above reasons I would allow the appeal and restore the judgment of the learned trial judge. The appellants should have their costs of the appeal to this court. The order of the Court of Appeal as to the costs of the appeal and cross-appeal to that court should stand.

Appeal allowed with costs and judgment at trial restored.

Solicitors for the appellants: *Fleming, Harris, Kerwin & Barr.*

Solicitors for the respondents, Duncan: *Bench, Keogh, Rogers & Grass.*

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*PRESENT: Kerwin, Taschereau, Estey, Locke and Cartwright JJ.

(1) [1935] 1 K.B. 354.

(2) [1942] A.C. 601.