19(
*May 22, 23, 24 Dec. 16

HENRY DORMUTH AND ADAM URSEL (*Defendants*) ..... APPELLANTS;

AND

RUTH V. UNTEREINER (*Plaintiff*) ....RESPONDENT;

AND

MARTIN MUSKOVITCH (*Defendant*) ..RESPONDENT.

HENRY DORMUTH AND ADAM URSEL (*Defendants*) ..... APPELLANTS;

AND

GRANT W. CHAMBERLAIN (*Plaintiff*) ..... RESPONDENT;

AND

MARTIN MUSKOVITCH (*Defendant*) ..RESPONDENT.

HENRY DORMUTH AND ADAM URSEL (*Defendants*) ..... APPELLANTS;

AND

LARRY MEIKLE (*Plaintiff*) .....RESPONDENT;

AND

MARTIN MUSKOVITCH (*Defendant*) RESPONDENT.

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*PRESENT: Taschereau C.J. and Martland, Judson, Ritchie and Hall JJ.

HENRY DORMUTH AND ADAM URSEL (*Defendants by counterclaim*) ..... APPELLANTS;

AND

MARTIN MUSKOVITCH (*Plaintiff by counterclaim*) ..... RESPONDENT;

AND

LARRY MEIKLE (*Defendant by counterclaim*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Negligence—Motor vehicles—Collision—Identification of vehicle—Apportionment of fault—Damages.

Appeals—Application to adduce new evidence—Supreme Court Act, R.S.C. 1952, c. 259, s. 67.

The plaintiff Mrs. Untereiner and her husband were passengers in a car owned and operated by the plaintiff Meikle. It was following and trying to overtake a truck which was owned by A. Ursel and was being driven by H. Dormuth in a very erratic manner. The occupants of the Meikle car knew Dormuth and had good reason to suspect that he was not in fit condition to drive. Their purpose in trying to overtake him was to persuade him to discontinue driving. They did not succeed.

The Dormuth truck interfered in some way with an oncoming car owned and driven by M. Muskovitch. The latter was forced on to the shoulder of the road and then came across the road to the wrong side and struck the Meikle car head on. Mr. Untereiner was killed and Mrs. Untereiner, Meikle and another passenger, Chamberlain, were injured. Muskovitch was also injured.

Meikle, Chamberlain and Mrs. Untereiner sued to recover damages for their injuries. Mrs. Untereiner also sued under *The Fatal Accidents Act* for herself and five young children. The defendants in each action were Dormuth, Ursel and Muskovitch. Muskovitch also sued Dormuth and Ursel and in this action Meikle was brought in as defendant by counterclaim. The actions were all tried together and the result was that the trial judge found that both Dormuth and Muskovitch were at fault. He apportioned the fault two-thirds to Muskovitch and one-third to Dormuth. He found that Meikle was free of blame.

The Court of Appeal reversed this apportionment and made Dormuth two-thirds responsible and Muskovitch one-third responsible. They also exonerated Meikle. In this Court Dormuth and Ursel appealed against liability on the ground that their truck was not the one involved in the accident. Muskovitch cross-appealed to ask that he be freed from blame on the ground that he acted reasonably in an emergency created by the bad driving of Dormuth.

In the action under *The Fatal Accidents Act* the trial judge made an award of $37,500. The Court of Appeal, as a result of a cross-appeal by

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Mrs. Untereiner, increased this award to $60,000. On the question of damages, the appellants applied to this Court to adduce new evidence on the hearing of the appeal pursuant to s. 67 of the *Supreme Court Act*. The evidence sought to be introduced was a marriage certificate disclosing that subsequent to the trial but prior to the hearing before the Court of Appeal Mrs. Untereiner had remarried.

Held (Judson J. dissenting in part): The appeal and cross-appeal should be dismissed.

Per Taschereau C.J. and Martland, Ritchie and Hall JJ.: The appellants failed in their contention that the Courts below were wrong in finding that the truck driven by Dormuth was the vehicle seen by Meikle and his passengers just before the accident, and the degree of fault, as apportioned by the Court of Appeal, was correct.

The special grounds required in an application made under the proviso to s. 67 of the *Supreme Court Act* include being able to show that the evidence could not have been discovered by reasonable diligence before the conclusion of the hearing in the Court of Appeal and being able also to satisfy this Court that the evidence, if accepted, would be practically conclusive. Here there was nothing to suggest that the evidence of remarriage could not have been discovered before the appeal by the exercise of reasonable diligence. Nor was the evidence of Mrs. Untereiner's remarriage standing alone "practically conclusive" of any issue in the case. The application should therefore be dismissed, and, as there were no circumstances shown that would justify an interference with the award of damages made by the Court of Appeal, that award would not be disturbed.

Varette v. Sainsbury, [1928] S.C.R. 72; *Gootson v. R.*, [1948] 4 D.L.R. 33; *K.V.P. Co. Ltd. v. McKie*, [1949] S.C.R. 698; *Brown v. Dean*, [1910] A.C. 373; *Hanes v. Kennedy*, [1941] S.C.R. 384; *Lehnert v. Stein*, [1963] S.C.R. 38, referred to; *Curwen v. James*, [1963] 2 All E.R. 619, distinguished; *Lang v. Pollard and Murphy*, [1957] S.C.R. 858, applied.

Per Judson J., *dissenting in part:* There was no ground for interfering with the concurrent findings of the Courts below that the Dormuth truck was the one involved, and that both Dormuth and Muskovitch were at fault. Also, the Court of Appeal was correct in attributing the greater part of the blame to Dormuth.

The Court of Appeal was in error in increasing the award in the action under *The Fatal Accidents Act*. There was no error in principle on the part of the trial judge nor was the award so inordinately low as to call for interference, as being a wholly erroneous estimate of the damages, and on this ground alone the assessment of the trial judge should be restored. Accordingly, it was unnecessary to consider the application to introduce evidence to show that Mrs. Untereiner had remarried subsequent to the trial but prior to the hearing before the Court of Appeal.

APPEAL and cross-appeal from a judgment of the Court of Appeal for Saskatchewan, allowing the appeals of the respondents Muskovitch and Untereiner and dismissing the appeal of the appellants Dormuth and Ursel from a judgment of Thomson J. Appeal and cross-appeal dismissed, Judson J. dissenting in part.

A. W. Embury, Q.C., and *B. J. Thomson, Q.C.*, for the defendants, appellants.

E. C. Leslie, Q.C., and *J. Stein*, for the plaintiff, respondent, Ruth V. Untereiner.

R. M. Barr, Q.C., and *M. Neuman*, for the defendant, respondent, Martin Muskovitch.

F. A. Alexander, Q.C., for the plaintiff, respondent, Grant W. Chamberlain.

E. D. Bayda, for the plaintiff, respondent, Larry Meikle.

The judgment of Taschereau C.J. and Martland, Ritchie and Hall JJ. was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal of Saskatchewan which allowed the appeals of the respondents Martin Muskovitch and Ruth Untereiner and dismissed the appeal of the appellants Dormuth and Ursel from a judgment of Thomson J. sitting without a jury on the joint trial of four actions arising out of the same automobile accident.

The accident in question occurred on Sunday afternoon (on July 15, 1958) when Larry Meikle was driving his 1947 Chevrolet in a southerly direction on Highway No. 11 in the Province of Saskatchewan, on his way back to Regina from an abortive fishing expedition at Long Lake, in company with Mr. and Mrs. Untereiner who were in the back seat of the car, and Grant Chamberlain who shared the front seat with Meikle. Both Courts below are agreed that there was no negligence on the part of Meikle which caused or contributed to the accident, which happened when a 1956 Ford sedan, owned and operated by Muskovitch and travelling in a northerly direction on the same highway, to use the language of the learned trial judge:

> . . . plunged across the roadway directly into the path of the oncoming car driven by Meikle, with which it collided practically head on. Meikle was well on his own side of the road and the suddenness and speed with which the Muskovitch car came across the road gave him no chance to take evasive action of any kind. All of the occupants of the cars involved in the collision were injured and Ignace Untereiner died shortly after reaching the hospital from injuries which he sustained in said accident.

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Muskovitch's explanation of the erratic behaviour of his vehicle is that immediately before the accident he had been travelling on his own side of the road when a truck, which is alleged to have been owned by the appellant Ursel and driven by the appellant Dormuth and which he had observed for some 200 yards approaching him in a "snake way", suddenly pulled at least partially onto its left-hand side of the highway whereupon he (Muskovitch) pulled hard over to the right and applied his brakes with the result that his right wheels dropped onto the soft shoulder of the highway, and that, when he pulled to the left to get back on to the hard top, his car plunged across into Meikle's path. The truck did not stop.

Under these circumstances, Mrs. Untereiner brought two actions against Muskovitch, Dormuth and Ursel. In one she claimed damages for her own personal injuries and in the other she claimed under *The Fatal Accidents Act,* R.S.S. 1953, c. 102, on behalf of herself and her five children in her capacity as executrix of the estate of her late husband. Grant Chamberlain and Larry Meikle also brought separate actions against Muskovitch, Dormuth and Ursel, and in the Meikle action Muskovitch counter-claimed against Meikle, Dormuth and Ursel.

After a most extensive review of the evidence, the learned trial judge gave judgment for Mrs. Untereiner in both her actions and for Chamberlain and Meikle against the defendants, Muskovitch, Dormuth and Ursel, but he divided the fault between the last named defendants, finding Muskovitch liable to the extent of 70 per cent and Dormuth and Ursel to the extent of the remaining 30 per cent. The counter-claim of Muskovitch against Dormuth and Ursel was allowed to the extent of 30 per cent thereof. The general damages in Mrs. Untereiner's action under *The Fatal Accidents Act* were fixed at $37,500.

From this finding the defendant Muskovitch appealed on the ground that the evidence did not justify a finding of any negligence against him, or in the alternative, that if he was negligent he was negligent in a lesser degree than Dormuth. He also claimed that the respondent Meikle was negligent.

Before the Court of Appeal, Mrs. Untereiner in her representative action sought to vary the quantum of damages

alleging that it should be raised to at least $60,000 and Dormuth and Ursel sought to have the action against them dismissed on the ground that Dormuth driving Ursel's truck was some miles away from the scene of the accident when it happened.

The effect of the judgment of the Court of Appeal is that it reduces the degree of fault attributable to Muskovitch to 30 per cent and correspondingly increases that attributable to Dormuth and Ursel to 70 per cent, and allows the appeal of Mrs. Untereiner in her representative capacity by increasing damages awarded in respect of her husband's death to $60,000. From this judgment Dormuth and Ursel appealed to this Court contending that both the Courts below erred in not finding that the Ursel vehicle driven by Dormuth was some miles away from the scene of the accident when it happened, or in the alternative, that the trial judge's apportionment of percentages of fault and his award to Mrs. Untereiner in her representative action should be restored.

The respondent Muskovitch moved to vary the judgment of the Court of Appeal on the ground that he was entirely blameless and should not have been found 30 per cent at fault and that the action against him should therefore have been dismissed and his counterclaim against Dormuth and Ursel should have been allowed in full. If he should be found partially at fault, Muskovitch further takes the position that the award of damages fixed by the learned trial judge should not have been disturbed.

The occupants of the Meikle vehicle were familiar with Ursel's red Ford half ton pick-up truck which the male members of the party had been trying to push out of the sand at the fishing grounds at Long Lake earlier on the afternoon of the accident, and they were all well satisfied that this was the truck which they had watched ahead of them on Route 11 for some miles as it weaved from right to left and finally as it caused Muskovitch to take the avoiding action which resulted in the accident.

Dormuth did not give evidence at the trial, but on examination for discovery, he had admitted that he had driven the Ursel truck over Highway No. 11 on his way back from Long Lake to Regina on the afternoon of the accident and that he had had difficulty in steering because

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the truck pulled to the right and had to be pulled sharply back to the left.

The Dormuth-Ursel defence is based in large measure on evidence to the effect that Dormuth and his companion Matity had left the fishing area at Long Lake 30 or 40 minutes ahead of the Meikle party and it is argued that having regard to the distance involved and the respective speeds at which Dormuth and Meikle were said to be travelling, it could not possibly have been the Ursel truck which was seen by Meikle and his passengers immediately before the accident.

Although no member of the Meikle party actually saw Dormuth driving the truck ahead of them, there is no reason to disbelieve their description of the colour, make and size of the vehicle which they did see and it follows that the defence based on the time element, which was so fully argued on behalf of Dormuth and Ursel, involves also an acceptance of the extraordinary coincidence that there were two red half ton Ford pick-up trucks, each with two occupants, each with a low box and each weaving from right to left, travelling in the same direction over the same highway on the same afternoon within 30 or 40 minutes of each other.

It is true that there are discrepancies as to times and speeds which remain unexplained, but it appears to me that the probabilities weigh heavily against the happening of such a coincidence, and I am far from convinced that the two Courts below were wrong in finding that the Ursel truck driven by Dormuth was the vehicle seen by Meikle and his passengers just before the accident.

The learned trial judge was of opinion that Muskovitch, who had noticed the erratic behaviour of the approaching truck at a distance of 200 yards, should have taken greater precautions to prepare for the potential danger. Although Brownridge J.A., in the decision which he rendered on behalf of the Court of Appeal, found that Muskovitch reduced his speed to between 30 and 35 miles per hour when he first sighted the truck, he nevertheless held that, under the circumstances, it was negligent not to have reduced it further at that time, and I am not prepared to interfere with the concurrent findings in this regard.

The learned trial judge however took the view, that to take the action which Muskovitch did in trying to get back on the asphalt before slowing his speed materially—

> . . . was to court trouble and highly negligent, especially as he did not look to see whether there was any other vehicle in the way. It was his duty to look and make sure that what he was about to do could be done in safety before *taking the dangerous course he adopted.* There was no need whatever to get back to the black top in a hurry. He was confronted with no new danger or obstruction requiring him to leave the shoulder and if he had continued as he was until he had his car under control he would have had no trouble and there would have been no accident. (The italics are mine.)

In my view a critical analysis of the second to second reactions of a driver in the course of avoiding an immediate peril created by the negligence of another user of the highway is at best a very doubtful yardstick by which to measure degrees of fault.

I agree with Brownridge J.A. that "the immediate peril" in the present case was occasioned not when the truck was first sighted but when it suddenly turned across the centre line of the highway. It was then only 30 yards away from the Muskovitch car and the combined speed of the vehicles must have been at least 70 miles per hour. Under these circumstances, it appears to me, with the greatest respect for the views expressed by the learned trial judge, that it is unrealistic to assess the actions of Muskovitch in terms of his having deliberately "adopted" a dangerous course. In my view his method of driving before and after he succeeded in avoiding the truck was conditioned by the imminent danger in which he had been placed through Dormuth's negligence and I agree that the fault should be apportioned in the manner directed by the Court of Appeal.

On the question of damages, the appellants applied to this Court to adduce new evidence on the hearing of the appeal pursuant to s. 67 of the Supreme Court Act, R.S.C. 1952, c. 259.

The evidence sought to be introduced is a marriage certificate issued by the Division of Vital Statistics of the Department of Health of Saskatchewan on March 8, 1962, which discloses that Ruth Violet Untereiner was married to one James Edward Cherry on October 15, 1960. This certificate is produced as an exhibit to an affidavit of one Brown who describes himself as a "Branch Superintendent"

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and deposes that he is "acquainted with" the respondent Ruth Violet Untereiner and that she has informed him that she is remarried to "Mr. Cherry" and that he verily believes her to be the person named in the certificate.

Section 67 of the *Supreme Court Act* reads as follows:

> The appeal shall be upon a case to be stated by the parties, or, in the event of difference, to be settled by the court appealed from, or a judge thereof, and the case shall set forth the judgment objected to and so much of the pleadings, evidence, affidavits and documents as is necessary to raise the question for the decision of the Court; *but the Court may, in its discretion, on special grounds, and by special leave, receive further evidence upon any question of fact, such evidence to be taken in the manner authorized by this Act, either by oral examination in Court, by affidavit, or by deposition, as the Court may direct.*

The words in italics were first introduced in 1928, (S.C. 1928, c. 9, s. 3) prior to which time the rule of this Court was firmly established that once the case had been settled it could not be amended "by adding what would be equivalent to new evidence". See *Confederation Life Association of Canada v. O'Donnell*[1]; *The Exchange Bank of Canada v. Gilman*[2]; *Red Mountain Railway Co. v. Blue*[3], and other cases cited in the note prepared by Mr. E. R. Cameron to be found in 10 Cameron's Supreme Court Cases at p. 18.

The case of *Varette v. Sainsbury*[4], although decided shortly before the proviso was added to s. 67, indicates the general view of this Court respecting the effect to be given to the discovery of new evidence. That was an appeal from an order of the Court of Appeal of Ontario granting a new trial on account of new evidence and Rinfret J. who delivered the reasons for judgment allowing the appeal on behalf of the Court, had occasion to say at p. 76:

> On an application for a new trial on the ground that new evidence has been discovered since the trial, we take the rule to be well established that a new trial should be ordered only where the new evidence proposed to be adduced could not have been obtained by reasonable diligence before the trial and the new evidence is such that, if adduced, it would be practically conclusive.

The same test was adopted in *Gootson v. The King*[5], which was an appeal to this Court from a judgment of O'Connor J. in the Exchequer Court.

[1] (1882), 10 S.C.R. 92 at 93.
[2] (1889), 17 S.C.R. 108.
[3] (1907), 39 S.C.R. 390.
[4] [1928] S.C.R. 72.
[5] [1948] 4 D.L.R. 33.

That was a case in which a servant of the Crown acting within the scope of his employment had fainted while in control of his automobile with the result that it ran on to the sidewalk hitting and injuring the suppliant. There was some evidence as to the driver having previously suffered from an epileptiform seizure but the trial judge found that there was no proof of negligence and dismissed the claim. On appeal to this Court it was contended that the burden lay upon the respondent to show affirmatively that its servant had not been subject to epileptic fits and it was also contended that he had in fact been so subject and that the accident ocurred as the result of such a fit.

On a motion being made for leave to adduce further evidence under the provisions of s. 68 (now s. 67), Kerwin J. (as he then was) said at pp. 34-35:

> It was never intended by this enactment that the Court should admit further evidence under circumstances such as are here present and counsel for the suppliant, apparently realizing this, sought to expand his motion to include an order for a new trial under Section 47 of the Supreme Court Act . . . Presuming that the latter part of that section permits the Court to order a new trial on the ground of discovery of new evidence, it must be shown that it could not have been discovered by the appellant by the exercise of reasonable diligence before the trial and that the new evidence is such that, if adduced, it would be practically conclusive.

See also: *K.V.P. Co. Ltd. v. McKie et al.*[1], *per* Kerwin J. at pp. 700-701.

The above statements were made with respect to the role of a court of first appeal in relation to evidence discovered after the trial but, in my view the same considerations apply when evidence is tendered for the first time before this Court on appeal from a provincial Court of Appeal. The special grounds required in an application made under the proviso to s. 67 include, in my opinion, being able to show that the evidence could not have been discovered by reasonable diligence before the conclusion of the hearing in the Court of Appeal and being able also to satisfy this Court that the evidence, if accepted, would be practically conclusive.

The special grounds upon which the present application is made are stated to be that (1) subsequent to the trial but prior to the hearing before the Court of Appeal, the respondent Ruth V. Untereiner was remarried; (2) evi-

[1] [1949] S.C.R. 698.

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dence of this remarriage was not before the Court of Appeal, and (3) the Court of Appeal increased the general damages, and the evidence of the second marriage is material for the purpose of considering the quantum of damages.

It is to be noted that the affidavit filed in support of this application makes no reference to reasonable diligence having been exercised to discover the new evidence before the hearing was concluded in the Court of Appeal on March 7, 1962. In this regard as was pointed out by my brother Hall in the course of the hearing of this appeal, it is significant that the marriage certificate now sought to be introduced was issued on March 8, 1962, and that the relationship between Dormuth and Mrs. Untereiner is described by the learned trial judge in the following terms:

> The Untereiners were well acquainted with Dormuth and were on close and intimate terms with his son Tony Dormuth who was married to one of Mrs. Untereiner's sisters.

There is nothing before us to suggest that the evidence of remarriage could not have been discovered before the appeal by the exercise of reasonable diligence and indeed the circumstances which have been disclosed make it seem probable that Dormuth, who is one of the applicants, knew of the remarriage of his son's sister-in-law with whom he was well acquainted, some time between the date when it took place (October 15, 1960) and March 7, 1962, when the hearing was concluded in the Court of Appeal.

Nor do I think that the evidence of Mrs. Untereiner's remarriage standing alone is "practically conclusive" of any issue in the present case. It is relevant only to the question of damages and there are many other factors, such as the earning power, stability and health of the husband and his attitude towards the five step-children which would have a distinct bearing on the question of damages and which are in no way disclosed by proof of the marriage alone.

In this regard it is to be noted that in the leading case of *Brown v. Dean*[1], Lord Loreburn L.C. observed, at p. 374 that "When a litigant has obtained a judgment in a court of justice . . . he is by law entitled not to be deprived of that judgment without very solid grounds; and where . . . the ground is the alleged discovery of new evidence, it must

[1] [1910] A.C. 373.

at least be such as is presumably to be believed, and *if believed would be conclusive*".

It is true that in that case Lord Shaw did not agree with the last words of that sentence and that modern English cases, many of which are reviewed in *Braddock v. Tollotson's Newspapers Ltd.*[1], have proceeded on the view that "conclusive" is too strong a word to use in this context. (See also *Ladd v. Marshall*[2], *per* Lord Denning at p. 1491.) But the phrase "practically conclusive" has been employed more than once in this Court and I see no reason for departing from it.

Our attention has been directed also to the case of *Curwen v. James and others*[3], where a widow who had been awarded damages in respect of the death of her husband, remarried on the same day as the notice of appeal was filed and the Court of Appeal, acting on the evidence of the remarriage which was introduced before it, proceeded to cut the damage award made by the trial judge in half. The evidence in that case was admitted under the provisions of Order 58, Rule 9 (2) of the Rules of the Supreme Court in England which differ materially from s. 67 of our own *Supreme Court Act*. No question arose as to whether or not reasonable diligence had been exercised to discover the evidence before the conclusion of proceedings in the lower Court and the decision is based in large degree on the assumption that, to use the language of Sellers L.J. "the fact of the marriage would lead to the conclusion that there is some benefit to be gained financially by the plaintiff and that she would have some of the hardship of the loss of her husband's earnings ameliorated by the benefit she gets from the marriage". I do not think that any such assumption necessarily arises in the present case.

I am accordingly of opinion that the application of Dormuth and Ursel based on the discovery of new evidence should be dismissed and as I am not satisfied that any circumstances have been shown that would justify an interference with the award of damages made by the Court of Appeal, I would not disturb that award.

The case of *Lang et al. v. Pollard and Murphy*[4], was one in which the award of damages had been increased by the

[1] [1950] 1 K.B. 47.
[2] [1954] 1 W.L.R. 1489.
[3] [1963] 2 All E.R. 619.
[4] [1957] S.C.R. 858.

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Court of Appeal for New Brunswick, and Cartwright J., speaking for himself and Taschereau J., as he then was, had occasion to say, at p. 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:
>
> > The second ground of appeal is that the 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.
>
> 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.
>
> 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 the same case, Kerwin C.J., speaking for himself and Fauteux J., after referring to *Pratt v. Beaman* and two other cases in which the provincial Court of Appeal had reduced damages, went on to say:

> While in these last three cases a provincial Court of Appeal had reduced the damages awarded by the trial judge, the same principle is applicable and that is, particularly in Canada where estimates of damages may differ in the 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.

(See also *Hanes et al. v. Kennedy et al.*[1], and *Lehnert v. Stein*[2].)

In view of all the above I would dismiss the appeal of Dormuth and Ursel as against all the respondents with costs and I would dismiss the cross-appeal of Muskovitch as against all other parties thereto with costs.

The application based on discovery of new evidence is dismissed as against all respondents except Muskovitch with costs but as I understood counsel for Muskovitch to lend

[1] [1941] S.C.R. 384 at 387, 3 D.L.R. 397.
[2] [1963] S.C.R. 38 at 45, 36 D.L.R. (2d) 159.

support to the application he should not in my view be entitled to any costs in respect thereof.

JUDSON J. (*dissenting in part*):—There were three vehicles involved in the collision which gives rise to this litigation. There was first a car travelling towards Regina owned and operated by Larry Meikle, in which Mr. and Mrs. Untereiner were passengers. It was following and trying to overtake a half ton truck which was owned by Adam Ursel and was being driven by Henry Dormuth in a very erratic manner. The occupants of the Meikle car knew Dormuth and had good reason to suspect that he was not in fit condition to drive. Their purpose in trying to overtake him was to persuade him to discontinue driving. They did not succeed.

The trial judge found that the Dormuth truck interfered in some way with an oncoming car owned and driven by Martin Muskovitch, that Muskovitch was forced on to the shoulder of the road and then came across the road to the wrong side and struck the Meikle car head on. Mr. Untereiner was killed and his wife, Meikle and another passenger, Grant W. Chamberlain were injured. Muskovitch was also injured.

Meikle, Chamberlain and Mrs. Untereiner sued to recover damages for their injuries. Mrs. Untereiner also sued under *The Fatal Accidents Act*, R.S.S. 1953, c. 102, for herself and five young children. The defendants in each action were Dormuth, Ursel and Muskovitch. Muskovitch also sued Dormuth and Ursel and in this action Meikle was brought in as defendant by counterclaim. The actions were all tried together and the result was that the learned trial judge found that both Dormuth, the truck driver, and Muskovitch, the driver of the oncoming car, were at fault. He apportioned the fault two-thirds to Muskovitch and one-third to Dormuth. He found that Meikle was free of blame.

The Court of Appeal reversed this apportionment and made Dormuth two-thirds responsible and Muskovitch one-third responsible. They also exonerated Meikle. In this Court Dormuth and Ursel appeal against liability on the ground that their truck was not the one involved in the accident, Muskovitch cross-appeals to ask that he be freed from blame on the ground that he acted reasonably in an

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emergency created by the bad driving of Dormuth. Both Courts have found that the Dormuth truck was the one involved, and that both Dormuth and Muskovitch were at fault. These are concurrent findings of fact and there is no ground for interference. I would also sustain the judgment of the Court of Appeal in attributing the greater part of the blame to Dormuth. On the ground of liability, therefore, I would not interfere with the judgment of the Court of Appeal.

In Mrs. Untereiner's action under *The Fatal Accidents Act*, the trial judge awarded $37,500, but delayed in making any apportionment between her on the one hand and the five children on the other. This apportionment still has not been made. The Court of Appeal, as a result of a cross-appeal by Mrs. Untereiner, increased this award to $60,000 and in my respectful opinion there was error in so doing. I cannot find that there was error in principle on the part of the learned trial judge or that the award was so inordinately low as to call for interference, as being a wholly erroneous estimate of the damages, and on this ground alone I would restore the assessment of the learned trial judge.

I set out in full that part of the reasons for judgment of the learned trial judge dealing with the assessment of Mrs. Untereiner's damages under *The Fatal Accidents Act*:

> The deceased Ignace Untereiner was married to the plaintiff, Ruth V. Untereiner, in April of 1949. At that time he was just a taxi driver but later became a truck driver. In 1956 he entered the service of North Star Oil Limited as the driver of a heavy duty oil truck and in 1957 purchased the truck he had been driving and entered into a contract with the said company under which he was paid on a gallonage basis. As a truck driver he had been working regularly and had been earning about $375.00 per month. As an independent operator, however, his earnings were larger. His income tax return for 1957 shows a net income for that year of $11,609.18. The income tax return filed by Mrs. Untereiner on his behalf for the six and one-half months of 1958, however, shows a net income of $3,067.36 for that period which indicates a somewhat lower income.
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> Upon the death of her husband, Mrs. Untereiner employed a driver for the truck and continued to transport oil under the contract her husband had made with North Star Oil Limited until the month of September of 1959. In that year, however, the said company changed its policy. It appears that at or about that time the Railway Companies made a new deal with the Oil Companies to transport petroleum products in tank cars at special rates and the Oil Companies discontinued the transport of their products by truck except to those places which could not be served by the railway. As a result North Star Oil Limited cancelled its contracts with all of its truckers and Mrs. Untereiner, as administratrix of her husband's estate, sold the truck and equipment. It is a reasonable inference that, even if

Untereiner had survived, his contract would have been cancelled and he would then have had to find other employment which might not have been so remunerative. It is clear from the evidence of the Branch Manager of North Star Oil Limited, however, that Untereiner was a good and thoroughly efficient operator and I am satisfied that he would have found profitable employment even though his earnings might have been somewhat reduced.

I gather from the evidence that the handling of these heavy trucking outfits is strenuous and exacting work and somewhat hazardous. Mr. Barber, the Branch Manager of North Star Oil Limited, admitted under cross examination that his company ordinarily would not hire men for this work who were more than fifty years of age unless they were in first class physical condition and as a rule did not hire men who were more than fifty-five years of age as drivers of such equipment. He expressed the opinion that these men, if physically fit, could carry on until they reached the age of fifty-five years or possibly in some cases sixty years. It would seem, therefore, that the early age of retirement is something that should be taken into consideration in fixing damages in this case.

At the time of his death Untereiner was thirty-six years of age and in good health. He was survived by Mrs. Untereiner and five children whose names and ages were correctly set out in paragraph 10 of the Statement of Claim. The evidence indicates that he was a good father and an excellent husband and as his earnings increased he made better provision for his wife and family. He, however, left an estate of relatively small value. According to the schedule filed for Succession Duty purposes the total value of his estate was only $13,078.67 from which must be deducted debts and liabilities estimated at $6,930.74, leaving a net worth before making any allowance for costs of administration of only $6,147.93. The principal asset was the house and lot which I understand was the family home. This property was valued at $6,000.00 and really represents the net equity in the estate. The title thereto, however, was registered in the names of the deceased and his wife as joint tenants and if the value of this house property be deducted there is practically nothing left in the estate.

The principles which apply in assessing damages under The Fatal Accidents Act are not in doubt. They are outlined and explained in detail by the learned author of Charlesworth on Negligence, 3rd Edition, at pages 557 to 565 inclusive. In dealing with the measure of damages the said author at page 557 says:

> The measure of damages is the pecuniary loss suffered by the dependants as a result of the death. "What the court has to try to ascertain in these cases is: How much have the widow and family lost by the father's death?" No damages can be given for the mental sufferings they have undergone, or by way of solatium for their wounded feelings or the pain and suffering of the deceased. The pecuniary loss in question means the actual financial benefit of which the dependants have in fact been deprived, whether the benefit was a result of a legal obligation or of what may reasonably have been expected to take place in the future. It is the amount of the pecuniary benefit which it is reasonably probable the dependants would have received if the deceased had remained alive.

Applying as best I can the principles set forth in Charlesworth on Negligence and approved in Pollock (otherwise Bruno) v. Marsden Kooler Transport Limited and Piche, [1953] 1 S.C.R. 66; Royal Trust Company v. Canadian Pacific Railway Company [1922] 3 W.W.R. 24 (P.C.) and Nance v. B.C. Electric Railway Company [1951] 2 W.W.R. (N.S.) 665 (P.C.),

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I assess the general damages to which the plaintiff and the children of the deceased are entitled at $37,500.00. Counsel have agreed that the special damages of the plaintiff in this action amount to $616.37. She, however, has received $232.50 from the Saskatchewan Government Insurance Office on account thereof which must be deducted. That would leave a balance of $383.87 to which the plaintiff is entitled as special damages. The plaintiff, Ruth V. Untereiner, as administratrix of her husband's estate, will, therefore, have judgment on behalf of herself and her children against the defendants for the total sum of $37,883.87 and the costs of and incidental to her action.

The eldest of the Untereiner children is only ten years and the youngest three years of age. This is a case in which no apportionment of the amount allowed as general damages should be made until someone is appointed to represent these infants. See remarks of Gordon, J.A., in McKenna and Kargus v. Noland and McQuatt, 28 W.W.R. (N.S.) 572 at p. 573. I will, therefore, defer the apportionment so that arrangements can be made for the appointment of a guardian or, failing that, for the official guardian to appear on behalf of these children. The interested parties will have leave to apply further as may be necessary for the proper disposition of the matter. As indicated by Gordon, J.A., in McKenna and Kargus v. Noland and McQuatt, supra, the defendants are not interested in this phase of the matter and need not appear on any such application.

The Court of Appeal appears to have increased the assessment on two grounds. They were of the opinion that the learned trial judge had erred in restricting his estimate of the probable earnings of the deceased to what he might have earned as a truck driver, with its incidence of early retirement, and that he underestimated the probability that Untereiner would have been self-employed, with many productive years ahead of him, unhampered by compulsory retirement.

As to this ground, it seems to me that the learned trial judge clearly contemplated the prospect that the deceased might find employment in other walks of life, and that he properly considered the contingency that such other employment "might not have been so remunerative".

Further, the Court of Appeal held that "The evidence established that in all probability he would have been an employer rather than an employee, and as such not obligated either to find suitable employment, or to retire as an employee".

As to this finding, my respectful opinion is that the evidence falls short of establishing a probability that the deceased would have continued as an employer, and that in any event the reasons for judgment of the learned trial judge cannot be construed as showing that he disregarded the occupational alternatives facing the deceased.

This makes it unnecessary to consider the application made for the first time in this Court to introduce evidence to show that Mrs. Untereiner remarried on October 15, 1960. The trial judgment is dated March 31, 1960. Muskovitch appealed to ask for complete exoneration on the ground that he was not negligent. Mrs. Untereiner cross-appealed. The appeal was heard on the 5th, 6th and 7th days of March, 1962, and the judgment delivered on August 20, 1962. Apparently it never came to the attention of the Court of Appeal that Mrs. Untereiner had remarried. Remarriage while an appeal is pending has recently been considered in a limited way in *Curwen v. James and others*[1]. I wish to say nothing about this problem until it arises squarely for decision.

This appeal should be dismissed with costs in so far as Meikle and Chamberlain and Muskovitch are concerned. The cross-appeal of Muskovitch should be dismissed with costs in so far as Dormuth, Ursel, Meikle and Chamberlain are concerned. As to Mrs. Untereiner she succeeds both on the appeal and cross-appeal on the question of liability but fails on the question of quantum. On this, I would allow the appeal and restore the trial judge's assessment of $37,500. There should be no order for costs to or against her.

The motion to introduce new evidence should be dismissed with costs.

Appeal and cross-appeal dismissed with costs; application based on discovery of new evidence dismissed with costs as against all respondents except Muskovitch, the latter not entitled to any costs in respect thereof; JUDSON J. *dissenting in part as to quantum.*

Solicitors for the defendants, appellants: Noonan, Embury, Heald & Molisky, Regina.

Solicitors for the plaintiff, respondent, Ruth V. Untereiner: MacPherson, Leslie & Tyerman, Regina.

Solicitors for the defendant, respondent, Martin Muskovitch: McDougall, Ready & Hodges, Regina.

[1] [1963] 2 All E.R. 619.

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Solicitors for the defendant, respondent, Martin Muskovitch: Barr & Morgan, Regina.

Solicitors for the plaintiff, respondent, Grant W. Chamberlain: Robinson & Alexander, Regina.

Solicitors for the plaintiff, respondent, Larry Meikle: Johnson, Bayda & Trudelle, Regina.