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*May. 20.
*Nov. 16.

THE ST. LAWRENCE & OTTAWA RAILWAY COMP'Y (Defendants).. } APPELLANTS;

AND

WILLIAM PITMAN LETT (Plaintiff)... RESPONDENT.

APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Railway Company—Negligence—Death of wife by—Damages to husband as administrator—Benefit of children—Loss of household services—Care and training of children.

Although, on the death of a wife caused by negligence of a railway company, the husband cannot recover damages of a sentimental character, yet the loss of household services accustomed to be performed by the wife, which would have to be replaced by hired services, is a substantial loss for which damages may be recovered, as is also the loss to the children of the care and moral training of their mother. (Taschereau and Gwynne JJ. dissenting.)

*PRESENT.—Sir W. J. Ritchie C.J. and Fournier, Henry, Taschereau and Gwynne JJ.

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APPEAL from the Court of Appeal for Ontario (1), sustaining a verdict for the respondent as administrator of his wife, on account of her death caused by negligence of the appellants.

The accident which caused the death of the respondent's wife occurred while she was driving along Dalhousie street in the city of Ottawa, at about ten o'clock in the morning of the third day of September, 1881. It appeared that as she approached a railway crossing on the said street, a train belonging to the appellants' company was proceeding along the track at right angles to the said street, moving reversely, and struck the carriage in which the respondent's wife was driving, and she was thrown out and received injuries from which she died. Her husband, having obtained letters of administration, brought an action against the company, on behalf of himself and the children of the deceased, and alleged in his statement of claim, that the train causing the accident which resulted in his wife's death, had violated the Railway Act in several particulars: by not ringing a bell or blowing a whistle; by not having a man on the rear of the car to warn persons of the approach of the train; and by proceeding at a greater rate of speed than six miles an hour.

On the trial it was shown that the deceased had been accustomed to perform various household services, such as milking a cow, &c., and managed all the household affairs.

The jury found the railway company guilty of negligence, and gave a verdict for the plaintiff with $5,800 damages of which $1,500 was apportioned to the husband and the balance divided among the children. This verdict the Court of Appeal refused to disturb, and the company appealed to the Supreme Court of Canada.

Christopher Robinson Q.C. for the appellants.

(1) 11 Ont. App. R. 1.

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In addition to the authorities and points relied on by counsel which are stated in the judgments of the court below (1), and in the judgments delivered in this court, *Seward* v. *Vera Cruz* (2); and *Savary et al* v. *G. T. Railway of Canada* (3) were cited.

Dalton McCarthy Q.C. and *M. O'Gara* Q.C. for the respondent, cited *Tilley* v. *Hudson River RR. Co.* (4); *McIntyre* v. *N. Y. Central R.R. Co.* (5); *Chamberlain* v. *Boyd* (6).

Sir W. J. RITCHIE C.J.—This action was brought by a husband, under Cons. Stats. of Canada, ch. 78, secs. 2 and 3, on behalf of himself and his children, to recover damages for the death of his wife caused by the negligence of the defendants and their servants. The sections of the statute referred to are as follows:—

2. Wherever the death of a person has been caused by such wrongful act, neglect or default, as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, in such case the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death has been caused under such circumstances as amount in law to felony. C. S. C., c. 78, s. 1.

3. Every such action shall be for the benefit of the wife, husband, parent and child of the person whose death has been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased, and in every such action the judge or jury may give such damages as they think proportioned to the injury, resulting from such death, to the parties respectively for whom and for whose benefit such action has been brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties, in such shares as the judge or jury by their verdict find and direct. C. S. C., c. 78, s. 2.

The jury found that the death was caused by the

(1) 11 Ont. App. R. 1.
(2) 10 App. Cas. 70.
(3) 6 L. C. Jur. 49.
(4) Sedgwick L. C. 796.
(5) 37 N. Y. 287.
(6) 11 Q. B. D. 407.

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negligence of the defendants, and awarded damages to the husband and to the children of the deceased being under age. The Queen's Bench Division (Chief Justice Haggarty and Mr. Justice Cameron) set aside this verdict and ordered a non-suit, Mr. Justice Armour dissenting; the Court of Appeal reversed the decision of the Queen's Bench Division, three of the learned judges holding plaintiff entitled to recover, Burton J. dissenting. All the judges in both courts admitted that defendants had been guilty of negligence, but differed as to the meaning to be attached to the word injury used in the statute. Chief Justice Haggarty and Mr. Justice Burton held that the loss of the wife or mother, no matter how industrious, careful or attentive she might have been in looking after her husband's domestic affairs, and in promoting the material and moral condition and prospects of her children, was still sentimental, and not of a sufficient pecuniary character to support the action. The other judges held that what is meant by pecuniary loss in all the decided cases in which the expression had been used is the loss of some benefit or advantage which is capable of being estimated in money as distinguished from mere sentimental loss.

The evidence as to damages was to the following effect:—The husband was married on 21st October, 1849; his wife was in her fifty-third year when she was killed; he was nine years her senior, and she was in the very best of health; they had had nine children, seven of whom were living aged respectively 30, 22, 21, 19, 16, 14 and 11. The five younger children, to whom the jury awarded damages, lived at home, and were not providing for themselves; the wife and mother managed the whole business of the house, made all purchases and repairs, and did everything about the house; the husband had nothing to do while she lived

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except to attend to the business of his office; she did a great deal of the house-work though they always kept one servant; she almost always milked the cow in preference to allowing the servant to milk her who did not understand her; and, to the question: Was she a careful mother? the answer was: Very much so; and to the question: As regards the education of her children? the answer was: Yes. The question now before us then is: What are the damages which the jury are authorized to give in proportion to the injury resulting from this death, to the parties respectively "for whom and for whose benefit such action has been brought," to be divided, after deducting certain costs amongst the parties in such shares as the judge or jury by their verdict shall direct.

I cannot think the injury contemplated by the legislature ought to be confined to a pecuniary interest in a sense so limited as only to embrace loss of money or property, but that, as in the case of a husband in reference to the loss of a wife, so, in the case of children, the loss of a mother may involve many things which may be regarded as of a pecuniary character. The term pecuniary is not used by the legislature, and this, of itself, I think, affords a good reason for saying that that term should not be introduced in a narrow confined sense as applicable only to an immediate loss of money or property. In several of the United States of America, where the word pecuniary is introduced into a statute, it is not construed in a strict sense, and is held not to exclude the loss of maintenance or of the intellectual, moral and physical training which a mother only can give to her children. Therefore, *a fortiori*, the word should not be judicially introduced into our statute with a view to a narrow and strict construction.

The principles, so far as they are enunciated, in the English cases, in my opinion, support the views I have

just expressed. In *Pym* v. *The Great Northern Ry. Co.* (1), Erle C.J., in delivering judgment, says :—

The principle which governs these cases appears to us to be, to consider whether there was evidence of a reasonable probability of pecuniary benefit to the parties, if the death of the deceased had not occurred; and was it lost by reason of that death, caused by the wrongful act, neglect, or default of the defendants? If this were so, then there is a case which the judge must leave to the jury.

And Pollock C. B., in *Franklin* v. *South Eastern Ry. Co.* (2), says:—

In this case the plaintiff, as administrator of his son, sued (under the Statute 9 and 10 Vic., ch. 93) the defendants, by the negligence of whose servants his son's death was caused; and the question was if he was entitled to maintain the action, it being contended that it was necessary the plaintiff should show a damage, and that he had shown none.

The statute does not in terms say on what principle the action it gives is to be maintainable, nor on what principle the damages are to be assessed, and the only way to ascertain what it does, is to show what it does not mean. Now, it is clear that damage must be shown, for the jury are to "give such damages as they think proportioned to the injury." It has been held that these damages are not to be given as a *solatium;* but are to be given in reference to a pecuniary loss. That was so decided for the first time in *banc* in *Blake* v. *The Midland Railway Co.* (3). That case was tried before Parke B., who told the jury that the Lord Chief Baron had frequently ruled at *nisi prius*, and without objection, that the claim for damage must be founded on pecuniary loss, actual or expected, and that more injury to feelings could not be considered. It is also clear that the damages are not to be given merely in reference to the loss of a legal right, for they are to be distributed among relations only, and not to all individuals sustaining such a loss; and accordingly the practice has not been to ascertain what benefit could have been enforced by the claimants had the deceased lived and give damages limited thereby. If, then, the damages are not to be calculated on either of these principles, nothing remains except that they should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life. Whether the plaintiff had any such reasonable expectation of benefit from the continuance of his son's life, and if so, to

(1) 4 B. & S. 406.
(2) 3 H. & N. 213.
(3) 18 Q. B. 93.

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what extent, were the questions left in this case to the jury. The proper question then was left, if there was any evidence in support of the affirmative of it. We think there was. The plaintiff was old and getting infirm; the son was young, earning good wages, and apparently well disposed to assist his father, and, in fact, he had so assisted him to the value of 3s. 6d. a week. We do not say that it was necessary that actual benefit should have been derived, a reasonable expectation is enough, and such reasonable expectation might well exist, though from the father not being in need, the son had never done anything for him. On the other hand a jury certainly ought not to make a guess in the matter, but ought to be satisfied that there has been a loss of sensible and appreciable pecuniary benefit, which might have been reasonably expected from the continuance of the life.

Dalton v. *The South Eastern Ry. Co.* (1) and *Franklin* v. *the same company* (2) are to the same effect, and are commented upon in the Supreme Court of Pennsylvania by Thomson J., in the case of *The Pennsylvania Railroad Co.* v. *Adams* (3) as follows:

The rule established in *Dalton* v. *The South Eastern Ry. Co.* and *Franklin* v. *the same company* is, that if there be a reasonable expectation of pecuniary advantage, the destruction of such expectation by negligence occasioning the death of the party from whom it arose will sustain the action. This is the settled rule in England for the right of recovery where the family relation exists in fact but not in law, so far as maintenance or support is concerned. It is high authority; it is a precedent we may safely follow. It seems to consort entirely with the highest dictates of reason and justice.

And there are many cases in the United States directly in point on the question, among which the following may be noted:

In *Tilley* v. *The Hudson River Railroad Company* (4) Denio J. says:

It will not be essential to pass upon the other exceptions, except so far as may be useful for the purposes of another trial. We think it was not improper to allow the plaintiff to show the habitual occupation and employment of the deceased, for the purposes for which it was offered and received on the trial, namely, to show her general

(1) 4 C. B. N. S. 296.
(2) 3 H. & N. 211.
(3) 5 P. F. Smith 503.
(4) 24 N. Y. 474.

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capacity and relation to her family. It is true that the testimony on that point was made to assume proportions beyond what seems to have been necessary for the purposes mentioned; but, it being competent, it was for the judge to determine the extent to which the examination might be carried.

The injury to the children of the deceased by the death of their mother was a legitimate ground of damages, and we do not agree with the defendant's counsel, that they ought to have been nominal The difficulty upon this point arises from the employment of the word pecuniary in the statute, but it was not used in a sense so limited as to confine it to the immediate loss of money or property; for if that were so, there is scarcely a case where any amount of damages could be recovered. It looks to prospective advantages of a pecuniary nature which have been cut off by the premature death of the person from whom they would have proceeded; and the word pecuniary was used in distinction to those injuries to the affections and sentiments which arise from the death of relatives, and which, though most painful and grievous to be borne, cannot be measured or recompensed by money. It excludes, also, those losses which result from the deprivation of the society and companionship of relatives, which are equally incapable of being defined by any recognized measure of value. But infant children sustain a loss from the death of their parents, and especially of their mother, of a different kind. She owes them the duty of nurture and of intellectual, moral and physical training, and of such instruction as can only proceed from a mother. This is, to say the least, as essential to their future well being in a worldly point of view, and to their success in life, as the instruction in letters and other branches of elementary education which they receive at the hands of other teachers who are employed for a pecuniary compensation.

Again in *Tilley* v. *The Hudson River Railroad Company*, Sedgwick's, leading Cases on Damages, p. 799, Hogeboom J. says:—

The charge of the judge was explicit that the damages must be limited to pecuniary injuries; and he said that in estimating them they had a right to consider the loss (that is, the pecuniary loss) which the children had sustained in reference to their mother's nurture and instruction, and moral, physical and intellectual training. I think this does not imply that the children are necessarily and inevitably subjected to such a loss, but leaves it to the jury to determine whether any such loss has been in fact sustained, and if so, the amount of such loss. This is the fair scope and

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meaning of the charge, and if it was not sufficiently explicit, should have been made so by a direct request for such purpose. This understood, I regard it as unexceptionable. It is certainly possible, and not only so, but highly probable, that a mother's nurture, instruction and training, if judiciously administered, will operate favorably upon the worldly prospects and pecuniary interests of the child. The object of such training and education is not simply to prepare them for another world, but to act well their part in this, and to promote their temporal welfare. If they acquire health, knowledge, a sound bodily constitution, and ample intellectual development under the judicious training and discipline of a competent and careful mother, it is very likely to tell favorably upon their pecuniary interests. These are better, even in a pecuniary or mercenary point of view, than a feeble constitution, impaired health, intellectual ignorance and degradation and moral turpitude. To sustain the charge, it is enough that these circumstances might affect their pecuniary prospects. It was left to the jury to say whether in the given case they did so or not, and if so to what extent. * * *

The charge is supposed to have been particularly objectionable because it set before the jury moral training and culture as one of the sources of pecuniary benefit, which the jury were at liberty to consider. * * * * *

But I think it defensible on the grounds already advanced, that moral culture, like bodily health and mental development, improve and perfect the man and fit him for not only a more useful but a more prosperous career, for worldly success as well as social consideration. It is not essential to show that they necessarily result in direct pecuniary advantage; it is sufficient that they may do so; that they often do so; that it is possible and not improbable that such may be the result, and that, therefore, these items may be set forth and presented for the consideration and deliberation of the jury, to be disposed of as they shall deem to be just. I think the exception is not well taken if they may possibly result in pecuniary benefit and do not tend in a contrary direction. I concede these are quite general and to some extent loose and indefinite elements to enter into a safe and judicious estimate of actual pecuniary damage, but I am unable to find in the statute a restriction which shall confine it within narrower limits.

In the *Pennsylvania Railway Co.* v. *Goodman* (1), the following doctrine is laid down:

Damages in a case like this, where the plaintiff is entitled to

(1) 62 Penn. 332.

recover, should be given as a pecuniary compensation, the jury measuring the plaintiff's loss by a just estimate of the services and companionship of the wife of which he was deprived by this accident, that is, of their value in a pecuniary sense—nothing is allowable for the suffering of the deceased nor for the wounded feelings of the plaintiff. Of course the jury will examine the testimony to aid them in ascertaining the damages, as well as every other point in the issue they are trying. But if damages are to be given at all, there is no reason why they should be nominal merely; they should be a just compensation for the value of the companionship and services lost to him by reason of this unfortunate collision.

When charging the jury, the judge said:

After commending this case to your most careful consideration, I have only to add, that if you should arrive at the conclusion that, according to the evidence in regard to the facts and the law as given to you by the court applicable to the facts which you find to be proved, the plaintiff is entitled to recover, you will enquire and assess the amount of damages to be awarded to him for the injury he has sustained. The law is, that the damages for such an injury are to be a pecuniary compensation, to be measured by the value of the loss of service and companionship sustained by the plaintiff. There is evidence before you in relation to the condition of the family of the plaintiff, his occupation and business, the age, health and character of his wife for industry and careful management. These are all considerations that may enable you to form a correct judgment as to the amount of damages you should award the plaintiff, if, according to the law and the evidence, he ought to recover.

When delivering the judgment of the court, the judge said:

Looking at the entire charge on the subject of damages, we think it clearly confined the damages to a pecuniary compensation for the loss of Mrs. Goodman's service. The court told the jury in express language that nothing is allowable for the suffering of the deceased, nor for the wounded feelings of the plaintiff. They said, also, that the plaintiff's loss was to be measured by a just estimate of the services and companionship of the wife. It is thought that this meant, by way of solace, for the loss of companionship. But all the judge said on this point made it evident he did not mean compensation by way of solace, and could not have been so understood by the jury. Companionship was evidently used to express the relation of the deceased in the character of the service she performed. He merely meant to say that the loss should be measured by the value

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of her services as a wife or companion. The form of expression, perhaps, was not the best selection of words, yet it certainly meant no more than that the pecuniary loss was to be measured by the nature of the service characterized as it was by the relation in which the parties stood to each other. Certainly the service of a wife is pecuniarily more valuable than that of a mere hireling. The frugality, industry, usefulness, attention, and tender solicitude of a wife and the mother of children, surely make her services greater than those of an ordinary servant, and therefore worth more. These elements are not to be excluded from the consideration of a jury in making a mere money estimate of value. Finding no error we can reach, the judgment must be affirmed.

And in *McIntyre* v. *New York Central R.R. Co.* (1) in the judgment of Fullerton J., we find the following:—

When we consider the defect which the statute was designed to remedy, it was taking too narrow a view of the matter to say that the word pecuniary was used in so limited a sense as to embrace only the loss of money.

Such a limitation would, in many cases, render the statute a mere mockery, because it would afford no substantial aid in the very case in which it is most needed. The loss of the society of a deceased relative, the injury to the affections of those surviving, cannot be regarded as being within the remedy of the statute, because in no sense can the loss be regarded as pecuniary. But to children the loss of a parent involves the loss of many other things which this court has heretofore regarded as of a pecuniary character, and as the subjects of consideration by a jury in assessing the damages under the statute.

I think the statute intended that where there was a substantial loss or injury there should be substantial relief. I cannot think that in giving compensation to a child for the loss of its parent the legislature intended so to limit the remedy as to deprive the child of compensation for the greatest injury it is possible to conceive a child can sustain, namely, in being deprived of the care, education and training of a mother, unless it could be shown that the loss was a pecuniary loss of so many dollars or so much property, a construction which, in ninety-nine cases out of a hundred, would

(1) 37 N. Y. 295.

simply amount to saying that though there was an almost irreparable injury, affecting the present and future interests of the child, no compensation was to be awarded; in other words it would be, in effect, to deny to a child compensation for the death of a mother by negligence in almost every conceivable case.

I think the term injury in the statute means substantial injury as opposed to mere sentimental, and I cannot bring my mind to the conclusion that a husband or infant children may not, in the loss of a wife or mother, and did not in this case by such a loss, sustain a substantial injury and one for which it was the intention of the legislature to indemnify the husband and children. I am free to admit that the injury must not be sentimental or the damages a mere solatium, but must be capable of a pecuniary estimate; but I cannot think it must necessarily be a loss of so many dollars and cents capable of calculation. The injury must be substantial; the loss, a loss of a substantial pecuniary benefit, and the damages are not to be given to soothe the feelings of the husband or child, but are to be given for the substantial injury. It may be impossible to reduce such an injury to an exact pecuniary amount. In estimating the pecuniary value of such an injury courts and juries, will, no doubt, be governed by a consideration of the relative positions of the parties, such as the relative positions of husband and wife, the ages of the children, and the duties discharged by the mother, and in the consideration of all the surrounding circumstances will give such damages as will afford a reasonable pecuniary compensation for the substantial injury sustained. No doubt this rule may be somewhat loose and indefinite, but the rule as to many injuries for which the law gives compensation is not less so.

I cannot, therefore, appreciate the force of the argu-

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ment as to the difficulty of fixing a pecuniary estimate upon the loss which the husband or child may sustain, as affording any reason against awarding him or them a just and reasonable compensation. There are abundant cases in our law where there is the same difficulty in reducing the injury to a pecuniary standard; in actions of slander for words actionable in themselves where special damage is not required to be proved; libel, breach of promise of marriage, and many others where substantial injury is complained of, but the amount of damage is left to the discretion and judgment of the jury; there are no judicial tables by which the amount of such damages can be ascertained, nor any judicial scales on which they can be weighed, yet pecuniary damages are, without difficulty awarded, assessed by the good sense and sound judgment of the jury, upon and by reference to, all the facts and circumstances of each particular case, and who are, as Lord Campbell expresses it, to take a reasonable view of the case and give a fair compensation.

There may, doubtless, be cases in which neither the husband nor children would be entitled to recover, because there may be cases where the wife and mother was incompetent, from physical infirmity, to render any services or benefit to her husband or children, but whom, on the other hand, might be a burthen to either or both; or there may be cases where the conduct and example of the mother may be baneful, and so far from being beneficial to the children may be positively injurious; it would seem obvious in such cases, that there being no substantial injury there could be no damage. But, on the other hand, let us suppose a case of a household of children too young to work, practically managed and maintained by the energy, activity, frugality, intelligence and industry of a wife and mother; is the loss of such a wife and mother no substantial pecuniary injury

to the husband and child? Or suppose the father of this family unable to work, or, if able to work, a poor man, dependent on his daily labor, with wages insufficient to enable him to employ a servant; who has a comfortable, happy home under the care and administration of such a wife; the wife is taken away; in what condition would that husband and those motherless children be left while their father was earning his scanty wage, the children neglected, the family meals uncooked, the household uncared for? Or take the case of a mother, a widow, with no means but her daily labor, who, by such daily labor, supports her children, clothes, educates, and brings them up in comparative comfort, who is killed by negligence and her children are thrown on the world, homeless, motherless and penniless, and yet, when all or any of them seek compensation for this grievous substantial injury inflicted on them by negligence, are they to be told that they have sustained no appreciable injury capable of pecuniary compensation, and that the injury they have sustained is purely sentimental? Truly, the daily suffering of the bereaved father and the motherless children would tell a very different tale.

I must confess myself at a loss to understand how it can be said that the care and management of a household by an industrious, careful, frugal and intelligent woman, or the care and bringing up by a worthy loving mother of a family of children, is not a substantial benefit to the husband and children; or how it can be said that the loss of such a wife and mother is not a substantial injury but merely sentimental, is, to my mind, incomprehensible. And if the injury is substantial, the only mode the law could provide for reimbursing the husband and children is by a pecuniary compensation, and so, in my opinion, in the eye of the law, the injury is a pecuniary injury.

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But it is said that this may lead to investigations of a very disagreeable and undesirable character. That, in my opinion, must be left to the discretion of those putting forward claims involving such a result; but on a fair claim, such as the present, it would seem somewhat strange that the party at whose hands the claimants have suffered should be permitted to say they should not be allowed to recover because in some doubtful cases the investigation may be made unpleasant or inexpedient. To allow an objection such as this to prevail or have any weight whatever as a bar to the right to recover would, in my humble opinion, simply be to put pure sentiment in the way of law and justice.

The evidence in this case shows that the husband was receiving benefits and advantages from the services of his wife capable of pecuniary computation, and had such reasonable expectation of pecuniary benefit from the continaunce of such services by the continuance of the wife's life as would entitle him to damages under the statute; and, as to the children, I agree with Mr. Justice Armour that there is an education in religion, morals and virtue which, owing to the peculiar confidence inspired by the relationship of mother and child, can be imparted to the children by the mother alone; I think that such education is a benefit and advantage to the child and is capable of being estimated in money, and that the deprivation of a mother's superintendence and care of the children, occasioned by the death of the mother, is a pecuniary loss to the children. Although those children, or some of them, being still under age, may have passed from mere childhood, they were still in a position where a mother's care and supervision and moral, physical and intellectual training was, if possible, more important, more necessary, more valuable to them, and more difficult to be supplied, than in the case of very young children.

FOURNIER J.—I entirely concur with the views expressed by the learned Chief Justice and I think the appeal should be dismissed.

HENRY J.—This appeal should be dismissed. I entirely agree with the Chief Justice in this case.

The action was commenced under the statute passed by the Legislature of the Province of Ontario, which is a copy of Lord Campbell's Act, and it was in consequence of the death of the plaintiff's wife being caused by what was not contested to be, the defendant's negligence.

The question is whether the husband of the deceased wife is entitled to bring this action in the capacity he has done, and whether the children are entitled to relief. I have looked at the statute very attentively and it allows a jury to award damages for injury caused by negligence under the circumstances in evidence in this case. The lady would have been entitled, had she survived the injury she sustained, to have brought, with her husband an action for damages. But it is said that Lord Campbell's Act was never intended to give to the survivor any right to recover damages except for a specific pecuniary loss—that is, if she lived, the husband would recover damages for any loss he could show he had sustained, but if she died, he has no remedy except for technically a pecuniary loss.

Looking at the law applicable to that subject at the time that statute was passed, we are to find out what the latter intended, and how far parties were to be compensated for loss sustained. In the case before us this lady was proved to be a dutiful wife and mother, industrious and hard working, even to the milking of the cows, and we are told that the loss of her services would not be a pecuniary, but a sentimental loss. Here is an actual substantial loss independent of any sentimental feeling. It is clear, to my mind, that nothing but absolute value

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could compensate for it. It is truly said that in England no sentimental damages can be recovered, and that there must be actual pecuniary loss. The statute does not provide for the recovery of damages for mere grief or loss of society, &c., to be ascertained solely, as must be the case, by the testimony of the interested party, for nobody else can measure or appreciate it. To that extent I admit the decisions go in England. And in this case we have no right to go beyond the decisions in England in limiting the operation of this statute. Under all the circumstances I think we are bound in this case to sustain the verdict of the jury awarding damages for a *bonâ fide* absolute loss, for I consider it is a pecuniary loss which the respondent and those for whom he is acting have sustained, which it takes money or money's worth to make up, and which can be ascertained by evidence as easily and effectually as may be done in cases of slander and many others.

I am therefore of opinion that the judgment of the court below should be affirmed.

TASCHEREAU J.—I concur in the conclusion arrived at by Mr. Justice Gwynne, whose reasons for judgment I have had occasion to read.

GWYNNE J.—This is an action brought by William P. Lett as administrator of his deceased wife, who was killed by a collision on the defendants' railway, to recover damages from the defendants under the provisions of chapter 128 of the Revised Statutes of Ontario. The action is brought for the benefit of the husband himself, and of seven surviving children of the marriage, of the respective ages of 30, 22, 21, 19, 16, 14 and 11 years. At the trial it appeared that the deceased was possessed of a small income derived from real estate, of which her husband upon her death

became tenant by the courtesy. The plaintiff testified that during the life of his wife she managed this property, and received the income without any interference upon his part, and that she always applied the income for the support of the family. The child aged 30 who was a married daughter, gave evidence that her mother was in the habit of assisting her with meat, butter, money and clothes to the value, as she believed, of about $100 per annum, but it is unnecessary to deal with this evidence as the jury allowed nothing to this daughter; the child aged 22, a son, who was in the receipt of a small income from an office held by him, gave evidence that he by contract with his mother, paid her ten dollars a month for his board, and that she was in the habit of making him little presents from time to time, which however were about balanced by money given by him to his mother in excess of the ten dollars per month agreed upon for his board; it is unnecessary also to deal with this evidence as the jury allowed nothing to this son either.

The husband made no claim, as by way of compensation for any loss alleged to have occurred in respect of the income which the wife possessed from her real estate, and the only evidence given in support of the husband's own claim for compensation for the injury alleged to be sustained by him, resulting from his wife's death was in the following language of the plaintiff:—

His wife he said was at the time of her death 53 years of age and he 62. She managed the whole business of the house, made all purchases and repairs, and did everything about the house. He had nothing to do while she lived, except attend to the business of his office from which he received an income of sixteen hundred dollars per annum. They always kept one servant, but the wife did a good deal of the household work, she mostly always milked the cow in preference to allowing girls to milk her, who did not understand her. The child, aged 21, is a daughter whose education was complete at the time of the death of the mother, and she, he said, had

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been trained in domestic affairs by her mother, since whose death she "runs the house."

When asked to explain the pecuniary damage occasioned to him by his wife's death, he replied that he would sustain the loss of her management. In support of the right of the children to compensation for injury resulting to them from the death of their mother, the only evidence given, apart from that of the son and daughter, to whom the jury allowed nothing, was that of the plaintiff, who, in reply to a question, whether the deceased was a careful mother, said that she was very much so. And upon the question being repeated in the form, whether she was a careful mother as regards the education of her children? he answered yes.

Upon this evidence the jury rendered a verdict for the plaintiff with $5,800 damages, distributed as follows:— To the plaintiff himself, $1,500; to the child aged 21, a daughter, $600; to the child aged 19, a son, $400; to the one aged 16, a son, $800; to the child aged 14, a daughter, $1,200; and to the child aged 11, a son, $1,300. Upon a rule being obtained in the Queen's Bench Division of the High Court of Justice for Ontario to set aside this verdict and for a new trial upon the grounds, among others, that the verdict was against law and evidence and the weight of evidence, and upon the ground that no cause of action was established, there being no pecuniary loss established, or that there was no right to recover on behalf of the children, as the death of Mrs. Lett was no pecuniary injury to the children, even if it was established to be to her husband, and on the ground that the damages were excessive, the majority of that court being of opinion that there was no evidence proper to be submitted to a jury of any injury resulting from the death of Mrs. Lett within the meaning of the 128th chapter of the Revised Statutes of Ontario, made the rule absolute for entering

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a non-suit. Upon appeal to the Court of Appeal of Ontario, this rule was set aside and the rule *nisi* for the new trial discharged with costs, thus leaving the verdict of the jury to stand. It is from this judgment of the Court of Appeal for Ontario that the present appeal is taken, and the question presented to us by it, is whether or not the evidence given of the sustaining by the persons, or any of the persons for whose benefit the verdict has been rendered, of injury resulting from the death of the deceased was of such a nature as that the verdict rendered for the plaintiff can be sustained in whole or in part, within the true meaning of chapter 128 of the Statutes of Ontario.

This statute in so far as the point in question is affected, is identical in its provisions with the Imperial Statute 9 and 10 Vic., ch. 93, commonly called Lord Campbell's Act. The rule to be collected from the decisions in the English courts, I think, is that damages are not recoverable by a husband upon the ground merely of his being deprived of his wife; or *per quod consortium amisit*, nor by children, upon the ground merely of their being deprived of their mother; but that the loss (by the death) of all those benefits which being procurable with money are capable of pecuniary estimate, and which the parties in whose behalf the action is given by the statute had actually enjoyed, and but for the death, might have reasonably expected to continue to enjoy; and the disappointment by the death of the reasonable expectation of pecuniary benefit in the event of the continuance of the life of the deceased, are injuries which may be compensated with damages recovered in an action under the statute.

The circumstances under which parties may recover depend, as it appears to me, much upon the condition in life of the parties claiming and the nature of the benefit or services, the loss of which, resulting from the

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death, constitutes the injury in respect of which compensation is claimed. Evidence which would be sufficient to warrant a recovery in the case of parties in a humble condition of life, might be quite insufficient and inappropriate in the case of parties in wealthy, or even in comfortable circumstances; for example, the loss of his wife by a poor man having a family depending for their support upon his manual labor and who is compelled of necessity to depend solely upon his wife for the management of his little household affairs and the care of his children, may, perhaps, be said to be a proper subject of compensation in money, to enable him to supply, albeit imperfectly by hired assistance, the necessary services which his wife during her life had rendered, while a claim by a wealthy man, or by a man in comfortable pecuniary circumstances, for the loss of his wife, although such wife had during her life taken such control and management of her household affairs and such care of her children as a good wife and mother, having regard to her husband's circumstances, might naturally be expected to take, could not reasonably be entertained. So likewise in the case of parents of good education but of narrow means, wholly insufficient to pay for a good, liberal education for their children, but who, being themselves competent to give such an education, had assumed the duty, the loss to the children of such parents, or of such a parent, may be said to be as susceptible of pecuniary estimate as would be the loss of a parent having in his life-time abundant means to procure the education of his children, which means terminated with his life. Of this latter nature was the case of *Pym* v. *The Great Northern Railway* (1), where the points decided and the rationale of the decision are thus stated:

As the benefit of education and the enjoyment of the greater com-

(1) 2 B. & S. 759 and 4 B. & S. 397.

forts and conveniences of life depend on the possession of pecuniary means, to procure them the loss of those advantages is one which is capable of being estimated in money; in other words, is a pecuniary loss, and therefore the loss of such advantages arising from the death of a father *whose income ceases with his life* is an injury in respect of which an action can be maintained on the statute. 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.

The English cases beyond doubt establish 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 the expectation arose will sustain the action. Some of the American courts, it must be admitted, have gone far beyond the decisions in the English courts. In *Pennsylvania Road Co.* v. *Goodman* (1) the Supreme Court of the State of Pennsylvania held, that a husband was entitled to recover by way of compensation for the loss of his wife, damages measured by the value of her services as a wife or companion. If this be sound law, there cannot well be conceived any case of an action by a husband for the loss of his wife not resulting in a verdict for the plaintiff upon the bare evidence of the death having been caused by the act or default of the defendant, such a decision seems to amount to one that the action lies—*per quod consortium amisit*—I cannot concur in this view. The cases on the contrary in which a husband can obtain damages for the loss of the services rendered by a wife are, in my judgment, very exceptional, and each case must be governed by its own peculiar circumstances; the condition in life of the husband and the evidence of the nature of the particular service, the loss of which is made the subject of the claim. In *Tilley* v. *H. R. R. Co.* (2) a majority of the Court of Appeals in the State of New York held, that those losses which result from

(1) 62 Penn. Rep. 329. (2) 29 N. Y. 252.

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the deprivation of the society and companionship of relatives, as being incapable of being defined by any recognized measure of value are excluded, and are not therefore the subject of compensation in damages under their statute, which is similar in substance to ours, but that in an action brought to recover damages on behalf of children for injury occasioned to them by the death of a mother, the jury in estimating damages had a right to consider the nurture, instruction and the physical, moral and intellectual training which they might have received from their mother had she continued to live, and that they were not restricted by the arrival of the children at their majority. From a reference to the report this does not appear to me to be laid down as an abstract proposition of law applicable in every case, but as having reference to the particular evidence given in that case as to what the mother had been in the habit of doing in her life time. The learned judge who read the judgment of the majority of the court there says:

> If they (the jury) are satisfied from the history of the family or the intrinsic probabilities that damages were sustained by the loss of bodily care or intellectual culture or moral training which the mother had before supplied, they are at liberty to allow for it.

And again he says:

> That which had been already given and of which the children had already reaped the benefit, could not be increased by the continued life of the parent, nor curtailed by her sudden death—the result had been already realized, but her sudden and wrongful removal was the withdrawal, the permanent and perpetual withdrawal, of a moral and intellectual fund from which the children were constantly deriving pecuniary aliment and support, and it is the withdrawal which formed the basis of the whole allowance of any damage arising from this source.

Having regard to the evidence in that case in so far as it appears in the report, I am not prepared upon a similar case arising under our statute to adopt the judgment of the majority of the court as above announced.

Pecuniary compensation proportionate to an injury done to a person by such person being deprived of anything should be the value expressed in money of the thing of which they have been deprived. What in the supposed case a child is deprived of by the loss of his or her mother, is the possibility of receiving from the mother that care in sickness in case the child should be afflicted with sickness, that a mother naturally would give, and only a mother can give, and of that motherly advice and moral instruction which it might naturally be expected that, and it is therefore probable that, a mother would take the opportunity of giving to her child. There is no standard, as it appears to me by which a pecuniary value could be set upon the probability of the necessity for such maternal care in sickness arising or upon such maternal care in case the opportunity for its display should arise, nor upon such material advice and moral instruction in case they should be given, nor does the loss of such maternal care and advice constitute, in my opinion, such a disappointment of a reasonable expectation of pecuniary advantage as is cognizable under the statute. These benefits which spring from parental love and affection are neither procured nor procurable with money, and are therefore insusceptible of having a pecuniary value attached to them, and their loss, therefore, cannot be estimated in money. To throw a case into a jury box, with a charge that the action lies on proof of death by negligence of the defendants, and that it rests with the jury to measure the value of the loss to a child of the possibility of benefit of which it is deprived by the death of its mother, without any standard existing by which the estimate can be made, could not fail to result in a verdict for the plaintiff in every case with damages against defendants, by way merely of punishing them for their having caused the death, a result which cannot have been within the con-

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templation of the statute, which only authorizes damages to be given proportionate to the injury resulting from the death to the parties on whose behalf the action is brought. In the case before us the only evidence in support of the verdict, in so far as it is in favor of the children, is that the deceased was a careful mother as regards the education of her children, but this carefulness is quite consistent with her not having herself taken any part in imparting their education to them. The plaintiff admitted that the education of the daughter who was 21 years of age was completed at the time of the death of the deceased, at which time also the younger children appear to have been going to school for their education; but it was contended that whether the education of any of them had or not been completed, or whether any of them had arrived at full age was of no importance, for that this right to recover damages rested wholly upon their having been deprived by their mother's death of the possibility of their receiving that maternal care in case of sickness, and that good advice and moral instruction which it was naturally and reasonably to be expected that a good and virtuous mother would, if she had lived, have given to her children. In my judgment there is no standard by which a pecuniary estimate can be made of the injury resulting to the children from their being deprived of the possibility of their receiving such maternal care and advice, and that therefore such an injury is not cognizable under our statute. If the loss of maternal advice be a ground for compensation that would open enquiries as to the nature, the quality and value, of the advice, of which having been given there should be some evidence. This, in my opinion, never could have been contemplated by the statute, and no defendant could venture to enquire into such particulars without exposing himself to heavy damages for his temerity.

At the trial there was, I think, some evidence given having relation to an injury resulting to the married daughter which could not have been withheld from the jury, for upon her behalf it was said that she was in the habit of receiving annually pecuniary assistance from her mother, which may have come out of the income which her mother derived from her real estate, but as this estate has devolved upon the father for his life, and as the daughter is, perhaps, as likely to receive from him the same benefit she was accustomed to receive from her mother, she seems, and with reason I doubt not, to be content with the verdict of the jury, which allows her nothing. She has made no complaint against that verdict, and is no party to the question before us, which, in so far as the children are concerned, is whether the verdict in favor of those of them in whose favor it has been rendered can be sustained, and I am of opinion it cannot, and that there was no evidence given which warrants a verdict in their favor. In support of the verdict, in so far as the amount awarded to the husband of the deceased is concerned, the only evidence offered was that of the husband himself, who attributes the injury resulting to him to the loss of the management of his affairs by his wife, and the statement that she "mostly always milked the cow in preference to allowing girls to milk her who did not understand her." In what the pecuniary injury to the husband consists in respect of this milking of the cow does not appear. It is not suggested that the deceased milked the cow for the purpose of relieving, or that she did thereby in fact relieve, her husband from any expense whatever. It is not pretended that the plaintiff derived any pecuniary benefit from the circumstance of the cow having been milked by the deceased, which he has lost by her death, nor that since her death he has been put to any greater

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expense in the matter than he was put to during her life. He cannot, therefore, recover any sum by way of compensation in damages in respect of this particular item. There remains to be considered only the ground upon which the plaintiff in his evidence rested his claim for compensation for the injury resulting to himself personally, namely, the loss of her management of his household affairs. Whether in an action of this discription there be anything peculiar in the condition in life of the parties, or whether there be anything exceptional in the nature of the services rendered by a wife to her husband, in respect of the loss of which by her death damages are claimed on behalf of the husband, are, no doubt, questions for the jury; but if there be not anything in the evidence disclosing anything peculiar or exceptional in those particulars, there can be nothing to submit to the jury unless the mere proof that the defendants caused the death of the wife be sufficient to entitle the husband to compensation in damages for injury resulting to him from her death; for the control and management of her husband's household affairs by a wife is an incident to her character as wife, and is part of the duty which, as a wife, she assumes and is, in fact, the management of her own affairs as much as of his—their joint affairs,—and every husband when he loses his wife by death loses the benefit of having his household affairs managed by his wife; such management is an incident to the *consortium*, and if the loss of the *consortium* be not sufficient to entitle him to compensation, the loss of that which is an incident to the *consortium* cannot. There is nothing in the evidence in the present case which distinguishes it from the case of damages sought to be recovered merely upon the ground of the loss of *consortium*, and as that is not sufficient to entitle the plaintiff to damages, the verdict rendered in his favor cannot I

think be sustained. It is not suggested that any evidence has been withheld which might have been given or that there is any further evidence which could be given upon another trial, nor, if there be any such evidence, has any explanation been offered for its not having been given, the only question appears to be whether or not the rule to enter a non-suit, which was granted by the Queen's Bench Division of the Supreme Court of Justice for Ontario, should be maintained, the rule *nisi* having only asked for a new trial. The Ontario courts have ever since the passing of 37 Vic., ch. 7, s. 33, now sec. 283 of ch. 50 of the Revised Statutes of Ontario, exercised the jurisdiction upon the argument of a rule *nisi* for a new trial, of granting a rule to enter a non-suit when the court was of opinion that the evidence given did not warrant any verdict in favor of the plaintiff; the section under consideration provides that

> Every verdict shall be considered by the court, in all motions affecting the same, as if leave had been reserved at the trial to move in any manner respecting the verdict and in like manner as if the assent of parties had been expressly given for that purpose.

This seems to be the exercise of a wholesome jurisdiction when there is no evidence given sufficient to sustain a verdict for the plaintiff for any amount, and as for the reasons already given, I am of opinion that the verdict for the plaintiff cannot be sustained, the appeal should be allowed, and the rule to enter a non-suit reinstated.

Appeal dismissed with costs (1).

Solicitors for appellants: *Pinhey, Christie & Christie*

Solicitors for respondent: *O'Gara & Remon.*

(1) Application to the Judicial Committee of the Privy Council for special leave to appeal in this case was refused.