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HER MAJESTY THE QUEEN, in right of the Province of Ontario, represented by the Minister of Highways for the Province of Ontario (*Defendant*) .... APPELLANT;

AND

ROBERT MALCOLM JENNINGS, a mentally incompetent person so found by his Committee, WILMOT STANLEY BRIGGS (*Plaintiff*) and GARRY CRONSBERRY (*Defendant*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Highways—Duty to keep highway in repair—Failure to maintain stop sign in proper position—Plaintiff injured in collision at intersection—Liability of Department—The Highway Improvement Act, R.S.O. 1960, c. 171, s. 33.

Damages—Plaintiff rendered unconscious as result of severe brain injury—No hope of recovery—Quantum of damages—Whether income tax which plaintiff would have had to pay on future earnings to be taken into account.

As the result of a collision between an automobile owned by the plaintiff in which he and his wife were passengers and which was being driven by their son and an automobile owned and operated by the defendant C, the plaintiff was so severely injured that he never regained consciousness and his wife was killed. The collision occurred at the intersection of a through highway and a concession road. At the time of the accident the plaintiff's car was being driven northerly on the highway and the defendant C was driving his car westerly on the concession road. The highway had been marked at the intersection by a stop sign. This sign and its location conformed to the relevant regulations but four days prior to the accident some mischievous boys had turned it around so that as C's car approached it the driver would not see a stop sign but only the back of the sign which was gray in colour and bore no lettering.

Action was brought for damages suffered by the plaintiff personally and also, pursuant to *The Fatal Accidents Act*, for damages for the death of his wife. The trial judge found that both the defendant Department of Highways and the defendant C were at fault and apportioned the blame 80 per cent to the former and 20 per cent to the latter. He assessed the damages of the plaintiff personally at $145,795.43 and the damages under *The Fatal Accidents Act* at $11,300.

Each of the parties appealed to the Court of Appeal. The defendant Department sought the dismissal of the action as against it, alternatively a reduction of the percentage of blame attributed to it and a reduction in the amount of damages. The defendant C by cross-appeal asked that he be absolved from liability and alternatively that the damages be reduced. The plaintiff by cross-appeal asked that the award of damages to him personally be increased. The plaintiff's cross-appeal was allowed, his total damages being assessed at $180,000.

PRESENT: Cartwright, Martland, Judson, Ritchie and Spence JJ.

The Department's appeal and C's cross-appeal were dismissed.

The majority in the Court of Appeal were of the opinion that the trial judge had erred in his assessment of damages in regard to the following matters: (1) The trial judge had deducted $50,000 from the total damages on the ground that had the plaintiff been well and normal for the next five years his own personal living expenses would have been $10,000 a year whereas all his estimated living expenses during that period would in fact be covered by an amount which was allowed for hospital expenses. This deduction should not have been made. At most the deduction should have been for not more than a sum sufficient to cover the plaintiff's food and lodging as distinguished from medical and nursing care in the hospital for five years. (2) There should not have been any reduction made in the damages for loss of future earnings by reason of income tax. (3) The allowance for general damages of $2,000 for loss of enjoyment of life should have been for loss of the amenities of life and was too low. (4) The allowance for loss in respect of certain stock options was too high. That there could be no certainty as to the price of the stock at the time the options would be taken up and that other circumstances might have prevented the plaintiff exercising the options were factors that should have been taken into consideration. (5) In allowing loss of salary for five years some allowance should have been made not only for the fact that the salary was being paid in advance but also some deduction should have been made for the contingency that the plaintiff might have, within that period of time, become ill or died or for other reason might have lost his position.

An appeal from the judgment of the Court of Appeal was brought to this Court. The Department asked that the action as against it be dismissed and alternatively that the assessment of the trial judge should be restored. C as cross-appellant asked that the action as against him be dismissed.

Held: The appeal and cross-appeal should be dismissed.

Per Cartwright, Martland, Ritchie and Spence JJ.: The appellant's contention that failure to maintain a stop sign as required by the relevant statute (*The Highway Improvement Act*, R.S.O. 1960, c. 171) and regulations does not amount to "default to keep the King's Highway in repair" was rejected. Its further contention that even if, contrary to its submission, the failure to maintain the stop sign constituted default in keeping the highway in repair the appellant was relieved from liability by the terms of subs. (3) of s. 33 of the Act was also rejected.

For the reasons given by McGillivray J. A. in the Court below, it was agreed that the collision was caused by the fault of both defendants and that the apportionment of the blame made by the trial judge ought not to be disturbed.

On the question of the quantum of damages, as to the deduction of $50,000, at the most the amount of this deduction should not have exceeded such portion of the estimated hospital expenses of $20,075 as represented the cost of food, and possibly the cost of lodging. As to item (3), the allowance of $2,000 for loss of amenities of life was very much too low. Damages for loss of amenities of life are not to be reduced by reason of the fact that the injured person is unconsicious and unaware of his condition. As to item (4), the allowance in respect of the loss of the right to exercise options to purchase stock, the estimate of the trial

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judge if excessive at all was not greatly so. As to item (5), it appeared that the trial judge did allow for the fact that the salary was in effect being paid in advance, and in view of the circumstances of the case no substantial amount should have been deducted by reason of the other contingencies to which reference was made.

On a consideration of the whole record, the total amount of $180,000 fixed by the Court of Appeal was not excessive and should not be disturbed.

Per Curiam: The principle stated in *British Transport Commission v. Gourley*, [1956] A.C. 185, (the incidence of taxation on future earnings should be taken into account in assessing damages in respect of loss of such earnings) was rejected.

APPEAL from a judgment of the Court of Appeal for Ontario[1], dismissing the appeal of the present appellant and the cross-appeal of the respondent Cronsberry from a judgment of Ferguson J., and allowing the cross-appeal of the respondent Jennings as to the quantum of damages awarded. Appeal dismissed.

C. L. Dubin, Q.C., K. Duncan Finlayson, Q.C., and *P. J. Brunner,* for the defendant, appellant.

Ross V. Smiley, Q.C., for the defendant, respondent and cross-appellant, G. Cronsberry.

B. J. Thomson, Q.C., for the plaintiff, respondent, R. M. Jennings.

Martland, Ritchie and Spence JJ. concurred with the judgment delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for Ontario[1] allowing a cross-appeal by the respondent Jennings, varying a judgment of Ferguson J. by increasing the amount of the damages awarded to Jennings personally from $145,795.53 to $180,000 and dismissing the appeal of the present appellant and the cross-appeal of the respondent Cronsberry. McGillivray J. A., dissenting in part, would have affirmed the judgment of the learned trial Judge.

The action arose out of a collision between an automobile, hereinafter referred to as "the Jennings car", owned by the respondent Jennings in which he and his wife the late Mary Jennings were passengers and which was being driven by their son William E. Jennings and an automobile, hereinafter referred to as "the Cronsberry car" owned and driven by the respondent Cronsberry.

[1] [1965] 2 O.R. 285, 50 D.L.R. (2d) 385.

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The collision occurred at about 5 p.m. on Sunday, November 5, 1961, at the intersection of Highway No. 12 which runs North and South, with the Second Concession road of the Township of Thorah which runs East and West.

The Jennings car was being driven northerly on Highway No. 12 at a speed of about 60 miles per hour which was a lawful speed. The Cronsberry car was being driven westerly on the Second Concession road. Highway No. 12 was a through highway and the Second Concession road was a "stop street". At this intersection Highway 12 had been marked by a stop sign placed at the northeast corner of the intersection 27 feet east of the east edge of the pavement of Highway 12 and 5 feet north of the north edge of the gravel on the Second Concession. The sign and its location conformed to the relevant statutes and regulations but on the Wednesday preceding the day of the accident some mischievous boys had turned it around so that as the Cronsberry car approached it the driver would not see a stop sign but only the back of the sign which was gray in colour and bore no lettering. Cronsberry, who suffered a concussion, had no recollection of the accident or of anything that occurred in the space of a few minutes before it happened.

The two cars collided with great violence in the intersection. Mrs. Jennings was killed, the respondent Jennings was so severely injured that he has never recovered consciousness. William Jennings was not seriously injured.

The action was brought for damages suffered by the respondent Jennings personally and also, pursuant to *The Fatal Accidents Act*, for damages for the death of the late Mary Jennings.

The learned trial judge found that both the appellant and Cronsberry were at fault and apportioned the blame 80 per cent to the former and 20 per cent to the latter. He assessed the damages of the respondent Jennings personally at $145,795.43 and the damages under *The Fatal Accidents Act* at $11,300.

Each of the parties appealed to the Court of Appeal.

The present appellant, hereinafter sometimes referred to as "the Department", sought the dismissal of the action as against it, alternatively a reduction of the percentage of

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blame attributed to it and a reduction in the amount of damages.

The respondent Cronsberry by cross-appeal asked that he be absolved from liability and alternatively that the damages be reduced.

The respondent Jennings by cross-appeal asked that the award of damages to him personally be increased.

The result of these appeals has been stated in the opening paragraph of these reasons.

In this Court, the Department asks that the action as against it be dismissed and alternatively that the assessment of damages made by the learned trial judge should be restored, it does not ask any further reduction of the damages; the respondent Cronsberry asks that the action as against him be dismissed; the respondent Jennings asks that the appeal be dismissed, he does not ask that the assessment of damages made by the Court of Appeal be increased.

Neither the appellant nor the cross-appellant Cronsberry suggests that there was any negligence on the part of the driver of the Jennings car.

On the question of liability there are the following findings of fact all of which are supported by the evidence; (i) that the sign was turned on the Wednesday morning preceding the accident and, notwithstanding a daily patrol by employees of the Department, was allowed to remain in that position up to the happening of the accident; (ii) that this was an unreasonable length of time; (iii) that the position of the sign was an effective cause of the collision in that had it been in its proper position it was probable that Cronsberry would have seen it and stopped before entering Highway 12; (iv) that, even if Cronsberry was unaware that the highway which he was approaching was a through highway and so was entitled to assume that he had the right of way over the Jennings car, he was negligent as he had a clear view for some hundreds of feet to the south of the intersection and could see that the Jennings car was approaching the intersection at such a rate of speed that unless Cronsberry stopped a collision would occur.

On this statement of facts, for the reasons given by McGillivray J.A., I agree that the collision was caused by the fault of both defendants and that the apportionment of

the blame made by the learned trial judge ought not to be disturbed.

Counsel for the appellant submitted that even if the failure to have the stop sign in position was in fact an effective cause of the collision there was no legal liability on the part of the Department. It is common ground that if such liability existed at the time of the accident it must be found in s. 33 of *The Highway Improvement Act*, R.S.O. 1960, c. 171, the relevant subsections of which are (1)(2)(3) and (10). These read as follows:

33 (1) The King's Highway shall be maintained and kept in repair by the Department and any municipality in which any part of the King's Highway is situate is relieved from any liability therefor, but this does not apply to any sidewalk or municipal undertaking or work constructed or in course of construction by a municipality or which a municipality may lawfully do or construct upon the highway, and the municipality is liable for want of repair of the sidewalk, municipal undertaking or work, whether the want of repair is the result of nonfeasance or misfeasance, in the same manner and to the same extent as in the case of any other like work constructed by the municipality.

(2) In the case of default by the Department to keep the King's Highway in repair, the Crown is liable for all damage sustained by any person by reason of the default, and the amount recoverable by a person by reason of the default may be agreed upon with the Minister before or after the commencement of an action for the recovery of damages.

(3) No action shall be brought against the Crown for the recovery of damages caused by the presence or absence or insufficiency of any wall, fence, guard rail, railing or barrier adjacent to or in, along or upon the King's Highway or caused by or on account of any construction, obstruction or erection or any situation, arrangement or disposition of any earth, rock, tree or other material or thing adjacent to or in, along or upon the King's Highway that is not on the roadway.

(10) The liability imposed by this section does not extend to a case in which a municipality having jurisdiction and control over the highway would not have been liable for the damage sustained.

The appellant contends that failure to maintain a stop sign as required by the relevant statute and regulations does not amount to "default to keep the King's Highway in repair". In the Courts below this submission has been unanimously rejected and, in my opinion, rightly so. It has been repeatedly held in Ontario that where a duty to keep a highway in repair is imposed by statute the body upon which it is imposed must keep the highway in such a condition that travellers using it with ordinary care may do so with safety. The danger created by the failure to maintain the required stop signs marking a through highway is too obvious to require comment. On this branch of the matter I

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agree with and wish to adopt the reasons of McGillivray J.A.

It was next argued by counsel for the appellant that even if, contrary to his submission, the failure to maintain the stop sign constituted default in keeping the highway in repair the appellant was relieved from liability by the terms of subs. (3) of s. 33. This point was disposed of adversely to the appellant at the hearing and counsel for Jennings and for Cronsberry were not called upon in regard to it. On this point also I am content to adopt the reasons of McGillivray J.A.

For the above reasons I conclude that the judgment finding both defendants liable to the plaintiff and as between them apportioning the blame 80 per cent to the Department and 20 per cent to Cronsberry should be upheld and it remains to consider the question of the quantum of the damages awarded to Jennings personally. The amount of the damages awarded pursuant to *The Fatal Accidents Act* is not questioned.

Jennings was born on April 16, 1909. His normal life expectancy at the date of the accident was 22.43 years. He is a graduate engineer. In 1955 he had become general manager of the Small Appliances Department of the Canadian General Electric Company at Barrie. In 1959 he had been made a vice-president of the company. The plant had progressed rapidly and satisfactorily under his management. He was paid by way of salary plus an annual "incentive bonus". His gross earnings had increased from $13,752 in 1955 to $26,294.44 in 1961. According to the evidence of Mr. Marrs, the manager of the Personnel Accounting of the company, Jennings' gross earnings in 1962 would have amounted to $30,525 and by 1967 would have increased to $34,000 a year and have continued at that rate until his retirement. If he retired at age 60 he would have received an annual retirement income of $7,025 and if he retired at 65 an annual retirement income of $11,215. Following the accident the company continued to pay his salary until the end of February 1962 when he was retired. He receives an annual retirement income of $4,842, which if he should still be living in 1974 when he reaches 65 years of age would be increased to $4,992.

The termination of Jennings' employment deprived him of the right to exercise certain options to purchase stock in

American General Electric at fixed prices. He lost the right to purchase 594 shares at $52.25, U.S. funds, and the right to purchase 117 of such shares at $68.25, U.S. funds. At the date of the trial the current market price of the shares was $82, U.S. funds, and Mr. Marrs calculated the amount of profit which would have resulted if Jennings had exercised his option and sold the shares at the market at $19,695 U.S. funds.

The evidence of Dr. Harrison as to the physical condition of Jennings is uncontradicted. He suffered so severe a brain injury in the accident that he has never regained consciousness. He has been a patient at the Queen Elizabeth Hospital since January 4, 1962. He is confined to bed. He cannot speak. He cannot make any voluntary movement. He cannot swallow and is fed through a duodenal tube that passes through his nostril down to his stomach. He has a tracheotomy tube in his windpipe because without it he cannot breathe. He is incontinent as to his bladder and his bowels and has to have bladder drainage with a permanent catheter. There is no hope of recovery or improvement. He does not suffer pain and does not realize what his condition is. He is kept alive by "very meticulous care". He is taking nourishment well and Dr. Harrison was of opinion that since his admission to the Queen Elizabeth Hospital up to the date of the trial in May 1963 his general physical condition had perhaps improved. The chief danger to his life is from a secondary infection developing either in the respiratory tract or in the bladder. The examination in chief of Dr. Harrison concluded as follows:

> Q. Are you able to give his lordship any assistance as to his probable life expectancy in this condition?
>
> A. My lord, that is a very difficult question. Barring what you might call a medical accident, in the way of one of these medical accidents taking place, his general vital functions are such that he could almost live—well, indefinitely. In my own experience out there, we had one patient that went over five years in this condition. It was the result of a motor accident. He, I may say, had many more sort of acute attacks of one sort or another during his illness than Mr. Jennings has had. I would hate to give a prognosis on whether he will live five years or ten years or even longer.

At the date of the hearing of the appeal in this Court, which concluded on December 17, 1965, Jennings was still alive.

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In approaching the assessment of damages the learned trial judge stated that his calculations were based on Jennings living for five years from the date of the trial but no longer.

The learned trial judge stated that while it was not customary to assess damages item by item he found it desirable to do so in this case. He allowed nothing for pain and suffering owing to the fact that Jennings has remained unconscious ever since the accident. He allowed:

Out of pocket expenses to the date of trial, agreed upon,	$ 13,801.53
Loss of salary to date of trial	33,800.00
Additional expenses for upkeep of son	600.00
Expenses of appointing Committee	529.00
Estimated hospital expenses for 5 years from date of trial	20,075.00
Estimated medical expenses for 5 years from date of trial	2,600.00
Estimated loss in connection with options to purchase stock	18,590.00
The present value at the date of the trial of Jennings' loss of salary for the ensuing 5 years after deducting estimated income tax from gross earnings	104,000.00
Loss of enjoyment of life	2,000.00

These items total $195,995.53, but apparently there was some correction not appearing in his reasons as the total arrived at by the learned trial judge was $195,795.53. From this total he deducted $50,000 on the ground that had the plaintiff been well and normal for the next five years "his own personal living expenses" would have been $10,000 a year whereas all his estimated living expenses during that period would in fact be covered by the item for hospital expenses set out above. In the result judgment was given for $145,795.53.

In the Court of Appeal, MacKay J.A., with whom Kelly J.A. agreed was of opinion that the learned trial judge had erred in his assessment in regard to five matters which he summarized as follows:

> In light of the authorities and commentaries to which I have referred I am of the opinion that in the present case:—
>
> (1) The sum of $50,000 should not have been deducted. At most the deduction should be for not more than a sum sufficient to cover the plaintiff's food and lodging as distinguished from medical and nursing care in the hospital for five years.
>
> (2) There should not have been any reduction in the damages for loss of future earnings made by reason of income tax.
>
> (3) The allowance for general damages of $2,000 under the heading of loss of enjoyment of life should be under the heading of loss of the amenities of life and is too low.

(4) The allowance for loss in respect of stock options was too high. The contingency that there could be no certainty as to the price of the stock at the time the options would be taken up and that there might have been other circumstances arise that would prevent the plaintiff exercising the options, ie. sickness, loss of position.

(5) In allowing loss of salary for five years some allowance should have been made not only for the fact that the five years salary is being paid in advance but also some deduction should be made for the contingency that the Plaintiff might have, within that period of time, become ill or died or for other reason might lose his position, it being, I think, reasonable to assume that in the modern business world there is no certainty of tenure in executive positions.

MacKay J.A. concluded that $180,000 would be a fair and reasonable amount at which to assess the plaintiff's total damages.

McGillivray J.A., who dissented on this branch of the case, agreed in substance with the views of MacKay J.A. as to each of the five items set out above except item (2). As to that item he held that the learned trial judge was right to take into consideration the fact that had Jennings received his salary he would have had to pay income tax on it. As to item (3), McGillivray J.A. while agreeing that the amount allowed was too low considered that this involved "no error in principle but a difference in view point as to what the award should be". In the result he decided that while the total awarded by the learned trial judge was perhaps somewhat less than it should have been the difference was not sufficient to warrant the Court of Appeal substituting a different figure.

With regard to the question raised in item (2) I agree with the reasons and conclusion of my brother Judson. Even if I had shared the view of the learned trial Judge and of McGillivray J.A. on this point I would none the less have been of the opinion that the total amount of $180,000 at which the Court of Appeal assessed the plaintiff's damages is by no means excessive.

As to the deduction of $50,000, I agree with the view of MacKay J.A. and that of McGillivray J.A. that at the most the amount of this deduction should not have exceeded such portion of the estimated hospital expenses of $20,075 as represented the cost of food, and possibly the cost of lodging. As McGillivray J.A. points out, this would of necessity be less than $20,075; the part is less than the whole; while it cannot be fixed with precision I am of opinion that the deduction should have been very much less than

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$20,075. If the percentage applied by Asquith L.J. in making a similar calculation in *Shearman v. Folland*[1], quoted with approval by MacKay J.A., were adopted the resulting figure would be less than $2,000.

As to item (3) I regard the allowance of $2,000 for loss of amenities of life as very much too low. MacKay J.A. in his reasons dealing with this branch of the matter has made a careful examination of the judgments in the recent cases of *Wise v. Kaye*[2] *and H. West & Son Ltd. v. Shephard*[3]. I am in full agreement with his view that these cases rightly decide that damages for loss of the amenities of life are not to be reduced by reason of the fact that the injured person is unconscious and unaware of his condition.

As to item (4), the allowance in respect of the loss of the right to exercise options to purchase stock, the evidence of Mr. Marrs shews that Jennings by reason of the termination of his employment lost the right which he would otherwise have had to purchase 594 shares in annual amounts of 217 shares up to November 18, 1965, at $52¼ and 117 shares in annual amounts of 15 shares up to June 28, 1967, at $68½. At the date of the trial the current market price of these shares was $82. It was Mr. Marr's opinion that the market price of this stock would move up gradually. It is true, as MacKay J.A. points out, that there was no certainty that Jennings would have realized a profit of the amount estimated by the learned trial judge. It is equally true that if the market price continued to move upward he could have realized a substantially larger profit. I do not attach any great importance to this item but in my view the estimate of the learned trial judge if excessive at all was not greatly so.

As to item (5), we do not know the details of the calculation by which the learned trial judge arrived at the figure of $104,000 but he expressly stated that he was taking the present value of the estimated loss of earnings and it would seem therefore that he did allow for the fact that the salary was in effect being paid in advance. In the circumstances of this case particularly in view of the evidence of Jennings' good record and high standing in the company of which he was a vice-president and of his normal life expectancy

[1] [1950] 2 K.B. 43.

[2] [1962] 1 Q.B. 638.

[3] [1964] A.C. 326.

mentioned above, I do not think that any substantial amount should have been deducted by reason of the other contingencies referred to by MacKay J.A. in connection with this item.

On a consideration of the whole record I am satisfied that, even on the assumption that the income tax which Jennings would have had to pay had he lived and continued to earn his salary should be taken into consideration in assessing his damages, the total amount of $180,000 fixed by the Court of Appeal is not excessive and should not be disturbed.

Before parting with the matter I wish to make it clear that I am not expressing agreement with the view, apparently entertained by both the learned trial judge and the Court of Appeal, that because the normal live expectancy of the plaintiff of 22.43 years had been reduced by his injuries to 5 years he should be compensated only for the earnings he would have been expected to receive during the 5 year period.

I would dismiss the appeal with costs payable to Jennings and dismiss the cross-appeal of Cronsberry with costs payable to Jennings. The appeal fails as against Cronsberry and Cronsberry's cross-appeal fails as against the appellant; as between Cronsberry and the appellant I would make no order as to costs in this Court.

Martland, Ritchie and Spence JJ. concurred with the judgment delivered by

JUDSON J.:—Before 1956, the problem involved in *British Transport Commission v. Gourley*[1] had been considered in only three reported cases in Ontario. They were decisions at trial and had followed *Billingham v. Hughes*[2]. Since 1956 the *Gourley* case has been applied in three reported cases from Alberta, Newfoundland and Ontario, and not applied in one case from Manitoba and one from Quebec. The cases are listed in [1965] 2 O.R. 297, with the exception of the recent Quebec decision in *Leroy v. Perini Ltd.*, which is now in appeal.

In the present case, the trial judge did follow *Gourley*. The majority in the Court of Appeal rejected this but for different reasons. MacKay J.A. expressed a preference for

[1] [1956] A.C. 185. [2] [1949] 1 K.B. 643.

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the dissenting opinion of Lord Keith and also agreed with Kelly J.A. that a proper foundation had not been laid for the application of the principle. Kelly J.A. confined his reasons to the second ground. He said that a defendant, seeking because of the incidence of income tax to reduce damages otherwise payable, must satisfy the court that the award is in fact tax free and then adduce the necessary evidence on which the court can assess the net amount of the award. Both elements, in his opinion, were lacking. McGillivray J.A. held, in agreement with the trial judge, that the principle in *Gourley* did apply and that the award, as a whole, was satisfactory and should not be interfered with. The majority increased the award from $146,000 to $180,000, only part of the increase being attributable to their rejection of *Gourley*.

All points of appeal, of which the application of the principle in *Gourley* was only one, were argued in this Court and it is necessary that we should face the issue and express an opinion. It is important not only for future litigation but for every-day practice in a contentious field where settlements are frequent.

Gourley was decided upon an admission of counsel that the damages were a non-taxable capital receipt. This admission was taken to be an accurate reflection of the law and of the practice of the Inland Revenue.

For what it is worth, my opinion is that an award of damages for impairment of earning capacity would not be taxable under the Canadian *Income Tax Act*. To the extent that an award includes an identifiable sum for loss of earnings up to the date of judgment the result might well be different. But I know of no decisions where these issues have been dealt with and until this has been done in proceedings in which the Minister of National Revenue is a party, any expression of opinion must be insecure. Such litigation would have to go through the Board of Tax Appeals or direct to the Exchequer Court with a final appeal, in appropriate cases, to this Court. As matters stand at present this ground alone is perhaps sufficient for the rejection of the principle in *Gourley*.

I would, however, put my rejection upon broader grounds. I agree with the dissenting opinion of Lord Keith in the *Gourley* case and the minority views expressed in the 7th

Report of the Law Reform Committee on the effect of tax liability on damages, published in August of 1958. These are stated in the following paragraphs:

(*a*) Damages should, so far as any monetary award can do so, restore the plaintiff to the position in which he would have stood but for the defendant's wrongdoing. On this basis they should represent compensation for loss of earning capacity and not for loss of earnings. In a case of personal injuries, what the plaintiff has lost is the whole or part, as the case may be, of his natural capital equipment and to tax him on this is contrary to generally accepted principles of taxation.

(*b*) What the plaintiff would have done or have been required to do with his money had he not suffered the injury complained of is, so far as the defendant is concerned, irrelevant. Tax is not a charge on income before it is received and there is no more reason for taking it into account than rates, mortgage interest and any other liabilities which the plaintiff may have to meet. To do so means that the defendant is making something less than full restitution for the injury. In other words, each £1 of income lost is worth £1 *to the plaintiff*, either to spend on himself, or to discharge his liabilities, including that for income tax.

(*c*) The net sum representing what the plaintiff would have received after deduction of tax is not adequate compensation for loss of the ability to deal freely with the gross sum. Not only is the plaintiff deprived of his chance of dealing with his income as he thinks fit and so reducing his liability to tax, but third parties who might otherwise have benefited from such arrangements as the plaintiff might be disposed to make are unable to do so.

(*d*) The present law operates in some cases in a way which is contrary to public policy. Thus it is now frequently more profitable to pay damages for the breach of a contract of service than to perform the contract, because by paying damages the employer saves the amount of the tax on the employee's salary.

It has been said that if the incidence of taxation on future earnings is ignored, the plaintiff is being over-compensated. With this I do not agree. A lump sum award under this head is at best no more than rough-and-ready compensation. There must be very few plaintiffs who are compelled to take a lump sum who would not be better off with their earning capacity unimpaired or a periodic reassessment of the effect of its impairment. There is, as things are at present, no possibility of such a reassessment. But mathematical precision is impossible in assessing the lump sum, and where large amounts and serious permanent disability are involved, I think that the award is usually a guess to the detriment of the plaintiff.

To assess another uncertainty—the incidence of income tax over the balance of the working life of a plaintiff—and

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Judson J.

then deduct the figure reached from an award is, in my opinion, an undue preference for the case of the defendant or his insurance company. The plaintiff has been deprived of his capacity to earn income. It is the value of that capital asset which has to be assessed. In making that determination it is proper and necessary to estimate the future income earning capacity of the plaintiff, that is, his ability to produce dollar income, if he had not been injured. This estimate must be made in relation to his net income, account being taken of expenditures necessary to earn the income. But income tax is not an element of cost in earning income. It is a disposition of a portion of the earned income required by law. Consequently, the fact that the plaintiff would have been subject to tax on future income, had he been able to earn it, and that he is not required to pay tax upon the award of damages for his loss of capacity to earn income does not mean that he is over-compensated if the award is not reduced by an amount equivalent to the tax. It merely reflects the fact that the state has not elected to demand payment of tax upon that kind of a receipt of money. It is not open to the defendant to complain about this consequence of tax policy and the courts should not transfer this benefit to the defendant or his insurance company.

The speculative and unsatisfactory result that may follow from a deduction for future income tax may be illustrated from the *Gourley* case itself. As pointed out in Street, Principles of the Law of Damages, p. 102, if Gourley had been able to postpone the trial for two years, he would inevitably have received several thousand pounds more by way of damages.

The practical difficulties that arise from the application of the principle are many and they have been noticed. What is to be done with the young plaintiff who had a promising career ahead of him? If he is unmarried or newly married, how does the Court deal with his potential exemptions? How does it deal with the complexities that may arise from a wife's separate income? Why should it be assumed that investment income is necessarily permanent or that it will always remain taxable in the hands of the plaintiff? What will be done with the foreign plaintiff and foreign systems of taxation?

In this country there are additional difficulties. Each of the provinces has the power to impose taxation upon income, and there is no assurance that the total impact of federal and provincial tax upon taxpayers in each of the provinces will remain the same. At the same time there is a considerable and increasing movement of people from one province to another. To deduct from an award of damages for loss of earning capacity an amount based upon the existing tax rates in the province in which he lived at the time of his injury might well create a hardship for a man who might reasonably have anticipated, in the future, a transfer of his employment to another province in which the rate of taxation is less.

In the litigation itself there are practical difficulties. There will be discovery on income tax matters with its possibilities of oppressive and endless examination. There are also problems of onus of proof. I notice that *West Suffolk County Council v. W. Rought Ltd.*[1] put the burden on the plaintiff. The Ontario Court of Appeal, in the present case, put the burden on the defendant. Finally, how does the principle fit in with lump sum awards either from a judge or jury or with jury trials at all in these cases?

I agree with Cartwright J. that the appeal should be dismissed with costs but I think that we should say now that we reject the principle stated in *Gourley*.

Appeal dismissed with costs; cross-appeal dismissed with costs.

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[1] [1957] A.C. 403.