MARJORIE GORMAN (*Plaintiff*) .....APPELLANT;

AND

HERTZ DRIVE YOURSELF STATIONS OF ONTARIO LIMITED (otherwise known as HERTZ RENT-A-CAR) and MARGARET FLORENCE ATHRON (*Defendants*) ..... RESPONDENTS.

1965

*June 9, 10, 11

Oct. 14

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Damages—Motor vehicle accident—Award by trial judge reduced by Court of Appeal—Appeal against quantum of damages as varied by Court of Appeal—Appeal successful—Applicable principles.

In an action arising out of an automobile collision between a vehicle driven by the plaintiff G and one driven by H, the trial judge found that the collision occurred solely through the negligence of the defendant A who was driving an automobile owned by the defendant car-rental company. Although there was an appeal from that finding, such appeal was dismissed and the only issue on the appeal to this Court was that of the quantum of damages as varied by the Court of Appeal.

Prior to the accident, the plaintiff, a woman of 60 years of age, was active, drove her car constantly and engaged in sports such as golf and curling. She suffered a number of different injuries of varying severity and importance and as a result was permanently crippled. The trial judge awarded her $35,000 in general damages which with other damages resulted in judgment in her favour for $42,451.18. The Court of Appeal was of the opinion that the trial judge's assessment of general damages was "so excessive that it cannot be upheld" and reduced same to $22,500.

Held (Judson J. dissenting): The appeal should be allowed and the judgment of the trial judge restored.

Per Cartwright, Martland and Ritchie JJ.: The Court of Appeal had not erred in stating the principles by which it should be guided but had erred in holding that the amount at which damages were assessed was so excessive as to warrant its interference. On this view of the matter the duty of this Court was as declared in s. 46 of the *Supreme Court Act* to "give the judgment . . . that the Court, whose decision is appealed against should have given". That Court should have dismissed the appeal.

Putting the matter in another way, where the court of first instance had not erred in principle, it was error in principle for the court of appeal to reduce damages unless they were so excessive as to constitute a wholly erroneous estimate and the question of whether or not they were so excessive must be decided by the second appellate court from a perusal of the evidence.

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

1965

GORMAN
v.
HERTZ DRIVE YOURSELF STATIONS OF ONTARIO LTD. et al.

Per Martland, Ritchie and Spence JJ.: This Court would not vary damages adjudged by the court of appeal in a province which had varied those assessed by the trial judge "except in the most exceptional circumstances", and the so-called exceptional circumstances were those where this Court was of the opinion that the court of appeal had committed an error in principle. Before a court of appeal could properly intervene, it must be satisfied that the trial judge applied a wrong principle of law or, short of that, that the amount awarded by the trial judge was so inordinately high or so inordinately low as to be a wholly erroneous estimate of the damage.

In the present case counsel for the defendants failed to demonstrate that the trial judge, acting, as was suggested, upon the submission of counsel for the plaintiff, separately assessed damages for each injury and then totalled them in order to arrive at his award. But even if such an inept formula had been used, no authority was cited to show that it was wrong in principle.

On a perusal of the evidence, it was determined that the trial judge could have arrived at a figure of $35,000 for general damages without the award being such as to earn the description as being "so inordinately high as to be a wholly erroneous estimate of damages".

Pratt v. Beaman, [1930] S.C.R. 284; *Hanes v. Kennedy,* [1941] S.C.R. 384; *Lang et al. v. Pollard et al.,* [1957] S.C.R. 858; *Lehnert v. Stein,* [1963] S.C.R. 38; *Widrig v. Strazer et al.,* [1964] S.C.R. 376; *Fagnan v. Ure et al.,* [1958] S.C.R. 377; *Nance v. British Columbia Electric Railway Co. Ltd.,* [1951] A.C. 601, referred to.

Per Judson J., *dissenting:* The judgment of the Court of Appeal was correct. This case was within their power of review and this Court should not interfere with their judgment.

APPEAL from a judgment of the Court of Appeal for Ontario, reducing the amount of damages awarded by Moorhouse J. after a trial without a jury. Appeal allowed, Judson J. dissenting.

E. J. Houston, Q.C., and *A. R. M. O'Connor, Q.C.,* for the plaintiff, appellant.

J. D. Arnup, Q.C., and *S. Sadinsky,* for the defendants, respondents.

Martland J. concurred with the judgment delivered by

CARTWRIGHT J.:—The relevant facts and the course of the proceedings in the Courts below are set out in the reasons of my brother Spence. I agree with his conclusion that this appeal should be allowed and there is little that I wish to add.

For the reasons given by my brother Spence I agree with him that it has not been shewn that the learned trial judge made any error in principle in arriving at the amount of

general damages. On the other hand, I find it difficult to say that the Court of Appeal dealt with the matter on any wrong principle. The ground on which that Court proceeded was that the learned trial judge's assessment of general damages was "so excessive that it cannot be upheld". In my opinion that phrase was used in the reasons of Schroeder J.A. as the equivalent of the one adopted by Viscount Simon in *Nance's* case, "so inordinately high that it must be a wholly erroneous estimate of the damage", and of the similar expressions in other cases also quoted by my brother Spence, with all of which the learned justice of appeal was, of course, familiar.

After a perusal of all the relevant evidence I agree with the conclusion of my brother Spence that the award made by the learned trial Judge was not "so inordinately high as to be a wholly erroneous estimate of damages"; indeed, with the greatest respect for those who think otherwise, the amount does not seem to me to be excessive. This is the sort of question on which there may well be differences of judicial opinion.

It results from this that, in my opinion, the Court of Appeal has not erred in stating the principles by which it should be guided but has erred in holding that the amount at which the damages were assessed was so excessive as to warrant its interference. On this view of the matter what is the duty of this Court? I do not think that we are bound to dismiss the appeal merely because no error in principle on the part of the Court of Appeal has been demonstrated. Having reached the conclusion that the amount awarded by the learned trial judge was such that the Court of Appeal ought not to have varied it, it appears to me that our duty is as declared in s. 46 of the *Supreme Court Act,* to "give the judgment . . . that the Court, whose decision is appealed against, should have given". In my opinion, that Court should have dismissed the appeal.

It may be that the matter is merely one of words and that a simpler method of expression, which would be in accordance with those used in the cases collected in the reasons of my brother Spence, would be to say that, where the court of first instance has not erred in principle, it is error in principle for the court of appeal to reduce damages unless they are so excessive as to constitute a wholly erroneous estimate and that the question whether or not they are so

1965

GORMAN v. HERTZ DRIVE YOURSELF STATIONS OF ONTARIO LTD. et al.

excessive must be decided by the second appellate court from a perusal of the evidence. Whichever way the matter is put I am satisfied that in the case at bar the award of the learned trial judge ought not to have been varied.

I would dispose of the appeal as proposed by my brother Spence.

Cartwright J.

JUDSON J. (*dissenting*):—I agree with the judgment of the Court of Appeal. I think that this case was within their power of review and that this Court should not interfere with their judgment.

I would dismiss the appeal with costs.

RITCHIE J.:—I agree with my brothers Cartwright and Spence that the award of the learned trial judge ought not to have been varied and I would dispose of the appeal as proposed by my brother Spence.

With respect to the Gorman appeal, Martland J. concurred with the judgment delivered by

SPENCE J.:—These are two appeals against the judgments of the Court of Appeal for Ontario. Both judgments in that Court reduced amounts awarded by the learned trial judge after a trial without a jury.

The actions arose as a result of an automobile collision which occurred on Highway 17 near the City of Ottawa, between a vehicle driven by the appellant Marjorie Gorman and one driven by the late Dr. William Hossack in which his wife, the late Mary Ann Hossack, and his infant son, Brian Hossack, were passengers. Dr. Hossack and Mrs. Hossack were killed. Mrs. Gorman and Brian Hossack were injured.

The learned trial judge found that the collision occurred solely through the negligence of the defendant Margaret Florence Athron who was driving an automobile owned by the defendant Hertz Drive Yourself Stations of Ontario Ltd. Although there was an appeal from that finding, such appeal was dismissed and the only issue in this appeal is that of the quantum of damages as varied by the Court of Appeal for Ontario.

After trial, the learned trial judge, Moorhouse J., awarded to the plaintiff Marjorie Gorman the sum of $35,000 in general damages which with other damages resulted in judgment in her favour for $42,451.18, and awarded to the

appellants in the second action who sued under the provisions of *The Fatal Accidents Act*, R.S.O. 1960, c. 138, as executors of both the late Dr. William Hossack and his wife Mary Ann Hossack, the sum of $94,000 general damages which, with other damages, resulted in judgment in their favour in the sum of $95,632.60.

Whether this Court is justified in varying the judgment of the court of appeal, which in turn had varied the damages awarded by the trial judge, has been dealt with in a considerable number of decisions of this Court and it may be taken that the jurisprudence has been established here. In *Pratt v. Beaman*[1], Anglin J. said at p. 287:

> The second ground of appeal is that damages allowed for pain and suffering by the trial judge, $1,500, should not have been reduced as they were on appeal, to $500. While, if we were the first appellate court, we might have been disposed not to interfere with the assessment of these damages by the Superior Court, it is the well established practice of this court not to interfere with an amount allowed for damages, such as these, by the court of last resort in a province. That court is, as a general rule, in a much better position than we can be to determine a proper allowance having regard to local environment. *It is, of course, impossible to say that the Court of King's Bench erred in principle in reducing these damages.*

(The italics are my own.)

In *Hanes v. Kennedy*[2], Kerwin J. said at pp. 387-8:

> Where general damages fixed by a trial judge sitting without a jury have been reduced by a Court of Appeal under circumstances such as we find here, this Court, as a general rule, will not interfere: *Ross v. Dunstall* (1921), 62 Can. S.C.R. 393; *Pratt v. Beaman*, [1930] S.C.R. 284. Mr. Cartwright referred to *McHugh v. Union Bank of Canada*, [1913] A.C. 299 at 309 . . . *no error in principle was made by the Court of Appeal in this case, and the cross-appeal should, therefore, be dismissed, with costs.*

(The italics are my own.)

And again, in *Lang et al. v. Pollard et al.*[3], Kerwin J. said at p. 859:

> . . . the same principle is applicable and that is, particularly in Canada where estimates of damages may differ in various Provinces, that this Court will not, *except in very exceptional circumstances,* interfere with the amounts fixed by the Court of Appeal where they differ from the damages assessed by trial judge.

(The italics are my own.)

In *Lehnert v. Stein*[4], Cartwright J. said at p. 45:

> As to the quantum of damages, this Court is slow to interfere with the amount fixed by a Provincial Appellate Court which has varied the assessment made by a trial judge. It is sufficient on this point to refer to the

[1] [1930] S.C.R. 284.
[2] [1941] S.C.R. 384.
[3] [1957] S.C.R. 858.
[4] [1963] S.C.R. 38.

1965

GORMAN v. HERTZ DRIVE YOURSELF STATIONS OF ONTARIO LTD. et al.

Spence J.

case of *Lang et al. v. Pollard et al.*, [1957] S.C.R. 858. In the case at bar a perusal of the evidence brings me to the conclusion that the amount fixed by the Court of Appeal is not excessive.

The final authority to which I shall refer is *Widrig v. Strazer et al.*[1], where Hall J., giving the judgment of the Court, said at pp. 388-9:

> The Court of Appeal reduced the trial judge's award of $40,000 to $12,000. The right of the Court of Appeal to review a trial judge's award is governed by well-settled principles as stated by Viscount Simon in *Nance v. British Columbia Electric Railway Company Ltd.*, [1951] A.C. 601 at 613, as follows:
>
> > Whether the assessment of damages be by a judge or a jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then, before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.
>
> Unless there was error of principle on the part of the Court of Appeal, this Court will not interfere with an amount allowed for damages by the court of last resort in a province. I adopt what Cartwright J., speaking for himself and Taschereau J. (as he then was) said in *Lang and Joseph v. Pollard and Murphy*, [1957] S.C.R. 858 at 862:
>
> > Under these circumstances where no error of principle and no misapprehension of any feature of the evidence is indicated I think that the rule which we should follow is that stated by Anglin J., as he then was, giving the unanimous judgment of the Court, in *Pratt v. Beaman* [1930] S.C.R. 284 at 287:
>
> (see *supra*).
>
> > This decision was followed in the unanimous judgment of this Court, delivered by Kerwin J., as he then was, in *Hanes et al. v. Kennedy et al.*, [1941] S.C.R. 384 at 387.
> >
> > The principle appears to me to be equally applicable whether the first appellate court has increased or decreased the general damages awarded at the trial.
>
> In my view there were errors of principle on the part of the Court of Appeal in reducing the amount of the damages. . . .

I have avoided citing the cases in which the court of appeal in the province had varied damages awarded by a jury. To summarize the jurisprudence established by this Court, this Court will not vary damages adjudged by the court of appeal in a province which had varied those assessed by the trial judge "except in the most exceptional

[1] [1964] S.C.R. 376.

circumstances", and it would further appear that the so-called exceptional circumstances are those where this Court is of the opinion that the court of appeal had committed an error in principle.

Therefore, I turn to examining the problem of whether the Court of Appeal in the present case did commit any errors in principle. The basis upon which a court of appeal is justified in varying the damages awarded by a trial judge, as the Court of Appeal for Ontario did in these cases, again, in my view, has been authoritatively decided by this Court. In *Fagnan v. Ure et al.*[1], Locke J. said at p. 385:

> The findings of the learned trial judge as to the compensation to be awarded to the respondents have been approved by the unanimous judgment of the Appellate Division (1957), 22 W.W.R. 289, 9 D.L.R. (2d) 480.
>
> The rule applicable when the matter was before that Court is as it is stated by Greer L.J. in *Flint v. Lovell,* [1935] K.B. 354 at 360, in the following terms:
>
> > In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.
>
> That statement was approved by the House of Lords in *Davies et al. v. Powell Duffryn Associated Collieries, Limited,* [1942] A.C. 601 at 617, [1942] 1 All E.R. 657, and by the Judicial Committee in *Nance v. British Columbia Electric Railway Company Limited,* [1951] A.C. 601 at 613, [1951] 2 All E.R. 448, [1951] 3 D.L.R. 705, 2 W.W.R. (N.S.) 665, 67 C.R.T.C. 340.

In the latter case, Viscount Simon, delivering the judgment of the Judicial Committee, said at p. 613:

> In those circumstances two distinct questions arise:— (1) What principles should be observed by an appellate court in deciding whether it is justified in disturbing the finding of the court of first instance as to the quantum of damages; more particularly when that finding is that of a jury, as in the present case. (2) What principles should govern the assessment of the quantum of damages by the tribunal of first instance itself.
>
> (1) The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or a jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then, before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it

[1] [1958] S.C.R. 377.

1965

GORMAN v. HERTZ DRIVE YOURSELF STATIONS OF ONTARIO LTD. et al.

Spence J.

must be a wholly erroneous estimate of the damage (*Flint v. Lovell*, [1935] 1 K.B. 354, approved by the House of Lords in *Davies v. Powell Duffryn Associated Collieries Ld.*, [1942] A.C. 601). The last named case further shows that when on a proper direction the quantum is ascertained by a jury, the disparity between the figure at which they have arrived and any figure at which they could properly have arrived must, to justify correction by a court of appeal, be even wider than when the figure has been assessed by a judge sitting alone. The figure must be wholly "out of all proportion" (per Lord Wright, *Davies v. Powell Duffryn Associated Collieries, Ld.*, [1942] A.C. 601, 616.)

Therefore, it must be determined whether the trial judge in the present case applied a wrong principle of law or, short of that, that the amounts awarded by the trial judge were so inordinately high as to be a wholly erroneous estimate of the damage. Since the trial was before a judge without a jury I do not seek to apply the "out of all proportion" test of Lord Wright in *Davies v. Powell Duffryn Associated Collieries Ld., supra.*

THE GORMAN ACTION

Schroeder J.A., giving the judgment of the Court of Appeal, said:

> We have also come to the decision that the learned trial Judge's assessment of general damages in favour of the Respondent Marjorie Gorman is so excessive that it cannot be upheld. We reject the contention of her counsel that a separate assessment should be made in respect of each individual injury sustained by this Respondent. Viewing her injuries as a whole, we consider that an award of $22,500 for general damages would constitute reasonable compensation under that head. To that extent the appeal should be allowed and the judgment varied by substituting for the award of $35,000 for general damages the sum of $22,500.

It would appear, therefore, that the learned justice in appeal may well have considered (1) that the trial judge committed an error in principle in that he, acting upon the submission of counsel for the plaintiff Gorman, separately assessed damages for each injury and then totalled them, and (2) that in any event the award of $35,000 general damages was "so inordinately high as to be a wholly erroneous estimate of the damages".

To deal with the first question, counsel for the plaintiff Gorman at trial appeared before this Court as counsel for her as appellant, and agreed that at trial in argument he had cited separate possible amounts of damages for each of his client's injuries as being appropriate if each of those injuries had been suffered by different individuals but he denied that

he had urged the trial judge to total those individual amounts. Counsel, on the other hand, reported that he had urged the trial judge to take into account that all of the injuries had been suffered by one person and award a lump sum considering those injuries and the well recognized elements of future expenses, pain and suffering up to the trial and prospective pain and suffering thereafter, well-nigh total elimination of his client in the enjoyment of life, and the fact that a lady of 60 years of age would not be able to readjust herself to her infirmities as would a younger person.

The learned trial judge delivered reasons at the end of the trial in which he determined the issue of liability and reserved for further consideration the quantum of damages, then some weeks later endorsed the record with the amounts of his assessment. However, on delivering judgment at trial, he said:

> Mrs. Gorman was an active woman and has been permanently crippled. She enjoyed driving about in her car, golfing, curling, and playing the piano. She feels that her ability to do these things has been completely taken away from her, and that her piano playing has been very seriously and permanently affected. In short, her enjoyment of life has been materially affected by this accident. I feel that it has.
>
> Some of the injuries which she received consisted of: Lacerations of the lower lip; bruises of the forehead; deep laceration of both knees into the joint; a comminuted fracture of the left patella; a chip fracture of the left femur near the joint; and her right ankle was almost severed. Swelling of the right hand, and there was a fracture of the metacarpal, near the wrist joint, and there was a fracture of the first left and the fourth matatarsal of the left foot; a fracture of the lower mandible; and numerous bruises and contusions. There were operations under general anaesthesia, and she had a cast from the groin to the foot, of both legs, and her jaws were wired because of the fractures, and she was obliged to take food through a tube. She had long and continuing physiotherapy.
>
> The medical evidence is that at some time, the right ankle will require to be locked. It has been advised, but this Plaintiff has postponed that for as long as she thinks that she can. However, she will again have to undergo surgery, and be for some few weeks in the hospital. The evidence is that the arthritic condition will be affected; she has had a large amount of dental work, and has undergone pain and suffering. These are factors, all of which have been mentioned by counsel, and if there are any that I have omitted, I simply have taken those from my notes of the evidence, and they will be considered when I endorse the record as to the amount of damages in her case, Mr. Houston.

I find nothing in that statement to indicate that the learned trial judge was intending to or did total the individual amounts suggested by counsel in order to arrive at his award. The fact that the amounts suggested by counsel for the individual injuries do total approximately that

1965

GORMAN v. HERTZ DRIVE YOURSELF STATIONS OF ONTARIO LTD. et al.

Spence J.

awarded by the trial judge I regard as a mere coincidence and no conclusive indication that such a formula was used. Moreover, counsel for the respondent in this Court admitted that he was unable to cite any authority that such an "adding machine approach" to the assessment of damages was incorrect in principle. It would certainly be inept but even if it had been used by the trial judge, and I am of the opinion that has not been demonstrated, I cannot say that it would be wrong in principle.

I turn next to the consideration of whether the award of $35,000 general damages was "so inordinately high as to be a wholly erroneous estimate of the damages". I have already cited the learned trial judge's reference to the injuries. Counsel for the appellant in his factum has listed 16 different injuries of varying severity and importance. It seems certain that the appellant who, prior to the accident, was a lady of 60 years of age, one who drove her car constantly and engaged in active sports such as golf and curling, is now a permanently crippled person with, at any rate, a degree of fixity of both legs and with every indication that arthritis resulting from the injuries has already advanced to a considerable degree. The trial judge, called upon to consider these facts in the light of the elements of damages which I have already cited as having been submitted to him by the counsel for the appellant at trial could, in my view, have arrived at a figure of $35,000 for general damages without the award being such as to earn the description as being "so inordinately high as to be a wholly erroneous estimate of damages". As Cartwright J. pointed out in *Lehnart v. Stein, supra,* one might only come to the determination of whether an award is "so inordinately high" by perusal of the evidence and I have summarized my perusal of that evidence in expressing the opinion above.

THE HOSSACK ACTION

Schroeder J.A., giving the judgment of the Court of Appeal, said:

> I propose to deal first with the assessment of damages in the action brought under *The Fatal Accidents Act*. An Appellate Court does not readily interfere with an assessment of damages made by a trial Judge unless it is satisfied that the damages awarded are clearly unreasonable and unsupported by the evidence or that they are so excessively high as to be clearly erroneous. In our respectful view the award of $94,000 is so

excessively high as to reflect an attempt to award an amount approaching a perfect compensation. There are numerous contingencies to be taken into account in assessing damages in these cases by reason whereof expectations of pecuniary benefit disappointed by a death caused by the act of a wrongdoer must be adequately discounted. The learned Judge failed, in our respectful opinion, to give full and proper effect to those contingencies. It is perfectly obvious that the actuarial evidence of Mr. Lang, based on the estimated savings of the deceased William Ross Hossack, did not take account of the fact that if the Respondents optimistic estimate of the accumulated savings were well founded, they would reach the hands of the beneficiaries subject to provincial succession duties tax and federal estate tax which would be substantial in an estate of half a million dollars. There are also many contingencies as, e.g., if the wife were to predecease the husband, and he were to remarry, or if the husband were to predecease the wife and she were to remarry, further that the wife might have been compelled to live on the husband's estate, in which event the question would arise as to how much of the said estate would remain on the wife's death. These and many other contingencies which need not be denominated exist in this case and must be given due effect.

We have had the benefit of very able, comprehensive and helpful arguments of counsel in the course of which the evidence was exhaustively reviewed. Upon full consideration we have attained to the conclusion that a proper award in favour of the infant under the provisions of *The Fatal Accidents Act* would be $65,000.00. To that extent the appeal should be allowed and the judgment in appeal varied by substituting for the sum of $94,000.00 the sum of $65,000.00.

It would appear, therefore, that the learned justice in appeal felt that the Court of Appeal was justified in varying the judgment of the learned trial judge for these reasons: (1) that the damages allowed reflected an attempt to award an amount approaching a perfect compensation, (2) that numerous contingencies to be taken into account in assessing damages in a fatal accidents case had not been taken into account, and (3) that the damages awarded were "so inordinately high as to be a wholly erroneous estimate of damages".

One contingency to which the learned justice in appeal refers was that the actuary's estimate of the total estate which would have been left by the late Dr. William Ross Hossack had he lived out his life in a normal fashion would only have gone to his son after provincial succession duties and federal estate taxes had been deducted therefrom. A further contingency which the learned justice in appeal felt the trial judge had failed to consider was the possibility of Mrs. Hossack predeceasing her husband and he remarrying, or Dr. Hossack predeceasing his wife and she being forced during the balance of her lifetime to live on the estate of her late husband which had accumulated up to the

1965

GORMAN
v.
HERTZ DRIVE YOURSELF STATIONS OF ONTARIO LTD. *et al.*

Spence J.

date of his death, and so reduce the amount available for the infant son of the late Dr. and Mrs. Hossack and, therefore, the pecuniary benefit of which he was deprived by their untimely death. I think the second contingency may be dealt with very briefly. The fact is that Mrs. Hossack died in the accident which gave rise to this cause of action. The pecuniary benefit to her son, in whose interest the action is taken, as the result of any estate which she might have left had she lived out her ordinary life was slight and, therefore, what was in essence the trial judge's task was to determine the pecuniary benefit of which the son was deprived by the death in the accident of his father. The fact is that his father, the late Dr. Hossack, did not leave a widow who might live on the late Dr. Hossack's estate had he predeceased her at some future time. It might well be that the late Dr. Hossack, had he lived, might have remarried, but the effect of such remarriage on the pecuniary benefit which his son would receive on the date of his father's death, had it occurred under normal circumstances, and at a normal time, is altogether conjecture and I do not see how it could be allowed for with any intelligence in the affixing of the damages.

I therefore find no error in principle in the learned trial judge's failure to consider this contingency, if he did so fail to consider it, and there is nothing in his reasons for judgment or in the endorsement of the record which indicated that he did fail to consider any proper element. It must be remembered that the learned trial judge said:

> I shall read the cases referred to by counsel and shall take into consideration all these factors required to be so taken into consideration and will endorse the record as to the amount of damages accordingly.

The question of the effect on the pecuniary benefit of which Brian Hossack was deprived by the untimely death of his parents, of the estate taxes, provincial and federal, is a matter of some importance. It would appear from a perusal of the evidence of Mr. Lang, the actuary, who gave evidence on behalf of the plaintiffs at trial, that this witness found a probable gross estate which would come to the son upon the death of Dr. Hossack had it occurred under ordinary circumstances of $503,000. After estate duties, federal and provincial, were deducted therefrom at their present rates, it would leave only a net estate of $364,500. Using the same calculation as Mr. Lang, that would have a present value of

$81,885 rather than the present value of $113,000 which Mr. Lang calculated as being the present value of an estate of $503,000. However, it was counsel's submission that the learned trial judge appears to have made up his award of $94,000 by the addition of three amounts,

(*a*) the present value of the probable future estate that Brian Hossack would have received upon the eventual passing of his father and mother under ordinary circumstances .....$50,000.

(*b*) the cost of food, clothing, shelter and education for a 20-year period which the infant Brian would have received from his parents if they had lived ..$32,000.

(*c*) the substantial loss suffered by the infant in losing the intellectual, moral and physical guidance and training which only a mother and father could give him .....$12,000.

On that basis, the trial judge reduced the $113,000 present value figure to which I have referred to $50,000 to allow for the many contingencies which might have interfered with the late Dr. Hossack leaving an estate as large as Mr. Lang calculated. That represents a reduction of 55.7 per cent. Had the present value been considered at $81,885, the reduction to $50,000 would only have represented a reduction to allow for the said contingencies of about 40 per cent. Had the reduction factor of approximately 56 per cent been used on the present value after such estate duties, then figure (*a*) in the calculation would have amounted to about $45,000 to $46,000 and added to figures (*b*) and (*c*) would have given a total damage award of about $90,000.

I am unable to say that an award of $94,000 as damages under *The Fatal Accidents Act* is so inordinately higher than an award of $90,000 that it is a wholly erroneous estimate of the damages. There has been very considerable argument as to the propriety of both the $32,000 allowance under head (*b*) and the $12,000 allowance under (*c*) above. I am of the opinion that those objections constitute merely an attempt to supplant the estimate made by the trial judge with the estimate by the Court of Appeal or by counsel before this Court and that no matter of principle is involved.

1965

GORMAN v. HERTZ DRIVE YOURSELF STATIONS OF ONTARIO LTD. *et al.*

Spence J.

There is, however, an additional factor which must be considered and it is the factor which deals with the establishment of a gross value of the estate of the late Dr. Hossack, had he lived his ordinary life, at $503,000. That amount was arrived at by the witness Lang by assuming that the late Dr. Hossack would have saved one-third of his net income and that those savings accumulated with interest for the 38 years of his normal life would have amounted at his death at the end of those 38 years to $503,000. The estimate that the late Dr. Hossack had saved one-third of his income was made by finding that those so-called savings amounted to $16,319 and that his total net income after deduction of taxes was $44,994. The $16,319 was a total which included a valuation of household goods, furniture and jewellery at $2,642, and two automobiles at $1,120, a total of $3,782. Certainly, it is difficult to understand how those items could be included under the heading of "savings" so that their capitalization at 4 per cent interest would build up into a gross estate in 38 years of $503,000. This would lead us to the conclusion that the actuary was incorrect in taking as the basis for his calculation that the late Dr. Hossack was saving one-third of his net income. In fact, usual living expenses, i.e., the purchase of furniture, household goods, jewellery and automobiles were erroneously included in that so-called saving of one-third of his net income. The capitalization of these amounts would appear to make inaccurate the calculated gross estate of the late Dr. Hossack, at normal death, of $503,000, and it would appear more accurate to say that the late Dr. Hossack saved only about 28 per cent of his net income. His total savings therefore would not have been the $212,292 calculated by Mr. Lang but about $178,000 and that total saving capitalized on the 4 per cent basis used by Mr. Lang would have yielded a gross estate at the time of death of about $422,000. This estate, after the allowance of estate duties, federal and provincial, would amount to approximately $305,803.

The present value of $503,000 is $113,000 and the present value of $305,803, therefore, would be about $68,500. If you allow about 56 per cent of that as being a proper figure to allow for contingencies you would reach an amount not of the $50,000 as apparently allowed by the learned trial judge but rather about $38,360 and if to that amount, as being the proper amount for category (*a*) *supra,* you add the same

amounts for category (*b*)—$32,000, and category (*c*)—$12,000, you arrive at $82,360.

Therefore, in my judgment, the proper allowance for damages under *The Fatal Accidents Act* should have been $82,360. In arriving at that figure, I believe that I have used the method of calculation adopted by the appellants and to which no objection was taken by counsel for the respondents, but I have based my calculation of the gross estate which the late Dr. Hossack might have expected to leave, had he died at a normal time and under normal circumstances, upon a more realistic estimate of his accumulated savings, and I have made allowance for the effect of estate duties, federal and provincial, which it would appear the learned trial judge, if he adopted the calculations made by Mr. Lang, failed to allow. In short, I have attempted to correct the two matters of principle upon which the trial judge seems to have fallen in error.

In doing so, I do not purport to deal with the question discussed in *British Transport Commission v. Gourley*[1], or in *Jennings v. Cronsberry*[2], as to whether or not deductions should be made in damage awards to a person who had been injured and thereby prevented from earning his living for, at any rate, a period of time to allow for tax on income which he would otherwise have earned. What must be determined in an action under *The Fatal Accidents Act* is the pecuniary benefit of which the person for whom the action has been instituted is deprived by the untimely death of the deceased. That pecuniary benefit, in my view, must be considered in the light of what such person will actually receive. What he actually will receive is the net estate after the deduction of estate duties and, therefore, an allowance must be made for the death duties in calculating the damages.

I am, therefore, of the opinion that this Court should allow the appeal in the Gorman action and restore the judgment of the trial judge. Since the appellant in the Gorman action was successful throughout, the appellant should have costs at trial, in the Court of Appeal, and in this Court.

This Court, by virtue of s. 46 of the *Supreme Court Act*, may "give the judgment and award the process or other

[1] [1956] A.C. 185.

[2] [1965] 2 O.R. 285 (CA.).

1965

GORMAN v. HERTZ DRIVE YOURSELF STATIONS OF ONTARIO LTD. et al.

Spence J.

proceedings that the Court whose decision is appealed against, should have given or awarded".

I would allow the appeal in the Hossack action to the extent of varying the general damages from the sum of $65,000, as fixed in the Court of Appeal, to $82,360 which with other damages of $1,632.60 allowed at trial will result in a judgment in favour of the plaintiffs in that action for $83,992.60. Since the appellant in the Hossack action did not succeed in having restored the judgment at trial, I would leave in effect the disposition of costs made in the Court of Appeal, and I would allow no costs in this Court.

Appeal allowed with costs, JUDSON J. *dissenting.*

Solicitors for the plaintiff, appellant: Soloway, Wright, Houston, Galligan & McKimm, Ottawa.

Solicitors for the defendants, respondents: Walker, Milton, Rice & Ellis, Toronto.