GEORGE VANA (*Plaintiff*) ..... APPELLANT;

AND

STANLEY TOSTA and BOLESLAW LAXAREWICZ (*Defendants*) .... RESPONDENTS.

1967
*Mar. 20
Nov. 27

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Damages—Motor vehicle accident—Wife killed and husband and children injured—Defendants liable—Assessment of damages—Factors considered—The Fatal Accidents Act, R.S.O. 1960, c. 138.

As a result of a collision between the plaintiff's motor vehicle and that of the defendant T, the plaintiff's wife, aged 37, was killed; their children (a daughter, aged 12, and a son, aged 9) sustained comparatively slight injuries and the plaintiff himself, aged 47, was seriously injured. In an action arising out of the accident, the trial judge found that at the time of the collision T's car was being driven by the defendant L in a wanton and reckless manner. He awarded the plaintiff on his own behalf and as next friend for his children a total sum of $49,720. An appeal to the Court of Appeal was confined entirely to the quantum of damages. That Court reduced the damages awarded under *The Fatal Accidents Act*, R.S.O. 1960, c. 138, from $20,000 to $10,000 for the plaintiff; from $10,000 to $2,000 for his daughter and from $5,000 to $1,500 for his son, and also reduced the award for personal injuries of the plaintiff from $10,000 to $8,500. An appeal by the plaintiff from the judgment of the Court of Appeal was brought to this Court.

Held (Judson and Ritchie JJ. dissenting in part): The appeal should be allowed.

*PRESENT: Cartwright, Judson, Ritchie, Hall and Spence JJ.

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Per curiam: The trial judge had not acted on any wrong principle of law when he took the element of "nervous shock" into consideration in awarding damages for the appellant's personal injuries and there was evidence to support his view in this regard. As the only ground upon which the Court of Appeal interfered with the general damage award was the inclusion of "nervous shock" as a factor for which the appellant was entitled to be compensated, this was a case in which the proper course was to restore the award of $10,000 made by the trial judge.

Per Cartwright, Hall and Spence JJ.: With respect to the award to the appellant under *The Fatal Accidents Act,* the award of the trial judge was excessive and not justified by the evidence. In reducing the award by $10,000 the Court of Appeal erred in placing too much emphasis on the possibility of remarriage and in taking into account any services the appellant's mother and mother-in-law might contribute to maintaining the home. Also, the case could not be considered as one where the earnings of the wife which she retained for herself were quite apart from any contribution made by her husband for her support, but rather as one where her earnings in part contributed to her support as well as to that of the balance of the family and the loss of those earnings was, therefore, a pecuniary loss to the husband. After reviewing the evidence as a whole, and giving due weight to the possible remarriage, remote as it might be, and what it would cost to hire a housekeeper and the other factors involved, the conclusion was reached that an award of $14,000 should be made.

The case of *St. Lawrence & Ottawa Railway Co. v. Lett* (1885), 11 S.C.R. 422, established that the children under the circumstances suffered the pecuniary loss from their mother's early death without the care, education and training (and also the guidance, example and encouragement) which only a mother can give. To allow damages under these circumstances attributable to such pecuniary loss of only $1,000 to a girl of 12 years of age and $500 to a boy of 9 years of age (these amounts being the net result of the Court of Appeal's judgment) was a "purely conventional assessment" and was, therefore, an error in principle. The amount of the award for this loss to the daughter should be increased from $1,000 to $2,000 and to the son from $500 to $1,000, resulting in the total award to the daughter under the provisions of *The Fatal Accidents Act* being fixed at $3,000 and the total award to the son under the provisions of *The Fatal Accidents Act* being fixed at $2,000. The award of the trial judge in the sums of $10,000 and $5,000 was unreasonable in that it was so "inordinately high as to be a wholly erroneous estimate of the damages".

Per Judson and Ritchie JJ., *dissenting:* The Court of Appeal's reduction of the trial judge's award for the appellant's damages under *The Fatal Accidents Act* from $20,000 to $10,000 should not be interfered with. The trial judge erred in principle in including factors which could not properly be classified as pecuniary loss and he failed to allow for certain contingencies of life, including the possibility that the appellant might remarry.

With regard to the damages awarded to the children, the Court of Appeal appeared to have concluded that the trial judge erred in principle by failing to confine himself to the actual evidence of pecuniary loss suffered by the children in the loss of their mother when he made his award to them for that loss. There was no error in principle

in the conclusion reached by the Court of Appeal and the award it suggested in respect of the loss of the care and guidance of the mother was appropriate having regard to all the circumstances.

[*St. Lawrence & Ottawa Railway Co. v. Lett* (1885), 11 S.C.R. 422, followed; *Grand Trunk Railway Co. of Canada v. Jennings* (1888), 13 App. Cas. 800; *Marsh v. Absolum*, [1940] N.Z.L.R. 448; *Hine v. O'Connor and Chambers and Fire Brigades Board*, [1951] S.A.S.R. 1, considered; *Naylor v. Yorkshire Electricity Board*, [1966] 3 W.L.R. 654; *Shaw v. Mills*, 1961 C.A. Eng. (unreported), referred to.]

APPEAL from a judgment of the Court of Appeal for Ontario[1], varying a judgment of Haines J. Appeal allowed, Judson and Ritchie JJ. dissenting in part.

R. G. Phelan, Q.C., and *E. A. Sabol*, for the plaintiff, appellant.

W. B. Williston, Q.C., R. J. Rolls and *J. F. Evans*, for the defendants, respondents.

The judgment of Cartwright, Hall and Spence JJ. was delivered by

SPENCE J.:—I have read the reasons for judgment of Ritchie J. and I am in complete agreement therewith in so far as they concern the restoration of the trial judge's award to the appellant which was attributable to nervous shock.

The Court of Appeal reduced by $10,000 the amount awarded the appellant under *The Fatal Accidents Act*, R.S.O. 1960, c. 138. The learned trial judge had awarded $20,000. The Court found that Haines J. did not take into account the possibility that the appellant might remarry and that he had no intention of hiring a housekeeper excepting his own mother to whom he had promised $30 a week as and when he could afford it. He was in debt due to the accident and unable then to pay anything. The mother was 75 years of age. On any basis, her usefulness as a housekeeper would be limited and of short duration. The Court also took into account that the appellant's mother-in-law who lived nearby and was then 62 years of age could be of assistance.

The possibility of remarriage is a limited one and should not be overemphasized in arriving at the amount to be awarded. There are many eventualities to be taken into consideration.

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[1] [1966] 1 O.R. 394, 54 D.L.R. (2d) 15.

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Speaking of the appellant, the learned trial judge said:

> . . . In the accident he suffered extensive injuries to his spine. The eleventh thoracic vertebra was moved forward on the twelfth thoracic vertebra and remains in this position. The first lumbar vertebra (which is immediately below the twelfth thoracic vertebra) was crushed to the extent of 20 to 25%. The second lumbar vertebra was driven downwards into the third lumbar vertebra, leaving a permanent dent or depression in the third lumbar vertebra. This is seen readily in the x-rays. The intervertebral space between the second and third vertebrae was damaged and narrowed.

He also held, and the evidence fully supports the finding, that the appellant will eventually require a spinal fusion—surgery in which he must accept a failure rate of 5 to 15 per cent and, pending this surgery, will undergo back pain. This pain in time will become unbearable to be relieved only by the spinal fusion which when done will incapacitate him for seven months. The likelihood of remarriage seems very remote in these circumstances. It was of this man that the trial judge said:

> Finally, I must consider the matter of remarriage. I have seen the plaintiff and have studied him closely throughout the trial. I think remarriage unlikely.

MacKay J.A. said:

> The learned trial Judge *refused* to take into consideration the possibility of the remarriage of the Plaintiff husband. I can find nothing in the evidence that would warrant this conclusion.

(The italics are mine.)

Haines J. did not, as the record shows, *refuse* to take into consideration the possibility of remarriage. He said, "I think remarriage unlikely" and in the circumstances outlined above I agree with him. The appellant was not questioned as to his intentions in this regard either in chief or on cross-examination. At the time of the trial he was going on 48 years of age with two young children, a girl thirteen and a boy eleven. The accident happened August 18, 1963. The appeal was heard on April 23, 1965. The appellant had not remarried nor is it suggested that he has done so to date.

In my view, the respect accorded to the assessment made by the trial judge extends considerably beyond the question of credibility and his observation of the plaintiff during the course of the trial which he would apply to the evidence given as to the plaintiff's physical injuries should be considered as forming the basis for his conclusion that the plaintiff would not remarry which, therefore, in my view,

is more than a personal opinion but rather is a conclusion which should be accepted by an appellate court.

In reducing the award by $10,000 the Court of Appeal erred in placing far too much emphasis on the possibility of remarriage and in taking into account any services the appellant's mother and mother-in-law might contribute to maintaining the home. It is trite law that a wrongdoer cannot claim the benefit of services donated to the injured party. In the present case it amounts in my judgment to conscripting the mother and mother-in-law to the services of the appellant and his children for the benefit of the tortfeasor and any reduction of the award on this basis is and was an error in principle. There being error in principle, the amount awarded by the Court of Appeal is reviewable in this Court: *Widrig v. Strazer et al*[2].

The next question is whether the $20,000 awarded by the learned trial judge should be restored or varied and whether the amount fixed by the Court of Appeal should stand. I am of opinion that the $20,000 awarded was excessive and not justified by the evidence. I am also of opinion that the Court of Appeal erred in cutting the award in two for the reasons given in the judgment of MacKay J.A., Mr. Justice MacKay pointed out that the evidence is indefinite as to how much of the wife's earnings were used for herself and how much might reasonably be expected to enure to the benefit of the husband and children. It is significant to observe that the wife's earnings only totalled about $1,500 per year and that the husband was a man in moderate circumstances. Out of the sum of $1,500 a year, the mother put aside about $200 a year for the future benefit of the two children. It must be realized that what she expended out of the balance for her own maintenance was, under the circumstances of a moderate income family, a contribution to what would ordinarily have been provided by her husband. The husband was under the duty of supporting his wife in accordance with their circumstances in life, and the case cannot be considered as one where the earnings of the wife which she retained for herself were quite apart from any contribution made by her husband for her support, but rather as one where her earnings in part contributed to her support as well as to that of the

[2] [1964] S.C.R. 376.

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balance of the family and the loss of those earnings was, therefore, a pecuniary loss to the husband. The situation resembles somewhat that dealt with by Ritchie J. in *Corrie v. Gilbert*[3]. In that case he said at p. 464:

> It is unusual in this Court on an appeal such as this to reject both the award of the jury and that of the Court of Appeal, but there is no doubt that under s. 46 of the *Supreme Court Act* it is empowered to give the judgment that the Court whose decision is appealed against should have given, and for the reasons which I have stated, I do not think the award made by either of the Courts below should be affirmed.

However, after reviewing the evidence as a whole and giving due weight to the possible remarriage, remote as it may be, and what it will cost to hire a housekeeper and the other factors involved, I have reached the conclusion that an award of $14,000 should be made and I would vary the judgment appealed from accordingly.

I deal next with that part of the judgment of the Court of Appeal for Ontario which would reduce the award under *The Fatal Accidents Act* to the daughter Nancy Vana from $10,000 to $2,000 and the award under the said *Fatal Accidents Act* to the son Steven Vana from $5,000 to $1,500.

Before setting these amounts, the learned judges in appeal said:

> The conclusion I have reached is that the learned trial judge erred in principle in that he took into consideration matters that cannot be classed as pecuniary loss; that he failed to allow for the contingencies of life to which I have referred; that he made assumptions in the absence of evidence and disregarded evidence that would tend to mitigate or lower the damages.

This statement followed immediately the consideration of the damages awarded to the two children under the provisions of *The Fatal Accidents Act*. If the initial words which I have quoted are taken to mean that the judgment of Ritchie C.J. in this Court in *St. Lawrence & Ottawa Railway Company v. Lett*[4] is no longer law, then I must, with respect, express disagreement. It would seem from the addendum which MacKay J.A. added to his reasons in which he discusses the cases of *Grand Trunk Railway Company of Canada v. Jennings*[5], *Marsh v. Absolum*[6] and *Hine v. O'Connor and Chambers and Fire Brigades Board*[7], that such an interpretation might be justified.

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[3] [1965] S.C.R. 457.
[4] (1885), 11 S.C.R. 422.
[5] (1888), 13 App. Cas. 800.
[6] [1940] N.Z.L.R. 448.
[7] [1951] S.A.S.R. 1.

Despite anything that was said in *Grand Trunk Railway Company v. Jennings* or comments made in the Australian and New Zealand cases, the decision of this Court in *St. Lawrence & Ottawa Railway Company v. Lett* is unaffected and remains good law in Canada. I am, therefore, in agreement with my brother Ritchie when he expresses that view in his reasons for judgment.

Even if it is not proper to interpret the judgment of MacKay J.A. as having disregarded the *Lett* case, the learned justice in appeal did comment:

> I am also of the view that in assessing damages to the children for the loss of the care and guidance of their mother that the principle applied in the case of *Benham v. Gambling*, [1941] A.C. 157, is to some extent applicable. In that case, damages of £1,200 had been awarded for the shortening of life of an infant 2½ years of age. The House of Lords reduced the amount to £200. At p. 168 Viscount Simon L.C. said:
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> > The truth, of course, is that in putting a money value on the prospective balance of happiness in years that the deceased might otherwise have lived, the jury or judge of fact is attempting to equate incommensurables. Damages which would be proper for a disabling injury may well be much greater than for deprivation of life. These considerations lead me to the conclusion that in assessing damages under this head, whether in the case of a child or an adult, very moderate figures should be chosen. My noble and learned friend Lord Roche was well advised when he pointed out in *Rose v. Ford*, [1937] A.C. 826, the danger of this head of claim becoming unduly prominent and leading to inflation of damages in cases which do not really justify a large award.

My brother Ritchie has referred to the criticism made of *Benham v. Gambling*, particularly by Danckwerts L.J. in *Naylor v. Yorkshire Electricity Board*[8], and expressed a disinclination to approve the formulation of any conventional figure by way of compensation for the loss of a mother's care and guidance. He was, however, of the opinion that MacKay J.A. had not intended to adopt any such conventional figure in his reasons but rather was indicating the desirability for moderation and for guarding against "this head of claim becoming unduly prominent and leading to inflation of damages in cases which do not really justify a large award".

With respect, I must disagree with this conclusion of my brother Ritchie. As he pointed out in his reasons, the net result of MacKay J.A.'s judgment is that he awarded Nancy Vana only $1,000 on account of the loss of her

[8] [1966] 3 W.L.R. 654.

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mother's care and guidance and that he awarded Steven Vana only $500 for such loss. Nancy Vana was 12½ years of age at the time of the accident in which her mother died, and Steven Vana was a little less than 10 years of age. In my view, awards of $1,000 and $500, respectively, to those two children for the loss of the care and guidance of their mother made as of the year 1963 were, to use the words of Danckwerts L.J. in *Naylor v. Yorkshire Electricity Board*, "a purely conventional assessment" and therefore were in error of principle. In such circumstances as I have already pointed out, it becomes the duty of this Court to assess what would be an amount awarded upon a proper principle.

I am of the opinion that the award of the learned trial judge in the sums of $10,000 and $5,000 was unreasonable in that it was so "inordinately high as to be a wholly erroneous estimate of the damages": *Davies et al. v. Powell Duffryn Associated Collieries Ltd.*[9] The award should be based upon a realistic assessment of the evidence of the particular circumstances of the case under consideration. It would not be proper to be guided by any criterion such as the necessity of finding "a very moderate figure" as recommended by Viscount Simon L.C. in *Benham v. Gambling*. The allowance of a proper amount for damages, in view of all the circumstances, would avoid the danger pointed out by Lord Roche in *Rose v. Ford*[10] of this head of claim becoming unduly prominent and leading to inflation of damages in cases which do not really justify a large award. That danger should be avoided not by the use of what Danckwerts L.J. termed "a purely conventional assessment" but by the trial judge making a careful charge to the jury or to himself if, as in the present case, he is trying the issue without the assistance of a jury, that the award must be based upon a reasonable assessment of all the circumstances and evidence in the case. What is that evidence in the present case? Without going into detail, I shall summarize it. The deceased woman was a good wife and industrious helpmate to her husband, and was a good mother to her children. No attempt was made by her husband to show that she was any extraordinary paragon but he gave such evidence without elaboration as would justify

[9] [1942] A.C. 601.

[10] [1937] A.C. 826.

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the aforesaid conclusion. In my view, to require the establishment of any different situation by the plaintiff would only encourage the gross exaggeration of evidence in an attempt to bolster claims and result in the exaggeration of the verdict to which Lord Roche referred. The *St. Lawrence & Ottawa Railway Company v. Lett* case established that these two children under these circumstances suffered the pecuniary loss from their mother's early death without the care, education and training (and I would also add the guidance, example and encouragement) which only a mother can give. I have already expressed the view that to allow damages under these circumstances attributable to such pecuniary loss of only $1,000 to a girl of 12 years of age and $500 to a boy of 9 years of age is a "purely conventional assessment" and is, therefore, an error in principle. I would increase the amount of the award for this loss to the daughter Nancy Vana from $1,000 to $2,000 and to the son Steven Vana from $500 to $1,000. This would result in the total award to Nancy Vana under the provisions of *The Fatal Accidents Act* being fixed at $3,000 and the total award to Steven Vana under the provisions of *The Fatal Accidents Act* being fixed at $2,000.

I would, therefore, allow the appeal to the extent of increasing the award under *The Fatal Accidents Act* to the appellant from $10,000 to $14,000, to Nancy Vana under *The Fatal Accidents Act* from $2,000 to $3,000, and to Steven Vana under *The Fatal Accidents Act* from $1,500 to $2,000.

As I have already stated, I agree with Ritchie J. in increasing the award to the appellant George Vana for his own personal injuries from $8,500 to $10,000. The appellant should have his costs at trial and in this Court. There should be no costs in the Court of Appeal for Ontario.

The judgment of Judson and Ritchie JJ. was delivered by

RITCHIE J. (*dissenting in part*):—This is an appeal from a judgment of the Court of Appeal of Ontario[11] varying the judgment of Mr. Justice Haines by reducing the damages which he had awarded to the appellant George Vana for

[11] [1966] 1 O.R. 394, 54 D.L.R. (2d) 15.

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personal injuries and to the children and himself under *The Fatal Accidents Act*, R.S.O. 1960, c. 138, in respect of the death of Mrs. Vana.

The damages in question were claimed as the result of a collision between the appellant's motor vehicle and that of the respondent Tosta, which the learned trial judge found to have been driven by the respondent Laxarewicz in a wanton and reckless manner. This appeal is confined entirely to the quantum of damages; the liability of the respondents is not questioned. The effect of the collision was that Mrs. Vana, who was occupying the front seat with her husband, was thrown from the car and sustained multiple injuries as a result of which she died; Vana himself was seriously injured and comparatively slight injuries were sustained by both children.

The learned trial judge awarded the plaintiff on his own behalf and as next friend for his children a total sum of $49,720, and the Court of Appeal varied this judgment by reducing the award for personal injuries to Mr. Vana from $10,000 to $8,500 on the ground that the trial judge had wrongly taken into consideration as an item of damage the fact that Vana had suffered nervous shock, and further varied the judgment at trial by reducing the amounts awarded under *The Fatal Accidents Act* on the ground, *inter alia*, that the trial judge had wrongly assessed the damages claimed on behalf of the children for loss of their mother's care and guidance as being "a pecuniary loss" within the meaning of that statute.

In dealing with the claim of the appellant Vana for nervous shock, the Court of Appeal made the following finding:

> There is no allegation of claim in the Statement of Claim that the Plaintiff, George Vana, suffered or is suffering from nervous shock as a consequence of his wife's death; neither he nor the medical witnesses gave any evidence that he did or was suffering from nervous shock from this cause. There was evidence that Mrs. Vana was bleeding from the mouth, nose and ears, but no evidence that her body was mangled or torn.
>
> I must therefore conclude that the learned trial Judge was in error in holding that this was a matter that he was entitled to take into consideration in assessing this Plaintiff's damages for personal injuries. Had it not been for this error I would not be disposed to interfere with the general damages awarded, although I think they were perhaps too high, but because of this error I would reduce them to $8,500.00.

With the greatest respect for the views thus expressed by Mr. Justice MacKay on behalf of the Court of Appeal, I am unable to agree with this finding.

The claim for personal injuries caused to the plaintiff is expressed in para. 10 of the statement of claim in the following terms:

> The personal injuries caused to the Plaintiff, George Vana, were compound fractures of the first and third lumbar vertebrae and of the 12th thoracic vertebra with severe shock, hospitalization, pain and a tendency to arthritic changes in the area of the fractures . . .

It is true that the claim thus made for "severe shock" is capable of being construed as being limited to the shock which Vana sustained as a result of his injuries, but when this claim is considered in conjunction with the circumstances of his wife's death, I do not think that it is to be read as excluding the nervous shock which he sustained from this cause as an element of damage.

The uncontradicted evidence of the appellant was to the effect that after the accident, injured as he was, he got out of his car to find his wife in a condition which he described as follows:

> . . . then I crawled to the window and I looked out the window because my wife wasn't in the seat. She was lying on the ground. She was on her stomach and her feet were under the car and I don't remember how I got out of the car but I went to her and I saw that she was badly hurt. She was bleeding from her nose and her mouth and her ears and some people had started to try to breathe through her mouth for resuscitation and I remember one fellow says, "Don't let the blood choke her, turn her head to the side" and they made me sit down.

As to there being no evidence of Vana suffering nervous shock from this cause, reference should be had to the following answer made by him in his examination-in-chief:

> Q. Yes, and what was your condition when you got to the Brant Hospital?
> A. Well, I was in shock and I laid in the Emergency Room there and Dr. DeJong came and said that I should lay on the stretcher till he takes me up for X-rays . . .

In considering the validity of the inclusion of nervous shock as an element of damage in such cases reference may usefully be had to what was said by Sellers L.J. in the Court of Appeal in England in the case of *Shaw v. Mills* which appears to be unreported except in Kemp and Kemp on The Quantum of Damages—Fatal Injuries Claims, 2nd ed. at p. 178. That was a case in which a man

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and his wife and three daughters were standing on a footpath when they were run into by a motorcycle with the result that the wife and youngest daughter were killed and the husband and the two other children (Jean and Barbara) were injured. Lord Justice Sellers is quoted as saying:

> In addition to their physical injuries the husband and Jean and Barbara saw the distressing sight before them. This circumstance, one would have thought would have resulted, in anyone of maturity in a shock which would have an effect upon their health quite apart from any other factors whatsoever. It is that element in these cases which has given rise to these appeals in respect of the personal injuries to the husband and to the elder daughter.

The appeal was dismissed.

The development of the law in this Court with respect to the function of a provincial court of appeal in reviewing an award of damages made at trial has recently been thoroughly reviewed by Spence J. in *Gorman v. Hertz Drive Yourself Stations of Ontario Ltd. et al.*[12], at pages 18 to 20 and I would also adopt the following language taken from the reasons for judgment of Lord Wright in *Davies et al. v. Powell Duffryn Associated Collieries Limited*[13], at p. 617 where he said:

> In effect the court, before it interferes with an award of damages, should be satisfied that the judge has acted on a wrong principle of law, or has misrepresented the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered.

I do not think that the learned trial judge in the present case acted on any wrong principle of law when he took the element of "nervous shock" into consideration in awarding damages for the appellant's personal injuries and I am, as I have indicated, of opinion that there was evidence to support his view in this regard. As the only ground upon which the Court of Appeal interfered with the general damage award was the inclusion of "nervous shock" as a factor for which the appellant was entitled to be compensated, I am with the greatest respect of opinion that this is a case in which the proper course is to restore the award of $10,000 made by the trial judge.

In considering the damages to be awarded to George Vana under *The Fatal Accidents Act*, the Court of Appeal

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[12] [1966] S.C.R. 13.

[13] [1942] A.C. 601.

observed that the learned trial judge had failed to take into consideration many of the hazards and uncertainties of life which should have been weighed before reaching a conclusion as to the pecuniary loss which he suffered by reason of his wife's death.

One of the matters which must always be considered in determining the amount to be awarded to a husband under *The Fatal Accidents Act* for the loss of his wife is the possibility of his remarriage and in this regard the learned trial judge found:

> Finally, I must consider the matter of remarriage. I have seen the plaintiff and have studied him closely throughout the trial. I think remarriage unlikely.

As Mr. Justice MacKay has said, there is nothing in the evidence that would warrant this conclusion and it appears to me that it must be based entirely from the trial judge's assessment of the bearing and manner of the appellant on the witness stand.

It must, of course, be accepted that the trial judge is in a better position to assess the quality of a witness whom he has studied closely throughout the trial than any court of appeal; the respect accorded to such an assessment is, however, normally limited to the question of credibility and I do not think that the same considerations apply to the trial judge's finding that remarriage was unlikely. His observations in this regard can, I think, only be treated as an expression of personal opinion based upon his observation of the appellant for a part of one day on the witness stand during which no one asked him whether he contemplated the possibility of remarriage or not. This does not appear to me to constitute a sufficient foundation for excluding such a possibility in the case of a 47-year old man, as the trial judge appears to have done, and I agree with Mr. Justice MacKay that the trial judge erred in disregarding this factor in making his award under *The Fatal Accidents Act*.

At the time of her death Mrs. Vana was engaged as a part-time waitress earning an average of $30 per week which the learned trial judge found she contributed to the household, and from which she also managed to create a bank account of $600 in three years which was to be used

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for the college education of the children. In considering this phase of the matter as an element of pecuniary loss recoverable by the husband under *The Fatal Accidents Act*, the trial judge described it as follows:

> Loss of the wife's contribution of $1,500 a year to the household for a period which I estimate at least ten years. It may well be that she would have worked much longer. She was in good health.

As Mr. Justice MacKay has pointed out, the learned trial judge did not appear to take into consideration the fact that any compensation awarded for the loss of these earnings would be paid in advance and that in the ordinary course of living the wife might, by reason of illness or for other reasons not have continued to work. Mr. Justice MacKay also pointed out that the evidence is indefinite as to how much of the wife's earnings were used for herself and how much might reasonably be expected to enure to the benefit of the husband and children. I agree with these observations made on behalf of the Court of Appeal and I also agree that part of the wife's estimated future earnings would be properly allocated to the damages awarded to the children.

Other factors which the trial judge took into consideration in making his award of $20,000 to George Vana under *The Fatal Accidents Act* were the expense of employing a housekeeper and perhaps another part-time assistant to train and guide the children, the expense of providing board and lodging for those employed to replace the wife's services, the expense of furnishing rooms and providing amenities for such employees and the further extra expense which might from time to time be incurred in providing those countless little services that would have been provided by the wife which will not be provided by employees. With respect to these items Mr. Justice MacKay points out that the uncontradicted evidence is to the effect that Mr. Vana had no intention of hiring any housekeeper except his own mother whom he had promised to pay at the rate of $30 a week. It must be remembered that the mother was 75 years of age and might well not be able to perform these duties for very long but it is also worthy of note that the other grandmother who lives across the street from them was only 62 and in Mr. Vana's own language, "she could more or less give guidance to Nancy and in her dealings with school work and so forth."

Mr. Justice MacKay has also pointed out that there is no evidence that the expense of providing board and lodging for a housekeeper would be any greater than the cost of maintaining a wife and that the husband would not be responsible for paying for the clothing and personal effects of a housekeeper. I agree with the Court of Appeal that the learned trial judge erred in principle in including in his award to Mr. Vana under *The Fatal Accidents Act* factors which cannot properly be classified as pecuniary loss and that he failed to allow for the contingencies of life to which reference has been made. I think, with the greatest respect for the learned trial judge, that it is also fair to say that in certain respects he erred in the manner in which he interpreted the evidence.

For these reasons and for those stated by Mr. Justice MacKay, I would not interfere with the Court of Appeal's reduction of the trial judge's award for George Vana's damages under *The Fatal Accidents Act* from $20,000 to $10,000.

It has been established since the earliest times that the damages to be awarded under *The Fatal Accidents Act* are confined to actual or expected pecuniary loss suffered by the claimant. The effect of the unbroken line of authority to this effect has not been materially changed since the principle was stated by Pollock C.B., in *Franklin v. South Eastern Railway Company*[14], where he said:

> 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 . . .

The damages to be awarded to the two Vana children under *The Fatal Accidents Act* must be considered in light of this principle, and the main question to be determined in this regard is whether the loss which the children suffered in being deprived of the mother's care and moral training can be said to be "a pecuniary loss" for which damages are recoverable under the statute.

The learned trial judge, following the decision of this Court in *St. Lawrence and Ottawa Railway Company v. Lett*[15], held that such damages were recoverable and that

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[14] (1858), 3 H. & N. 211, 157 E.R. 448.
[15] (1885), 11 S.C.R. 422.

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they should be substantial and he accordingly awarded $10,000 to the 12-year old daughter and $5,000 to the 9-year old boy. The Court of Appeal reduced these damages to $2,000 and $1,500 respectively.

In *St. Lawrence and Ottawa Railway Company v. Lett*, (hereinafter referred to as the *Lett* case) the Chief Justice, speaking for a narrow majority of this Court (3 to 2), made the following statements at p. 426:

> 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.

And again at p. 432:

> 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 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.

It is apparent that this decision of the Chief Justice constituted a clear recognition of the fact that the loss to children of the care and guidance of their mother is to be regarded as a loss of a pecuniary character which is to be assessed as a separate head of damage.

Leave to appeal from this decision to the Privy Council was refused but three years later the case of *Grand Trunk Railway Company of Canada v. Jennings*[16], (hereinafter referred to as the *Jennings* case) which involved the death of a father, was decided by the Privy Council and in that case Lord Watson had occasion to say:

> When a man has no means of his own and earns nothing, it is obvious that his wife or children cannot be pecuniary losers by his decease.

It is argued that the decision in this case was inconsistent with the view of the majority in the *Lett* case and that it

[16] (1888), 13 App. Cas. 800.

stands as authority for the proposition that the lack of a mother's care and guidance is not to be treated as a pecuniary loss for the purpose of assessing damages under *The Fatal Accidents Act*. This argument was based on the premise that there is no difference in principle between the moral and practical training of a mother and that of a father and that, as the Privy Council found no pecuniary loss to have been occasioned by the father's death in the *Jennings* case, it must follow that their Lordships did not agree with the reasoning in the *Lett* case.

The cases in Australia and New Zealand —to which Mr. Justice MacKay referred support this proposition as is indicated by the language employed by Mr. Justice Kennedy in *Marsh v. Absolum*[17], where he said at p. 475:

> I think that the lack of a mother's care and moral training is a great loss to a child but it is not a pecuniary loss.

The view adopted by the Australian and New Zealand courts has not been shared by the courts in Canada where the *Lett* case has been widely followed in different provinces ever since it was decided. I do not think that Mr. Justice Ruttan of the Supreme Court of British Columbia was overstating the matter when he said in *DeBrincat v. Mitchell*[18]:

> The guiding principle as contained in the judgment of Chief Justice Ritchie in the Supreme Court decision of *Lett v. St. Lawrence and Ottawa Elec. Ry.* (1885) 11 S.C.R. 422, keeps re-appearing in extensive quotation in many of the cases that have been decided in the succeeding 70 years. Pecuniary loss is the loss of some benefit or advantage which is capable of being estimated in terms of money, as distinct from mere sentimental loss. Here we must value the loss of the services of a young wife to a young husband, their respective ages being 30 and 32 at the time of the accident; and the loss of a mother of two small children, aged three and five years.

More recently Mr. Justice Patterson of the Supreme Court of Nova Scotia in the case of *Walter et al. v. Muise*[19] referred at length to the *Lett* case and made a small allowance to the infant children for loss "of the care of a mother for something over a year" notwithstanding the fact that the evidence indicated that they had become adjusted to life with their step-mother.

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[17] [1940] N.Z.L.R. 448.
[18] (1958), 26 W.W.R. 634 at 635.
[19] (1964), 48 D.L.R. (2d) 734.

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It is contended that the reasons for judgment delivered by Mr. Justice MacKay on behalf of the Court of Appeal are predicated on acceptance of the proposition that the loss of a mother's care and training is not a pecuniary loss and that in this regard the Court of Appeal were accepting the views expressed in the Australian and New Zealand cases. That the Court of Appeal recognized the loss of a mother as being a loss of a pecuniary character for which her surviving children were entitled to recover damage is made plain by Mr. Justice MacKay where he says:

> In my view there is little evidence aside from that as to the amounts being saved by the mother for their education to justify an award of any substantial amount to the children.

In the present case the mother had put aside $200 a year for three years for the future benefit of the two children and assuming, as the trial judge did, that she would continue to do this for ten years, this would amount to a fund of $1,000 for each child; but the Court of Appeal has awarded $2,000 to the girl and $1,500 to the boy and it accordingly appears to me that this must include an award of $1,000 to the girl and $500 to the boy as a separate item of damage in compensation for the deprivation of their mother's care and training. In my view the recognition of this separate head of damage is in conformity with the principle invoked by the Chief Justice in the *Lett* case and clearly indicates that the Court of Appeal rejected the interpretation placed on the *Jennings* case by the Australian and New Zealand authorities.

In the course of his reasons for judgment, Mr. Justice MacKay refers to four Ontario cases, in which awards were made to children under *The Fatal Accidents Act* in respect of the death of their mother and he quotes from Mr. Justice Laidlaw in *Wannamaker v. Terry*[20], where he said at p. 589:

> All members of this Court agree that the service performed by a mother for her infant children is a very important matter of consideration and the continuance of her life is an important thing to them, but what the jury have to decide is how much this service was worth in dollars and cents. How much in dollars and cents were they deprived of by her death.

As I have indicated, I do not read the decision of the Court of Appeal as excluding the loss of their mother as an

[20] [1956] O.W.N. 588.

element in assessing the damages to be awarded to the children under *The Fatal Accidents Act*. Mr. Justice MacKay did, however, express the following view:

> I am also of the view that in assessing damages to the children for the loss of the care and guidance of their mother that the principle applied in the case of *Benham v. Gambling*, [1941] A.C. 157, is to some extent applicable.

In *Benham v. Gambling* damages of £1,200 had been awarded at trial in respect of the shortening, and therefore the loss of prospective enjoyment, of the life of a child of $2\frac{1}{2}$ years. The House of Lords reduced the award to £200 and the portion of the decision of Viscount Simon L.C., which Mr. Justice MacKay considered "to be to some extent applicable" in assessing damages to the children for the loss of the care and guidance of their mother, was that passage in which the Lord Chancellor pointed out that where the jury or judge of fact was faced with "attempting to equate incommensurables", in terms of damages, "very moderate figures should be chosen".

The case of *Benham v. Gambling* has not been without its critics and in the recent case of *Naylor v. Yorkshire Electricity Board*[21] the Court of Appeal deviated from it to the extent of taking the reduced value of the pound into consideration. In the course of his reasons for judgment, Danckwerts L.J. said:

> Accordingly, in *Benham v. Gambling* the House of Lords, under the compelling influence of Viscount Simon L.C., evolved by a process of judicial legislation a theory that the damages should be a strictly moderate figure, somewhere between a minimum of £200 and a maximum of £500. This, of course, was a purely conventional assessment which paid no regard to the real facts or, perhaps I should say, the difficulties of the case. . . . Since then the value of money has fallen two and a half times, and, conventional or not, the figure of £200 or £500 must be even more unrealistic than it was in 1941.

Having regard to this decision and to the decision of the High Court of Australia in *Skelton v. Collins*[22], I would deprecate the formulation of any "conventional figure" by way of compensation for the loss of a mother's care and guidance. I do not, however, think that Mr. Justice MacKay intended to adopt any such figure but rather that he was indicating the desirability for guarding against "this

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[21] [1966] 3 W.L.R. 654.

[22] (1966), 39 A.L.J.R. 480.

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head of claim becoming unduly prominent and leading to inflation of damages in cases which do not really justify a large award".

In my opinion, the decision of the Chief Justice of this Court in the *Lett* case goes no further than deciding that children may be entitled to compensation under *The Fatal Accidents Act* in respect of the loss of their mother's care and guidance and that where they have thereby sustained "substantial injury", the damages should be commensurate with that injury. In this context the words "substantial injury" are used in contradistinction to "mere sentimental" injury, but in order to justify anything more than a moderate award under this head, there must, in my view, be evidence to support a reasonable inference that the future of the children has been adversely affected by their mother's death and that they will suffer a resultant pecuniary loss which is capable of being expressed in terms of "such damages as will afford a reasonable ... compensation for the substantial loss sustained", to employ the phrase used by the Chief Justice in the *Lett* case.

In the *Lett* case damages were awarded to five of the deceased mother's children. The two youngest, a girl of 14 and a boy of 11, were awarded $1,200 and $1,300 respectively and the Chief Justice was able to affirm this award as representing compensation for the loss of the mother's educational and moral training. It is difficult, more than 80 years later, to understand all the factors which influenced the Court in affirming this award, although I think it can safely be said that children at that time were much more dependent on the education which was received in the home than they are today when education at the public expense is available to all. In any event, it is quite clear that the Chief Justice considered himself bound by the English authorities decided under *Lord Campbell's Act* and that he applied the principle that such damages were not to be awarded as a *solatium* but rather in reference to a loss which he regarded "as of a pecuniary character".

In the present case, aside from the fact that she was putting aside $200 a year for her children and was in good health, the evidence of Mrs. Vana's activities in the home

is to be found in the following excerpt from the appellant's examination-in-chief:

> Q. What activities did your wife follow?
> A. Well, she was a den mother as for the young boy about three months out of the year she conducted meetings for the cub scouts and my daughter she used to take my daughter to piano lessons and my wife did her own cooking and baking and ...

And later:

> Q. Well then, what were her relations with her children?
> A. Well she was a very faithful housewife as far as mother, schooling, she did her job excellently, she did her own ironing, washing, cleaning and took care of the children and she did she loved roses, she had her own little rose garden in the back lot there.

This evidence indicates that Mrs. Vana was an excellent mother but the task of translating the loss of her influence and character on the lives of her children into terms of a damage award is so beset with uncertainties and lends itself so readily to being inflated in the eyes of the trial court in terms of sympathy, speculation and conjecture, that as I have indicated, I adopt the suggestion which I take to be implicit in the decision of the Court of Appeal, that the proper course by which a trial judge should be guided in such cases is to instruct himself or the jury as the case may be that the amount to be awarded should bear a realistic relationship to the evidence, if any, which makes it reasonably probable that the children will actually suffer a pecuniary loss as a result of their mother's death.

I think that this is the basis of the decision of the Chief Justice in the *Lett* case, *supra,* and the fact that in 1885, in light of the evidence which was before him, the Chief Justice considered awards of $1,200 and $1,300 to be appropriate for the loss of a mother to children who were 14 and 11 years old respectively, does not appear to me to be inconsistent with the award made by the Court of Appeal in the present case nor in my view does it necessarily follow from Mr. Justice MacKay's reference to the case of *Benham v. Gambling, supra,* that the assessment made by the Court of Appeal was "a purely conventional" one. In my opinion, the Court of Appeal, like the Chief Justice in the *Lett* case, took the view that any award of damages under *The Fatal Accidents Act* must be supported by evidence of actual pecuniary damage or damage "of a pecuniary character" and that the element of *solatium* is to be excluded in mak-

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ing such an award. In awarding damages to children for the death of their mother there must be, as I have indicated, evidence which makes it reasonably probable that the children will actually suffer a pecuniary loss as a result of their mother's death.

There may be cases where the evidence would only justify a very small amount and others in which a very substantial award would be appropriate. The result of each case must, of course, depend on its own facts and the circumstances affecting the measure of the damages to be awarded to children by reason of their mother's death may range from a case where, before her death, the mother was so physically or mentally incapacitated as to be unable to play any useful part in her children's lives in which case the children cannot be said to have suffered any resultant pecuniary injury, to the case of the death of a widowed mother who was the sole support of her infant children and whose death, leaving them without guidance, to adjust to life entirely on their own, would obviously constitute a substantial loss. In each case the question is one for the trial tribunal to decide subject to review by the Court of Appeal in cases where the trial court has erred in principle or has awarded an amount which is so inordinately high or so inordinately low as to make it an entirely erroneous estimate of the damage. In the present case the Court of Appeal appears to have concluded that the trial judge erred in principle by failing to confine himself to the actual evidence of pecuniary loss suffered by the children in the loss of their mother when he made his award to them for that loss.

The considerations which should govern this Court in reviewing an award such as the one here made by the Court of Appeal are, in my opinion, those to which Judson J. referred in *Hossack et al. v. Hertz Drive Yourself Stations of Ontario Ltd. et al.*[23], at p. 34 where he said:

> ... the volume of litigation in personal injury cases and under *The Fatal Accidents Act* demonstrates the need for an experienced reviewing tribunal with reasonably wide powers. The Court of Appeal has this experience. They know better than anyone else what an award should be both in the interests of justice to the particular litigants and interest of some principle of uniformity, to the extent that this is attainable. Any further reviewing tribunal should be slow to interfere unless it is convinced that there is error in principle.

[23] [1966] S.C.R. 28.

I see no error in principle in the conclusion reached by the Court of Appeal and as I think that the award suggested by Mr. Justice MacKay in respect of the loss of the care and guidance of Mrs. Vana is appropriate having regard to all the circumstances, I would not interfere with it.

In the result, I would allow this appeal in part by restoring the award of $10,000 made by the learned trial judge in respect of George Vana's personal injuries and would affirm the assessments made by the Court of Appeal under *The Fatal Accidents Act.*

The appellant has succeeded in part and under all the circumstances I think he should have the costs of this appeal.

Appeal allowed with costs, JUDSON *and* RITCHIE JJ. *dissenting in part.*

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