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*June 9, 10, 11 Oct. 14

FLORENCE ELVENA HOSSACK and GORDON SCARBOROUGH PAUL, Executors of the Last Will and Testament of William Ross Hossack, deceased, and the said FLORENCE ELVENA HOSSACK and the said GORDON SCARBOROUGH PAUL, Executors of the Last Will and Testament of Mary Ann Hossack, deceased. (*Plaintiffs*) .... APPELLANTS;

AND

HERTZ DRIVE YOURSELF STATIONS OF ONTARIO LTD. and MARGARET FLORENCE ATHRON and ROGER LEMOYNE (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Damages—Fatal accident—Award by trial judge reduced by Court of Appeal—Appeal against quantum of damages as varied by Court of Appeal—Failure of appeal—Applicable principles.

An automobile collision between a motor vehicle driven by G and one driven by WH in which his wife MH and his infant son BH were

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

passengers resulted in the father and mother being killed and the child being injured. In an action brought by the executors of WH and MH under the provisions of *The Fatal Accidents Act,* R.S.O. 1960, c. 138, 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 as to the quantum of general damages awarded to the infant son. These damages were assessed by the trial judge at $94,000 and this figure was reduced by the Court of Appeal to $65,000.

At the time of the accident WH and MH were in their early thirties and their son was almost 6 years old. WH was a consulting engineer engaged in progressively prosperous employment and had accumulated an estate computed by the trial judge at $31,556.39.

Held (Spence J. dissenting): The appeal should be dismissed.

Per Cartwright J.: No error in principle was found in the reasons of either of the Courts below. The task of the trial judge was to view the whole of the relevant evidence as a properly instructed jury would do and to fix the figure, not susceptible of precise arithmetical calculation, which would represent compensation for the amount of actual pecuniary benefit which the son might reasonably have expected to enjoy had his parents not been killed. Once the Court of Appeal had decided that the amount fixed by the trial judge was so high as to require interference its duty was the same as that of the trial judge.

As a result of the death of his parents the son inherited in round figures the sum of $35,000. When to this was added the sum of $65,000 awarded by the Court of Appeal, he was entitled to a total fund of $100,000. Considering all the relevant evidence, an award which brought the total received by the son up to $100,000 could not be said to be an inadequate compensation for the loss of the pecuniary benefits which he might reasonably have expected to receive had his parents not been killed.

Per Martland J.: In the circumstances of this case, this Court should not interfere with the amount of the damages awarded by the Court of Appeal.

Per Judson J.: This was not a case where this Court should interfere. There was no error in principle in the Court of Appeal when it reduced the general damages so as to constitute reversible error. The Court of Appeal was mindful of the principle that an appellate court does not readily interfere with an assessment of damages made by a trial judge unless it is satisfied that the award is clearly unreasonable and unsupported by the evidence or that it is so excessively high as to be clearly erroneous. They were unanimously of the opinion that this case fell within these principles of review.

Per Ritchie J.: Notwithstanding the provisions of s. 46 of the *Supreme Court Act,* this Court was not justified in substituting a figure of its own for that awarded by the Court of Appeal except upon the ground that that Court appeared to have applied some wrong principle of law in assessing the damages or that its award was so inordinately high or so inordinately low as to be wholly erroneous. In the circumstances of this case there was no such ground for interfering with the award made by the Court of Appeal.

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Per Spence J., *dissenting*: 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 the proper allowance for damages under *The Fatal Accidents Act* should have been $82,360. This figure was arrived at by attempting to correct two matters of principle upon which the trial judge seemed to have fallen in error. The calculation of the gross estate which WH might have expected to leave, had he died at a normal time and under normal circumstances, should have been based upon a more realistic estimate of his accumulated savings, and an allowance should have been made for the effect of estate duties, federal and provincial, which it appeared the trial judge failed to allow.

By virtue of s. 46 of the *Supreme Court Act,* this Court may "give the judgment and award the process or other proceeding that the Court whose decision is appealed against, should have given or awarded". Accordingly, the appeal should be allowed and the judgment of the Court of Appeal varied.

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 dismissed, Spence J. dissenting.

C. F. MacMillan, Q.C., for the plaintiffs, appellants.

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

CARTWRIGHT J.:—The facts out of which this appeal arises are set out in the reasons of my brother Spence, and I shall endeavour to avoid repetition.

The only question is as to the quantum of the general damages awarded to Brian Paul Hossack the infant son of the late William Ross Hossack and Mary Ann Hossack. These damages were assessed by the learned trial judge at $94,000 and this figure was reduced by the Court of Appeal to $65,000.

At the conclusion of the trial the learned trial judge gave oral reasons for judgment determining all questions of liability and these are no longer in dispute. He reserved his

judgment as to the quantum of damages. His findings relevant to the question now in issue are expressed as follows:

> William Ross Hossack was born on the 9th of August, 1927. Mary Ann Hossack was born on the 21st of November 1929. They were married on the 16th of April 1953. Their son, Brian, was born on the 2nd of November 1955. On the evidence it is unlikely there would have been further issue, although I do not overlook the possibility of adoption.
>
> Mary Ann Hossack was a well-educated woman, and a musician of recognized ability, who, I infer, devoted her time to her home and family. There was no evidence of her recent employment out of her home.
>
> William Ross Hossack was a man of very high academic standing, and most favourably spoken of by his employer. He was a musician of standing; a man whose writings on professional subjects were purchased by magazines, a man who had acquired his Doctorate in Astro-Physics, and at the time of his death was employed by the firm of Stevenson and Kellogg, consulting engineers. It is not disputed that he had a very bright future. Evidence of his earnings and savings was given before me.
>
> From evidence given, I compute his estate at $31,556.39. It includes an item of $6,869.84 benefit to be received from the Charles Ross estate.
>
> The estate of his wife Mary Ann Hossack I compute at $6,310, subject to possible reduction in the amount of $2,828.57, the amount of a government annuity.
>
> 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 reasons of Schroeder J.A., who gave the unanimous judgment of the Court of Appeal, in so far as they deal with the question of damages are set out in the reasons of my brother Spence and I will not repeat them.

I find myself unable to hold that the learned trial judge proceeded on any wrong principle. It is not possible to say that he did not take into account the fact that whatever estate either of the deceased would have left would be subject to succession duty and estate tax. We do not know what contingencies he considered; he may have considered all those enumerated and suggested in the reasons of Schroeder J.A.

On the other hand I can find no error in principle in the reasons of the Court of Appeal. Having reached the conclusion that the award was so high as to require alteration, that Court "upon full consideration" has fixed the figure which it finds to be appropriate. Once again we do not know the details of the calculations by which the amount is arrived at. I can see no objection to the course taken by either of the Courts below. The task of the learned trial judge was to view the whole of the relevant evidence as a properly

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Cartwright J.

instructed jury would do and to fix the figure, not susceptible of precise arithmetical calculation, which would represent compensation for the amount of actual pecuniary benefit which the son might reasonably have expected to enjoy had his parents not been killed. Once the Court of Appeal had decided that the amount fixed by the learned trial judge was so high as to require interference its duty was the same as that of the learned trial judge.

As a result of the death of his parents the son inherits in round figures the sum of $35,000. When to this is added the sum of $65,000 awarded by the Court of Appeal, he becomes entitled to a total fund of $100,000. The income from such a fund will be amply sufficient to provide him with an excellent education without the need of encroaching upon capital. On a consideration of all the relevant evidence it appears to me that an award which brings the total received by the son up to $100,000 cannot be said to be an inadequate compensation for the loss of the pecuniary benefits which he might reasonably have expected to receive had his parents not been killed.

In my opinion, this is a case in which the Court of Appeal was justified in altering the assessment made by the learned trial judge and we ought not to interfere with the amount which that Court has fixed.

I would dismiss the appeal with costs.

MARTLAND J.:—In my opinion, in the circumstances of this case, this Court should not interfere with the amount of the damages awarded by the Court of Appeal. Accordingly I would dismiss this appeal with costs.

JUDSON J.:—The Court of Appeal has reduced an award of damages under *The Fatal Accidents Act* from $94,000 to $65,000. The action was brought on behalf of Brian Hossack, an infant, who, at the time of the accident, was almost six years old. I say at once that in my opinion this is not a case where this Court should interfere. There was no error in principle in the Court of Appeal when it reduced these general damages so as to constitute reversible error. The Court of Appeal was mindful of the principle that an appellate court does not readily interfere with an assessment of damages made by a trial judge unless it is satisfied that the award is clearly unreasonable and unsupported by the evidence or that it is so excessively high as to be clearly

erroneous. They were unanimously of the opinion that this case fell within these principles of review and I agree with their judgment.

This appeal raises no new problem in this Court. It was argued on behalf of the appellant that this was not a case which should have been reviewed by the Court of Appeal. It was said that these damages were not so inordinately high as to justify any interference. When the problem of review comes up in this Court, this kind of adjectival condemnation of what the Court of Appeal has done offers little or no guidance and it would be better to abandon its use. I refer particularly to the reasons of Rand J. in *Lang et al. v. Pollard et al.*[1] at pp. 862-3 on this point. I think the Court of Appeal is justified in interfering when it comes to the conclusion that the award is unreasonable. This is a better guide than the form of words that has been in common use.

The fact is that in this Court two rules have been applied depending naturally upon what the Court thinks of the amount of the award. If this Court thinks the award at trial was within reasonable limits, it says that the Court of Appeal should not have interfered. If, on the other hand, this Court thinks that the award at trial was not within reasonable limits and, consequently, reviewable by the Court of Appeal, it says that whether or not it would have made the same variation in amount as the Court of Appeal, there is no ground for interference.

In spite of the formula that has been used in attempting to define the limits on the power of review of the Court of Appeal, that Court has, I think, always proceeded on the basis that it would review when convinced of the unreasonable nature of the award. There is more to be gained by looking at what the Court of Appeal and this Court have actually done in the leading cases that have come here and by ignoring the adjectival description of the function. I will take as examples five leading cases in this Court. They are:

1. *Lehnert v. Stein*[2];
2. *Lang et al. v. Pollard et al.*[1];
3. *Hanes et al. v. Kennedy et al.*[3];
4. *Pratt v. Beaman*[4];
5. *Ross v. Dunstall*[5].

[1] [1957] S.C.R. 858.
[2] [1963] S.C.R. 38 at 45.
[3] [1941] S.C.R. 384.
[4] [1930] S.C.R. 284.
[5] (1921), 62 S.C.R. 393.

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Judson J.

This is what happened in these cases, taking them in the order in which they are listed above:

	Assessment at Trial	*Assessment in Court of Appeal*	*Result in this Court*
1.	$ 12,000	$ 18,000	affirmed
2.	7,000	15,000	affirmed
	1,200	3,000	
3.	10,000	5,000	affirmed
4.	7,500	2,075	affirmed
5.	11,060	8,560	
	10,000	5,482	affirmed

It is highly desirable that this power of review of reasonably wide scope should exist in the Court of Appeal and that this Court, if it recognizes that the case is one for review, should be slow to interfere. Everyone concerned is aware of the difficulties that surround an assessment of damages and its review in the Court of Appeal, and 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.

In this particular case the Court of Appeal thought that the award was too high by approximately one-third. There is no principle of law involved in the formulation of this opinion. The trial judge awarded a round sum of $94,000; the Court of Appeal a round sum of $65,000. There is no suggestion anywhere that the Court of Appeal did not take into account all the items that go to make up "reasonable prospect of pecuniary loss" in a case of this kind. They differed from the trial judge in their translation of monetary claims into an award. This is a matter of the weight they give to the claims and the supporting evidence. It is, to me, impossible to assign error when they say that considering the case as a whole they think the award should be $65,000

instead of $94,000. I have no doubt that to some extent they reached this result by discounting the claim for loss of prospective inheritance.

The facts were fully before them. Without attempting in detail to go into the circumstances of this family, it may be said that the boy's prospects and those of the family were bright. The boy was an only child. The father was in progressively prosperous employment. The award takes into account maintenance and education until graduation from the university. The evidence of an actuary predicted that this boy, when his father died forty-five years hence, would come into an estate of half a million dollars. This may look all right according to the actuary's figures and his assumptions, but I doubt whether any jury would have assessed a prospective inheritance at that figure in these uncertain days. It was a figure that the Court of Appeal had the power to review in arriving at their total award. We do not know in precise figures by how much they discounted this element in the trial judge's assessment, but that is no justification for a further review here.

I would affirm their judgment and dismiss the appeal with costs.

RITCHIE J.:—The circumstances giving rise to this appeal have been fully described in the reasons for judgment of my brother Spence and it is unnecessary for me to repeat them at any length.

The only question is as to the adequacy of the award of $65,000 which the Court of Appeal substituted for an award of $94,000 made by the learned trial judge in respect of the damages sustained by Brian Hossack as the result of the death of both his parents who were killed in a motor vehicle accident which was found to have occurred solely through the negligence of the respondent Margaret Florence Athron who at the time was driving an automobile owned by the defendant Hertz Drive Yourself Stations of Ontario Limited.

The Court of Appeal found that in making his award of damages the learned trial judge had left out of account the fact that the estimated accumulated savings of the deceased father, if he had lived out his life span, would have passed to his son subject to provincial succession duties and federal estate tax. This was a relevant factor as these taxes would have been substantial. The Court of Appeal was also of opinion that the award of $94,000 was inordinately high.

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Ritchie J.

Notwithstanding the provisions of s. 46 of the *Supreme Court Act*, I do not think that this Court is justified in substituting a figure of its own for that awarded by the Court of Appeal except upon the ground that that Court appears to have applied some wrong principle of law in assessing the damages or that its award is so inordinately high or so inordinately low as to be wholly erroneous.

In the circumstances of this case I can see no such ground for interfering with the award made by the Court of Appeal and I would accordingly dismiss this appeal.

SPENCE J. (*dissenting*):—These are two appeals against the judgments of the Court of Appeal for Ontario. Both judgments in the 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 the 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 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.*[5], 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

[1] [1930] S.C.R. 284.
[2] [1941] S.C.R. 384.
[3] [1957] S.C.R. 858.
[4] [1963] S.C.R. 38.
[5] [1964] S.C.R. 376.

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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 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. Lovall,* [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 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.)

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

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Spence J.

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 metatarsal 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 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.

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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 $94,000.00 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 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

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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.

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.

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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.

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

[2] [1965] 2 O.R. 285 (C.A.).

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This Court, by virtue of s. 46 of the *Supreme Court Act*, may "give the judgment and award the process or other 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 dismissed with costs, SPENCE J. *dissenting.*

Solicitors for the plaintiffs, appellants: Richardson, Macmillan, Rooke & MacLennan, Toronto.

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