1952

*Jun. 11
*Oct. 7

MARSDEN KOOLER TRANSPORT LTD. AND ALBERT PICHE (DEFENDANTS) ..... APPELLANTS;

AND

ANNIE POLLOCK, AS ADMINISTRATRIX OF THE ESTATE OF WILLIAM BRUNO POLLOCK, DECEASED (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Automobile—Motorcyclist colliding with disabled trailer at night—Flares extinguished and not placed at distance required by Statute—Failure to repair or move trailer—Damages—Deceased illegitimate—Whether award in reasonable proportion to loss—Public Service Vehicles Act, R.S.A. 1942, c. 276—Fatal Accidents Act, R.S.A. 1942, c. 125—Trustee Act, R.S.A. 1942, c. 215.

The respondent's minor son was killed when his motorcycle collided in a very foggy night with the appellant's disabled trailer which had been left parked on the highway well over on its proper side of the road. The appellant had placed three flares, two behind and one in front of the trailer, all three at less than one hundred feet from the trailer; but these flares were extinguished at the time of the accident.

The action was taken by the son's mother, as administratrix of his estate, and on her own behalf and that of his father, as dependents. The trial judge, having found negligence in the failure to set out the flares in the manner prescribed by the *Public Service Vehicles Act* (R.S.A. 1942, c. 276) and in the failure to remove the trailer from the highway or repair it, awarded damages in the sum of $6,000 under the provisions of the *Fatal Accidents Act* (R.S.A. 1942, c. 125) and the *Trustee Act* (R.S.A. 1942, c. 215). This judgment was affirmed by the Court of Appeal for Alberta.

Held: The appeal should be dismissed; Kellock and Locke JJ., dissenting in part, would have ordered a new trial restricted to the amount of damages to be awarded under the *Fatal Accidents Act*.

Per Kerwin, Estey and Fauteux JJ.: Applying *City of Vancouver* v. *Burchill* [1932] S.C.R. 620 and *Fuller* v. *Nickel* [1949] S.C.R. 601, even if the appellant did put the flares out in a manner that did not comply with the statute, it was not liable in damages unless such breach was the direct cause of the accident. The statutory requirement of putting out flares in the circumstances of this case constitutes a duty the performance of which is the minimum required by law and does not relieve from exercising the care that a reasonable man would exercise in the circumstances. The collision was directly caused by the failure to exercise such care. A reasonable man would

*PRESENT: Kerwin, Kellock, Estey, Locke and Fauteux JJ.

have appreciated the danger, foreseen the possibility of injury and would have made an effort to remove or repair the trailer which, upon the evidence, would have been successful. (*Jones* v. *Shafer* [1948] S.C.R. 166 distinguished).

The amount of damages awarded under the *Fatal Accidents Act* must be determined upon the particular facts in each case and, in part, must be a matter of estimate, even conjecture. Appellate Courts have, apart from some error in principle, interfered only where the damages were clearly excessive, that is to say where there was no reasonable proportion between the amount awarded and the loss sustained, which is not the case here even though the damages awarded were somewhat large.

Per: Locke J. (dissenting in part): The fact that the flares were not placed at the distance from the stranded vehicle required by the regulations had no bearing on the occurrence of the accident since they had been extinguished before it happened. The proper inference to be drawn from the evidence was that the flares were in a defective condition when placed upon the highway and this, coupled with the negligence found by the trial judge of failing to remove the vehicle from the highway, was sufficient to sustain the finding of liability.

No evidence was given at the trial as to the age or the financial circumstances of the parents on whose behalf the claim for damages was made under the *Fatal Accidents Act* in respect of the death of an illegitimate child and the amount awarded was so excessive as to bear no reasonable relation to any loss shown to have been sustained. There should be a new trial restricted to the assessment of damages.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta, affirming the judgment of Shepherd J. (1), which had awarded the respondent $6,000 for damages for fatal injuries suffered by her son when his motorcycle collided with the appellant's trailer parked on the highway at night.

A. F. Moir for the appellants.

F. R. McLean Q.C. and *F. Dunne* for the respondent.

The judgment of Kerwin, Estey and Fauteux JJ. was delivered by

ESTEY J.:—William Bruno Pollock, shortly after 1:30 on the morning of August 20, 1948, riding a motorcycle northward toward Edmonton on Highway No. 2, lost his life when he collided with a heavily loaded trailer owned by the appellant Marsden Kooler Transport Limited (hereinafter called the Company) and parked on the highway. This action is brought by his mother, as administratrix of his estate, on her own behalf and that of his father William

(1) [1951] 3 W.W.R. (N.S.) 266.

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Bruno. The learned trial judge (1) awarded damages in the sum of $6,000 against both appellants and his judgment was affirmed in the Appellate Court.

The appellant Piche, an employee of the Company, was driving the Company's truck, with trailer attached, northward on Highway No. 2 when about 9:00 p.m., on the evening of August 19, 1948, a bearing seized in the right rear wheel of the trailer. It was impossible for him then to move the trailer further with his own truck. He, therefore, detached the truck and left this trailer, 22 feet long and 7 feet 8 inches wide, parked on the east side of the highway. The highway had a hard surface width of 22 feet, with one foot of gravel on each side. The policeman who made certain measurements found the west side of the trailer was 13·6 feet from the west edge of the hard surface. This trailer was entirely on the hard surface and every vehicle proceeding northward, of necessity, had to turn to the west in order to avoid it.

Piche immediately communicated with another of the Company's drivers, who returned with his truck while Piche was still there, but no effort was then made, notwithstanding the presence of two of the Company's drivers and their respective trucks, to move the trailer. The learned trial judge found:

> I am satisfied from the evidence that had Piche and his fellow truck driver hooked up their two trucks to the trailer they could have removed it from the highway without difficulty shortly after it became disabled. The wrecker truck that did remove it the next morning pulled it two and a half miles in about an hour to a point where it was clear of the highway.

Piche put out three flares, one between 30 and 50 feet north of the trailer, the second just south of the trailer and a third about 30 or 50 feet south of the trailer. These were not placed as required by the regulations made under *The Public Service Vehicles Act* of the Province of Alberta (R.S.A. 1942, c. 276). They remained burning until some time around midnight, but were not burning at the time of the collision. After the collision these flares were found in a damaged condition, but in places that did not assist in determining where they had been originally placed. The learned trial judge stated that after parking the trailer and placing the flares

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Piche then drove in his truck to Edmonton, called at his employer's warehouse and, finding it closed, went home to bed, making no other effort to get in touch with his employer until the next morning, nor did he notify the police, nor anyone else, of the presence of the trailer on the highway.

The trailer was, in fact, removed by another party the next morning as a result of action taken by the police.

The deceased had left Edmonton about midnight with two friends, each riding a motorcycle. They went to Leduc and as they passed the trailer the three flares were burning. They left Leduc to return to Edmonton about 1:30 in the morning. It was then very foggy. As they approached the trailer the flares were not burning. The deceased was riding last and it would appear that his motorcycle collided with the rear left corner of the trailer, causing him to lose his life.

The appellants' contention that, even if Piche did put the flares out in a manner that did not comply with the statute, the appellants are not liable in damages, as here claimed, unless such breach was the direct cause of the accident, has been repeatedly recognized. *City of Vancouver* v. *Burchill* (1) and *Fuller* v. *Nickel et al* (2). The learned trial judge appears to have been satisfied that the absence of the flares did contribute to the accident and that their absence was due to the manner in which they were placed by Piche. It was, however, unnecessary for the learned judge to make a specific finding to that effect, as he found that if Piche had exercised reasonable care the trailer would have been removed from the highway some time before the accident took place. It was on the failure in this regard that the learned judge appeared to place the greater emphasis and it was undoubtedly a direct cause of the collision.

This case illustrates again what has been repeatedly stated that a statutory requirement such as putting out flares constitutes a duty that must be performed and if the flares are placed with care they are often an adequate protection, at least for some time. However, the performance of that statutory obligation is the minimum required by law and does not relieve a person in Piche's position from exercising the care that a reasonable man would

(1) [1932] S.C.R. 620. (2) [1949] S.C.R. 601.

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exercise in the circumstances. A reasonable man would have appreciated the danger caused by the presence of the trailer, foreseen the possibility of injury and would have utilized the Company's two trucks in an effort to remove the trailer which, upon the evidence, would have been successful.

There was another alternative. It was about 10:00 p.m. when Piche left for Edmonton. A reasonable man would not have been content merely to try the warehouse door, but would have made an effort to communicate with his employer and endeavour to arrange for either the repair, which the evidence establishes could have been made upon the highway, or removal of the trailer.

If either of the foregoing reasonable courses had been adopted the trailer would not have been there at the time of the collision. It was Piche's failure to exercise the care of a reasonable man in the circumstances that directly caused the collision here in question. At all material times he was acting within the scope of his employment with the appellant company.

Jones v. *Shafer* (1), relied upon by the appellants, is distinguishable upon its facts. There, apart from other distinguishing factors, the learned trial judge found:

> I do not think under the circumstances here that the defendant could have secured the necessary equipment to do so (that is to move the truck), at least until the next morning.

The flares were put out with care and were removed by some unknown person. Moreover, after the flares were so removed the police visited the vehicle there in question and lighted the lights thereon, which were burning at the time of the accident.

The appellants contend that the damages in the sum of $6,000 awarded under *The Fatal Accidents Act* (R.S.A. 1942, c. 125) are excessive. They draw our attention to the statement of my Lord the Chief Justice, then Rinfret J., with whom Smith J. concurred, in *Littley* v. *Brooks et al* (2):

> In assessing damages under the Fatal Accidents Act, it is well settled law that the jury are confined to pecuniary loss sustained by the family and cannot take into consideration the mental suffering of the survivors . . . It is the reasonable expectation of pecuniary advantage by the relatives remaining alive that may be taken into consideration.

(1) [1948] S.C.R. 166.

(2) [1932] S.C.R. 462 at 470.

The appellants then cite a number of cases in which they contend the damages awarded were such as to indicate the damages here are excessive. The amount of damages allowed upon the above basis must be determined upon the particular facts under consideration in each case and, in part, must be a matter of estimate, even conjecture. *Grand Trunk Ry. Co. of Can.* v. *Jennings* (1). Appellate courts have, apart from some error in principle, interfered only where the damages are clearly excessive. Our attention was directed to *Taff Vale Ry.* v. *Jenkins* (2), where damages were fixed by a jury under *The Fatal Accidents Act.* It was contended in the House of Lords that the damages were excessive. Lord Atkinson stated that in such a case an appellate court would regard the damages as excessive only where "the Court cannot find any reasonable proportion between the amount awarded and the loss sustained." In *Davies* v. *Powell Duffryn Associated Collieries, Ld.* (3), Lord Wright stated:

> Where the verdict is that of a jury, it will only be set aside if the appellate court is satisfied that the verdict on damages is such that it is out of all proportion to the circumstances of the case: *Mechanical and General Inventions Co., Ld.* v. *Austin,* 1935 A.C. 346. Where, however, the award is that of the judge alone, the appeal is by way of rehearing on damages as on all other issues, but as there is generally so much room for individual choice so that the assessment of damages is more like an exercise of discretion than an ordinary act of decision, the appellate court is particularly slow to reverse the trial judge on a question of the amount of damages. It is difficult to lay down any precise rule which will cover all cases, but a good general guide is given by Greer L.J. in *Flint* v. *Lovell,* 1935—1 K.B. 354, 360.

The statement of Lord Justice Greer (4) referred to reads as follows:

> 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.

On the foregoing basis, even if one were disposed to conclude that the damages were somewhat large, there is no basis here disclosed upon which an appellate court should interfere.

The appeal should be dismissed with costs.

(1) (1888) 13 App. Cas. 800.
(2) [1913] A.C. 1 at 7.
(3) [1942] A.C. 601 at 616.
(4) [1935] 1 K.B. 354 at 360.

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KELLOCK, J. (dissenting in part)—In my opinion, this appeal should succeed as to damages only. At the time of the accident, the deceased was within a few weeks of being seventeen years old. He was a normal, healthy boy, and the family was apparently in humble circumstances. The boy had been engaged in helping his father in his business of trucking, being paid a wage of $60 a month, out of which he was paying $7 a week to his mother for board. The father testified that a few months after his son's death he took in another man on a partnership basis, he himself retaining a 75 per cent interest, and that this arrangement cost him from $60 to $70 a month more than he had been paying his deceased son. There is nothing in this evidence, however, which suggests that either the father or the son during the latter's lifetime realized that the boy was being under-paid or that he was making a contribution to his father. He occasionally bought, as the father said, "odd little things, a present, some small thing" for his sister "that didn't amount to much."

The contention of the respondent that the deceased "was in a rather different position from so many others of his age due to the fact that here was not only an expectation of contribution insofar as the dependents were concerned, but an actual contribution of $50 to $60 per month through his work with his father," is therefore not borne out by the evidence.

It is, of course, quite unnecessary in a case of this kind that, in order to establish a reasonable expectation of pecuniary benefit, the deceased should have in fact contributed to the support of the plaintiff, but, to employ the language of Lord Atkinson in *Taff Vale Railway Company* v. *Jenkins* (1), the court must find a "reasonable proportion between the amount awarded and the loss sustained."

In my opinion, there is on the evidence in this case no reasonable relation between the amount awarded and the loss sustained. I therefore concur in the order proposed by my brother Locke.

(1) [1913] A.C. 1 at 7.

LOCKE, J. (dissenting in part):—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta which dismissed the appeal of the present appellants from a judgment for damages awarded against them under the provisions of the *Fatal Accidents Act* (c. 125, R.S.A. 1942) and the *Trustee Act* (c. 215, R.S.A. 1942).

In view of the nature of the findings of negligence made at the trial, it is desirable to state the facts proven in some detail. The appellant Piche, a truck driver employed by the appellant company, was on the evening of August 19, 1948, driving a three ton tractor drawing a vehicle described as a semi-trailer upon the main highway from Calgary to Edmonton. At about 8 o'clock, when he was north of Leduc, trouble developed in one of the housings of the trailer, the bearings being smashed or seized, whereupon he drew over to the right side of the pavement and stopped and, deciding that he would be unable to proceed without assistance, sent word to the driver of another truck of the respondent company which was preceding him to the north asking him to return and assist him. When the driver of the second truck joined him, Piche decided to put out flares on the highway to give warning of the presence of the trailer, to disconnect that vehicle from the tractor and leave it standing on the highway. Having done this, he proceeded to Edmonton and, after going to the appellant company's warehouse to report and finding it closed, went to his home and retired to bed.

The highway at the place in question has a hard surface twenty-two feet wide: the trailer was twenty-two feet long and seven feet eight inches wide and, according to a constable who gave evidence on the respondent's behalf, the left side of the vehicle was thirteen feet six inches distant from the west side of the pavement, thus being well to the east of the center line The right wheels of the trailer were close to the easterly edge of the pavement. While the trailer was equipped with the clearance lights required by the *Vehicles and Highways Traffic Act* (c. 275, R.S.A. 1942), these were supplied with electricity from the tractor and were extinguished when the latter unit was disconnected.

The boy William Bruno Pollock in respect of whose death damages were claimed had that evening ridden, in company with two companions named Fricker and McMinn

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from Edmonton South to Leduc. Each of them was riding on a motorcycle. They had passed the trailer on their way south, at which time, according to Fricker, there were three flares on the roadway, one to the north and two to the south of the trailer. After spending a short time at Leduc, McMinn started north for Edmonton and was followed a short time after by the others. Pollock who had left with Fricker apparently got behind and was riding alone at the time the accident occurred. According to Fricker, it had become very foggy and before he reached the place where the trailer was standing he had lost sight of Pollock. As he approached the trailer there were no flares to be seen: having passed it he proceeded north. Pollock meanwhile followed Fricker along the highway and, failing to detect the presence of the trailer, collided with the left rear of the vehicle suffering injuries which caused his death before anyone reached the scene of the accident.

The claim of the respondents as pleaded is in negligence. While, as stated in the reasons for judgment of Shepherd, J. (1), he permitted an amendment at the trial to set up a claim in nuisance he made no finding on that issue. He found Piche to have been negligent in failing to set out the flares in the manner required by regulations made under the provisions of the *Public Service Vehicles Act* (c. 276, R.S.A. 1942) and in failing to remove the trailer from the highway which, he considered, could have been accomplished with the assistance of the other truck of the appellant company. The learned trial judge also expressed the view that as the trailer could have been repaired on the highway by taking out repairs from Edmonton this should have been done.

The regulations relating to the setting out of warning lights passed under the provisions of the *Public Service Vehicles Act* read as follows:—

> When during the period between sunset and sunrise or any other time when things are not plainly visible at a distance of 500 feet a Public Service or Commercial Vehicle becomes stationery for any reason whatever upon any highway outside the boundaries of a city, town or village, and
>
> (*a*) the lighting equipment required by The Public Service Vehicles Act and/or The Vehicles and Highway Traffic Act is disabled, the driver or other person in charge of such vehicle shall immediately cause two red lanterns, fusees, flares or approved

(1) [1951] 3 W.W.R. (N.S.) 266.

reflectors to be placed on the highway in line with the vehicle, one at a distance of approximately one hundred (100) feet in front of the vehicle and one at a distance of approximately one hundred feet at the rear of the vehicle.

(b) the lighting equipment is not disabled, the driver or person in charge of such vehicle shall after a period not exceeding ten (10) minutes, proceed to set out flares, lamps, lanterns, reflectors, or fusees as provided for above.

In dealing with this aspect of the matter the learned trial judge said in part:—

In fixing the distance of approximately 100 feet at which flares must be set out under circumstances such as we have here it is presumed that this distance of approximately 100 feet is the minimum required for safety but in this case the flares were at the most placed not more than 50 ft. from the parked trailer. This surely was negligence on the part of Piche for which he and his employer, the other defendant, must be held responsible.

It was, however, not the fact that the flares were put out less than one hundred feet from the vehicle that caused or contributed to the occurrence of the accident but the fact that they were extinguished when Pollock arrived there on his return journey. Unless, therefore, as contended for the respondent, the placing of the flares on the highway at less than the prescribed distance from the vehicle was a contributing factor to their being extinguished by passing vehicles striking them, the fact that this was done is an irrelevant circumstance.

The flares in question were described by Piche as being round pot flares burning kerosene and having a screw top wick in them and they were, according to him, in good condition and full of oil. Constable McLean of the Royal Canadian Mounted Police said that they were the usual type used for this purpose and he considered them to be standard equipment. According to Piche, he had placed one flare on the highway to the east of the center line about twenty paces to the north of the trailer, a second one close to the back of it and a third some twenty paces to the south of it. This witness had said at the coroner's inquest that he had placed the flares thirty feet to the north and to the south of the trailer and this discrepancy in his evidence is commented on adversely by the learned trial judge. With respect, however, I think it can make no difference in considering what caused the flares to be extinguished whether the one to the north and the one

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farthest to the south were thirty feet or fifty feet (estimating a pace as Piche did as two and a half feet) from the trailer. As to the distance such flares are visible, Holcombe, an experienced bus driver employed by the Western Canadian Greyhound Lines and who passed the trailer in the early morning hours of August 20 when it was very foggy, said that they were visible at a distance of three hundred yards and that the vehicle itself was visible when he was about seventy-five yards distant. Engel, an experienced driver, said that he could see such flares in a fog in ample time to stop: if it was really foggy he considered they could be seen from one hundred to two hundred feet distant. Fricker, who said that there was fog as he described it "in patches" when they passed the trailer going south, stated that at that time the flares could be seen a quarter of a mile away. There is no contradiction of this evidence in the record. Constable McLean said that flares of this type when set out at night were very good as warning signals, but he was unable from any experience to say how effective they were in a fog.

In endeavouring to come to a conclusion as to what caused the flares to be extinguished, it is of importance to consider the condition and the various locations in which they were found after the accident. Constable McLean found one of the flares about twenty feet south of the trailer on the east side of the highway. The wick had been knocked out and the container was damaged. He also found one about twenty or thirty feet to the north of the trailer in the ditch on the west side of the highway. A third flare was seen by the witness Holcombe between the rear wheels and under the back of the trailer which, he said, had been "up ended." Constable McLean found a skid mark on the highway commencing forty-eight feet south of the van and leading to the left rear corner which, in his opinion, had undoubtedly been caused by Pollock's motorcycle. Holcombe who said that one of the flares was burning at a point some forty to fifty feet south of the trailer when he passed that vehicle going south, said that it had apparently been hit by some vehicle at about the point where the skidmark commenced and coal oil was spilled on the highway. The evidence of both of these witnesses, it

may be noted, supports Piche's statement that he had placed the most southerly flare about twenty paces or fifty feet distant from the trailer.

Since it was proven as part of the plaintiff's case that the flares were out at the time of the accident, the only reasonable inference to draw from this evidence is, in my opinion, that the most southerly flare was struck by Pollock's motorcycle and the one placed immediately to the south of the vehicle also struck as it skidded towards the rear of the van. As to the flare which had been placed to the north of the trailer, in view of the evidence of the visibility of such flares, the proper inference is, I think, that after it had ceased to burn it had been struck and knocked to the side by some passing vehicle. Nothing in any of this evidence, in the view I take of this matter, supports the idea that the distance at which they were placed from the vehicle had any bearing on their being extinguished. The finding of liability based upon an infringement of the regulations cannot, therefore, be supported.

The second ground of negligence found was that the trailer could, without difficulty, have been removed from the highway within a short time after it became disabled as the equipment to do so was available. The learned trial judge was of the opinion that if Piche and his fellow truck driver had hooked up their two trucks to the trailer they could have removed it from the highway without difficulty shortly after it became disabled. There was conflicting evidence upon this point. While the evidence of Engel, the driver of the powerful wrecker sent to the scene, would indicate the contrary, the admissions made by Piche on cross-examination that while he considered it would have injured the axle of the vehicle the two tractors could have moved the trailer off the highway were accepted by the learned trial judge. It was shown that very close to the place where the trailer was halted there was a roadway leading into an elevator to which the trailer might have been moved and the possibility of danger to passing traffic avoided. It is to be remembered that while this large trailer was equipped with clearance lights which would have served as an additional warning to traffic upon the highway these were extinguished, of necessity, when the tractor was disconnected. Flares of the required type if in condition

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should, upon the evidence, have burned throughout the night and the fact that these flares went out in the circumstances above detailed is consistent only, in my opinion, with the fact that they were in a defective condition when they were placed upon the highway. It was the duty of the appellants, I think, since they proposed to leave the vehicle standing upon the highway to see that the flares set out were in proper condition to continue burning throughout the hours of darkness, particularly in view of the absence of any other lights upon the vehicle. These circumstances, together with the negligence found by the learned judge, suffice, in my opinion, to sustain a finding of liability on the part of the appellants.

It is further argued for the appellants that the cause of the accident was the negligence of Pollock and, alternatively, that he was guilty of negligence which contributed to the occurrence. On these issues the learned trial judge has found for the respondent and the Appellate Division has dismissed the appeal from this finding. The argument addressed to us has not satisfied me that there has been any error in dealing with this aspect of the case.

The appellants contend further that the damages awarded under the *Fatal Accidents Act* are excessive and bear no reasonable relation to the actual financial loss suffered by the parents of the deceased. The respondent Annie Pollock is the mother of the deceased boy who was born out of wedlock: the father William Bruno and the respondent, it appears, have lived together for about twenty years and there is another child of which they are the parents who was seven years old at the time of the trial. While unmarried they have maintained a home together and the boy lived with them and went to school until he was fourteen years old, after which he worked for his father in his business of trucking and dealing in scrap metal. The father was paying his son $60 a month for his services and the boy paid $7 a week to his mother for board. Had he lived he would have attained the age of seventeen years on September 6, 1948. Neither the age of the father or the mother was proven and no evidence given as to the financial circumstances of either of them. According to William Bruno, it would have cost him $120 a month for a man to replace his son as his assistant in carrying on his

business at the date of the trial which was December 19, 1950, more than two years after the time of the accident. It was also shown that at times the boy used to buy small presents for his mother and for the little girl. He was a strong healthy lad and had had nothing other than minor illnesses during his life.

Upon this evidence the learned trial judge awarded damages under the *Fatal Accidents Act* of $6,000. The learned Chief Justice of Alberta, in delivering the judgment of the Court, said as to this:—

> While we might not have awarded so large a sum under the Fatal Accidents Act, we are not prepared to find that the trial judge assessment under that Act did not bear a reasonable proportion to the loss sustained.

The principles which govern awards under statutes of this nature have long since been settled. In my opinion, they cannot be more concisely and accurately stated than in the following passage from the judgment of Killam, C.J. in *Davidson* v. *Stuart* (1):

> The damages are not to be allowed for injury to the feelings of the survivors, but for the loss of a life of substantial pecuniary value to the relatives entitled under the statute; there must be evidence reasonably warranting the inference that the relatives have sustained a loss of that character. It need not appear that the deceased was under any legal liability to the survivors of which his death has prevented performance; it is sufficient that the circumstances were such as should give them a reasonable expectation of pecuniary benefit from the continuance of the life.

Section 2 of the *Fatal Accidents Act* provides that the expression "child" in the statute shall, unless the context otherwise requires, include an illegitimate child: but for this there would have been no claim by either parent (*Town of Montreal West* v. *Hough* (2)). In addition to the damages claimed under the provisions of that *Act* the plaintiff claimed under the provisions of the *Trustee Act* and the learned trial judge awarded a sum of $1,000 which, we were informed by counsel for both parties, was for loss of life expectancy, and the sum of $340 for funeral expenses. The deceased boy left other estate to the amount of $750 which amount, together with the damages awarded under the *Trustee Act,* go to the mother under the provisions of the *Intestate Successions Act* (c. 211, R.S.A. 1942), the net amount so received being $1,750. From the damages

(1) (1902) 14 M.R. 74 at 81. (2) [1931] S.C.R. 113 at 120.

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awarded under the *Fatal Accidents Act* it was directed that this amount be deducted, leaving a sum of $4,250 to be divided equally between the father and the mother.

The onus lay upon the plaintiff in the present matter to establish that those on whose behalf the claim was advanced had a reasonable expectancy of pecuniary benefit from the continued life of Pollock and this, in my opinion, was done in so far as the claim was made on behalf of the mother and the father. It was, however, further the obligation of the plaintiff to prove the facts from which a fair estimate of the damage sustained could be made. The fact that at a time two years after the event the father was required to pay a man $60 a month more than the amount he had paid to his son does not, of course, establish a loss in any such amount. The period when this was done was two years later when all wage earners were being paid increased amounts and a full grown man would presumably be able to do more and effective work than a boy of seventeen. The boy had gone to work when taken out of school and, while it is perhaps fair to assume that for some time he would work for his father for less than he could obtain elsewhere, in the normal course of events within two or three years he would either establish himself elsewhere or expect the same wages as other men for the work done. It is not necessary in claims under the *Act* that it should be shown that the person on whose behalf the claim is made has a claim in law to maintenance or assistance but the fact that this boy was illegitimate is, in my opinion, a factor which must be considered in dealing with the claim advanced on behalf of his father. The age of the parents and the financial circumstances of each of them were also material facts to be considered in estimating what value should be attributed to the support which the father and mother might reasonably expect to receive from their son in the future and neither point was touched in the evidence.

The question of the quantum of the award under the *Fatal Accidents Act* is to be considered as standing by itself. The evidence is, in my opinion, inadequate to enable the Court to properly estimate the amount of the loss sustained

by the boy's death. Upon the evidence as it stands, I think the amount of $6,000 is so excessive as to bear no reasonable relation to such loss as was shown to have been sustained.

In these circumstances, I think there should be a new trial restricted, however, to the amount of damages to be awarded under the *Fatal Accidents Act*. As the appeal should otherwise fail, in my opinion, and success thus be divided between the parties I think there should be no costs either in this Court or in the Appellate Division.

Appeal dismissed with costs.

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Solicitors for the respondent: *Maclean & Dunne.*