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REPORT

ON

THE ESTATE CLAIM FOR LOSS OF EXPECTATION OF LIFE

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The Manitoba Law Reform Commission was established by *"The Law Reform Commission Act"* in 1970 and began functioning in 1971.

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INTRODUCTION

The purpose of this Report is to discuss the historical basis of the estate claim for loss of expectation of life, and in particular, to make a number of recommendations as to how the law of recovery in actions for wrongful death might be improved.

The statutory claim, under section 55(1) of *"The Trustee Act"*, C.C.S.M., c. T160, for damages for shortened expectation of life has been the subject of much discussion and criticism in several jurisdictions in Canada, Australia and Great Britain. There are two major criticisms of the award: first, that the award is artificial in that it allows compensation for a person's suffering after that person's death and benefits those who have not suffered; and secondly, that the amount of the award is arbitrary, there being no accurate method of assessing damages under this head.

These matters have attracted recent attention in a number of case reports and in 1976, the Hon. the Attorney-General referred a study of them to the Manitoba Law Reform Commission for inclusion in the Commission's programme. We subsequently published a 47-page Working Paper entitled *"Rationalizing Actionable Fatalaties Claims and Damages"*. The paper set out the choices for reform we had to consider and served to focus the attention of our readers on the issues of concern. In accordance with the Commission's usual practice, it was widely circulated in order that we might obtain the views and comments of persons in relevant areas of activity and of lawyers with knowledge and experience in the field of personal injury claims and civil litigation generally.

Only two responses were received but in each instance these contained thoughtful and constructive comments on our

earlier paper. In addition, we have since received and reviewed the report and findings of other law reform bodies on this issue. On the basis of these, the Commission has been led to reconsider its original provisional proposals and to make certain additional recommendations.

Finally, we make mention of the altered composition of this Commission. Since the publication of our Working Paper in June 1977 and during the course of the preparation of this Report, the Commission has undergone significant changes. The appointment of five new Commissioners between January and February 1979 and the subsequent appointment of Prof. C.H.C. Edwards as Chairman in July of this year means that as far as this particular study is concerned, in all we have the benefit of the opinion of twelve Commissioners, each of whom has had to study and consider these matters over the span of several meetings.

GENERAL

> The basis of the system of damages for personal injury, as in the case of damages for other wrongs, is financial restitution. The sum of money should, insofar as money can do so, put the injured party in the same position as if he had not been injured.
>
> - Goldsmith's *Damages for Personal Injury and Death in Canada: 1958-72*.

As Goldsmith suggests, the overriding purpose of our law of damages is to compensate the injured party for his loss, not to punish the injurer. The loss may be pecuniary - consisting either in expenditures necessitated by the accident or in diminution of earning capacity - or non-pecuniary - the

type of loss with which we will be dealing in this paper.

Non-pecuniary loss is in practice divided into several elements: actual pain and suffering, an entirely subjective sensation of conscious distress; and loss of faculty and amenities, the ability to enjoy the normal activities and functions of life.[1] An award for such loss cannot provide full compensation; no amount of money can drive away pain and suffering, or restore a lost limb. The Royal Commission on Civil Liability and Compensation for Personal Injury (1978) suggests three functions of an award for non-pecuniary loss:

> First a conventional award may serve as a palliative. Pain and suffering and loss of amenity are real enough, at least for the seriously injured plaintiff; and he may well feel entitled to some reparation where these misfortunes befall him because of an injury for which someone else is liable. Secondly, an award for non-pecuniary loss may enable the plaintiff to purchase alternative sources of satisfaction to replace those he has lost. Thirdly, it may help to meet hidden expenses caused by his injury. Although in theory all expenses resulting from injury are recoverable as pecuniary loss, in practice some of them may well be unquantifiable or unforeseen.[2]

A further element was added to non-pecuniary loss in the 1930's with the recognition of "loss of expectation of life" as a compensable element. This new head of damages was, as Fleming puts it, "propitiously launched by 'objectifying it' to permit claims after death even of persons who had died instantaneously or without regaining consciousness".[3] The loss of expectation of life was considered as the loss of a personal asset, something in the nature of property.

The claims by a deceased's estate for "loss of expectation of life" date from the case of *Rose v. Ford*,

[1937] A.C. 826. Lord Wright stated in upholding an award under this head that:

> . . . [A] man has a legal right that his life should not be shortened by the tortious act of another. His normal expectancy is a thing of temporal value so that its impairment is something for which damages should be given.[4]

No guidelines were laid down for the actual assessment of damages under this new head, and from the beginning, this assessment has been a major problem for the courts.

The novel claim for loss of expectation of life caused much discussion and was the basis of much litigation in Canada in the years immediately following *Rose v. Ford*. Each province had a provision similar to the English survival of action provision found in the *Law Reform (Miscellaneous Provisions) Act, 1934*, which made sweeping changes to the common law rule "*actio personalis moritur cum persona*" - a personal right of action dies with the person. Prior to the House of Lords' decision, however, "no one had thought that a personal representative could collect damages for the estate of a deceased person solely on the fact that such person's life had been shortened or that he had been killed by the defendant's tortious conduct".[5]

There was considerable opposition to this new head of damages,the principal criticism being that such a claim was personal to the deceased and when vested in his personal representative, did not further the purposes of compensation. The award benefitted someone who had not suffered any loss. The arguments in support of the claim - that the loss of expectation of life represents real and actual damage, the claim for which should accrue to the deceased's beneficiaries; and

that the award could serve to pay the victim's debts - did not prevail. In the early 1940's, every common law province except Manitoba and Alberta abolished the claim for loss of expectation of life.

The Manitoba survival of action provision, section 55(1) of *"The Trustee Act"* was enacted in 1931 (S.M. 1931, c. 52, s. 48(1)) following the Ontario model. The section reads as follows:

> All actions or causes of action in tort, whether to person or property, other than for defamation, malicious prosecution, false imprisonment, or false arrest, in or against any person dying continue in or against his personal representative as if the representative were the deceased in life. . . .

In 1940, a bill entitled An Act to Amend the Trustee Act was introduced in the Manitoba Legislature, with the purpose of precluding an award for damages for loss of expectation of life in an estate action. The bill was attacked as retrograde legislation introduced for the benefit of the insurance companies, and was defeated, the Legislature voting to retain the law as it stood.

The fluctuating level of awards under this head was a cause of concern, and it prompted the House of Lords, in *Benham v. Gambling*, [1941] A.C. 157, to outline in a general way the approach to be followed in assessing such damages, and to stress that in all cases a very moderate figure should be chosen. In *Benham* the moderate figure was £200. This "conventional sum" was increased because of inflation to £500 in 1968: *Yorkshire Electricity Board v. Naylor*, [1968] A.C. 529 (H.L.).

It was in the *Benham* case that it was decided that damages for loss of expectation of life were to be assessed on an objective basis - "an objective estimate of what kind of future on earth the victim might have enjoyed, whether he had justly estimated the future or not".[6] The court held that:

> The thing to be valued is not the prospect of length of days, but the prospect of a predominantly happy life . . . . The question thus resolves itself into that of fixing a reasonable figure to be paid by way of damages for the loss of a measure of prospective happiness.[7]

The House of Lords was willing to admit that "the truth, of course, is that in putting a money value on the prospective happiness in years that the deceased might otherwise have lived, the jury or judge of fact is attempting to equate incommensurables".[8]

To Professor Atiyah, the author of *Accidents, Compensation and the Law* (1975, 2nd ed.) the House of Lords decision in *Benham* is unsatisfactory, not in result - a fixed and moderate sum for damages - but in that the court felt entitled and bound to rationalize a decision on terms which would be "quite unacceptable to any reasonable man". He suggests that claims for loss of expectation of life where no dependency exists, as in the case of parents claiming damages for the loss of a child, are in effect claims for damages for the grief caused by bereavement. According to Prof. Atiyah, it would have been perfectly rational for the courts to recognize this fact and restrict the award of damages in such cases on various grounds.

> They could have said, for instance, that the death of a young child, though a terrible tragedy for the parents could not be properly compensated in

> money anyhow; that grief and anguish, though understandable and no doubt bitter in many cases, could not be compared with serious physical injuries which *would leave a man disabled all his life; they could* have pointed to the way in which the law does not generally recognize grief and mental distress as a ground for the award of damages unless caused by physical injury to the plaintiff himself. They might also have said that the grief of one parent for loss of a child is not measurable and can only be compared with the grief of another parent; the extent and degree of the parent's grief certainly does not decrease with the age of the child; and that therefore above all else, the law should seek uniformity in making awards of damages in such cases.[9]

The caution by the House of Lords in *Benham* against excessive damages for shortened expectation of life had an effect on Canadian decisions as well. In 1949, the Manitoba Court of Appeal in *Anderson v. Chasney*, [1949] 4 D.L.R. 71; 2 W.W.R. 337, held that the *Benham* decision did not apply to Manitoba cases because it was not interpretative of the Manitoba Act and because of a difference between the value of life in England and in Canada. The Supreme Court disagreed however, and in *Bechtold v. Osbaldeston*, [1953] 2 S.C.R. 117; 4 D.L.R. 783, stated that while differences do exist, they may be taken into account without departing from the ratio of the House of Lords' decision. Moderation was to apply in Canada as well.

In *Gayhart v. Registrar of Motor Vehicles*, (1956), 20 W.W.R. 422, the Manitoba Court of Appeal reviewed the authorities with a view to putting the issue of assessment to rest. Schultz, J.A. observed that "the real difficulty in the past has been the lack of a base or norm which could be regarded as a starting point for the calculation of damages; a relative figure to which other awards could be related, assuming a reasonable similarity of circumstances".[10]

Schultz, J.A. used the Supreme Court decisions of *Bechtold (supra)* - $7,500 for a man of 23 years - and *Northland Greyhounds v. Bryce*, [1956] S.C.R. 409 - $2,500 for a woman of 56 years - as his starting point for assessment, and awarded $2,800 for a child of 3 1/2 years.

In its desire to support the idea of moderation as expressed in *Benham*, the Court of Appeal was forced to make a fine distinction justifying their award of $2,800, given that in *Benham* the award for a child of 2 1/2 years was only £200. The Court stated that "it is true that the difference in age is only one year, but that year is the one in which the infant emerges from infancy with all its uncertainties to childhood with its much greater possibilities and assurance".[11]

The cases exhibit the difficulty experienced by the courts in their attempts to evaluate a measure of happiness. They become involved in a discussion of evidence establishing the prospective worth of the deceased's lost years; as in the case of *Lockwood v. Canadian Steel Sales Ltd.*, [1956] C.S. 426:

> She was gainfully employed in an occupation in which she was content. She was active in societies and social affairs. She was of friendly disposition and well-liked by her associates . . . . Her health was good . . . she had every reason to expect that her future life on earth would bring her happiness.[12]

The courts often express the dilemma that while the many uncertainties of life make it unreasonable to award anything more than very moderate damages, a person's most precious possession has been taken away from him, and consequently the damages awarded should not be nominal but should represent a reasonable compensation for the loss.

In *Crosby v. O'Reilly*, [1973] 6 W.W.R. 632 (Alta. C.A.), the life of a brilliant twenty-one year old post-graduate student "with the prospect of many years of happy and successful life" was assessed by a jury at $90,000. On appeal the award was reduced to $10,000 to reflect the trend of awards for loss of expectation of life in Alberta. The Court of Appeal expressed the opinion that the House of Lords in *Benham*

> . . . took a rational course in an otherwise irrational area . . . committing the common law of England to a conventional sum as the maximum award for loss of expectation of life . . . . The sum is determined as a matter of law since its determination is not amenable to fact. Incommensurables cannot be equated except by convention.[13]

The plaintiff appealed to the Supreme Court of Canada, and the court, while upholding the appellate court decision to reduce the trial court award, disagreed with the "rigid position" of an upper monetary limit as expressed by the Court of Appeal.

> Rather than fix the direction as one of law governing the upper limit of an award, the trial judge should direct the jury, in the light of the evidence respecting the deceased in all of his or her qualities, mode of life and prospects in the light of age and physical condition, that a figure beyond a particular sum, which may be less than $10,000, may be excessive.[14]

The idea of an upper limit or a fixed sum continues to appeal to the courts as they wrestle with the assessment for loss of expectation of life. In *Pollock v. Milbery and M.P.I.C.*, [1976] 2 W.W.R. 481, Hall, JA., of the Manitoba Court of Appeal quoted with approval the opinion of Lord Devlin in the *Naylor* case (*supra*):

> It would be a great improvement if this head of damages was abolished and replaced by a short Act

> of Parliament fixing a suitable sum which a wrongdoer whose act has caused death should pay into the estate of the deceased. While the law remains as it is, I think it is less likely to fall into disrespect if judges treat Benham as an injunction to stick to a fixed standard than if they start revaluing happiness, each according to his own ideas.[15]

In recent cases, the courts in Manitoba have continued to attempt an evaluation of happiness, assessing the prospects of the deceased and arriving at a figure reflecting, for example, "the reasonable share of happiness that a normal life holds in store" (*Gallant v. Baklaschuk*, Man. Q.B., Wright, J. July 21st, 1978 - $7,500 for a thirteen-year old boy) or "a satisfying life . . . which held every promise of a prospective measure of happiness" (*Kernested v. Desorcy*, [1978] 3 W.W.R. 625 (Man. Q.B.) - $7,200 for a twenty-year old woman).

As Fleming points out, "in the absence of any logical process for assessing such damages, the courts are inevitably driven to a conventional scale or tariff acceptable to the prevailing sense of what is fair and equitable".[16]

RELIEF UNDER *"THE FATAL ACCIDENTS ACT"* (THE ST. LAWRENCE FACTOR)

While *"The Trustee Act"* provides for awards for the estate of the deceased, *"The Fatal Accidents Act"* provides (as its title says) "compensation to families of persons killed by accident". Under the latter statute there exists in Canada a head of damages (similar to the Scottish "loss of society" award dealt with later in this Report) which is sometimes called the "St. Lawrence factor" after a case of its origin: *St.Lawrence and Ottawa Railway Company v. Lett* (1885), 11 S.C.R. 422. In that case, the Supreme Court of Canada dealt with the interpretation of the term "injury" in the phrase "damages proportioned to the injury resulting from the death" in section 3, c. 79 of the Consolidated Statutes of Canada.

Ritchie, C.J. stated that:

> I cannot think that the injury contemplated by the legislature ought to be confined to a pecuniary interest in a sense so limited as only to embrace loss of money or property, but that, as in the case of a husband in reference to the loss of a wife, so, in the case of children, the loss of a mother may involve many things which may be regarded as of a pecuniary character . . . .
>
> . . . I cannot think that in giving compensation to a child for the loss of its parent the legislature intended so to limit the remedy as to deprive the child of compensation for the greatest injury it is possible to conceive a child can sustain, namely, in being deprived of the care, education and training of a mother . . . . I cannot bring my mind to the conclusion that a husband or infant children may not, in the loss of a wife or mother, sustain a substantial injury and one for which it was the intention of the legislature to indemnify the husband and children. . . .[17]

In *Vana et al v. Tosta et al* (1967), S.C.R. 71; 60 D.L.R. (2d) 97, the Supreme Court approved of the decision in *St. Lawrence* and stated that:

> It is apparent that this decision of the Chief Justice constitutes a clear recognition of the fact that the loss to children of the care and guidance of their mother is to be regarded as a loss of a pecuniary nature which is to be assessed as a separate head of damage.[18]

These two cases have been applied in the provincial courts, and awards for loss of care and guidance have been given based on statutes with terms similar to those considered in *St. Lawrence*: "damages proportioned to the injury resulting from the death" (*Kovats v. Ogilvie* (1970), 17 D.L.R. (3d) (B.C.C.A.); *Franco et al v. Woolfe et al* (1974), 6 O.R. (2d) 227 (H.C.); *Trudel v. Canamerican Lease and Rental Ltd.* (1975), 59 D.L.R. (3d) 344 (Ont. H.C.); *Chapman v. Verstralte*, [1977] 4 W.W.R. 214 (B.C.S.C.)).

The term "pecuniary" was not used in the statute under discussion in *St. Lawrence*, and this, the Supreme Court felt, "affords good reason for saying that that term should not be introduced in a narrow confined sense as applicable only to an immediate loss of money or property".[19] The comparable Manitoba provision, section 4(2) of *"The Fatal Accidents Act"* does include the term "pecuniary": "such damages as are proportional to the pecuniary loss resulting from the death . . .". Despite this distinction, the Manitoba courts have followed the *St. Lawrence* and *Vana* line of cases in awarding damages for the "loss of guidance, example, encouragement, training and education" (*Clements et al v. Leslie Storage Ltd. et al* (1977), 82 D.L.R. (3d) 469 (Man. Q.B.)).

In a letter to this Commission in March 1979, a Winnipeg solicitor remarked that this recognition of the Courts in claims under *"The Fatal Accidents Act"* for "loss of parental guidance" does not square with a literal reading of section 4(2) of the Act. He expressed the hope that the Law Reform Commission would recommend that this section be amended to recognize expressly this aspect of a claim. Ontario has done so recently with the enactment of section 2(d) of *"The Family Law Reform Act"*, S.O. 1978, c. 2, which replaces *"The Fatal Accidents Act"*, R.S.O. 1970, c. 164. The section reads as follows:

> The damages recoverable may include . . .
> (d) an amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the injured person if the injury had not occurred.

As far as we could determine, there has been no judicial consideration of this new provision.

The classification of such loss as "pecuniary", despite its non-pecuniary nature, does not solve the problem of assessment. The Supreme Court in *St. Lawrence* realized the difficulty involved but stated that:

> There are abundant cases in our law where there is the same difficulty in reducing the injury to a pecuniary standards; in actions of slander for words actionable in themselves where special damage is not required to be proved; libel, breach of promise of marriage and many others where substantial injury is complained of, but the amount is left to the discretion and judgment of the jury; there are no judicial tables by which the amount of such damages can be ascertained, nor any judicial scales on which they can be weighed, yet pecuniary damages are without difficulty awarded, assessed by the good sense and sound judgment of the jury . . . .[20]

In the *Vana* case, the Supreme Court rejected the idea of a purely conventional assessment of damages along the lines of the conventional figure in *Benham v. Gambling*. Ritchie, J. felt that:

> . . . the proper course by which a trial judge should be guided in such cases is to instruct himself or the jury . . . that the amount to be awarded should bear a realistic relationship to the evidence, if any, which makes it reasonably probable that the children will actually suffer a pecuniary loss as a result of their mother's death.[21]

A careful charge to the jury, according to Spence, J. would avoid the danger of this head of damages becoming unduly prominent and leading to inflation of damages in cases which do not really justify a large award, a concern voiced in *Rose v. Ford* with regard to "loss of expectation of life".[22]

This approach requires the courts to hear evidence on such matters as the contribution of the deceased to family

life, and the role of the deceased in the care and education of the children. In *St. Lawrence*, the "wife and mother managed the whole business of the house, made all purchases and repairs and did everything about the house".[23] In *Vana v. Tosta*, the Court concluded that "the evidence indicates that Mrs. Vana was an excellent mother";[24] in *Kovats v. Ogilvie*, the British Columbia Court of Appeal had to consider damages for the loss of a "well-educated, happily married and devoted mother".[25] In *Franco v. Woolfe*, the Court described the deceased mother as the "cornerstone, providing the incentive, the encouragement, counsel and advice for all . . . a model of activity".[26]

In *Trudel v. Canamerican Leasing and Rental Ltd., (supra)*, both father and mother had to be compensated for, and Galligan, J., of the Ontario High Court, felt that the loss to the six surviving sons was especially severe. The father had been a high school principal, an "educator . . . seriously interested in his sons and their progress". Soon after his death, several of the boys dropped out of school, and in assessing the damages, the judge stated that:

> The loss of their father's counsel probably means serious financial loss throughout their working lives because, very frequently, lesser education means lower income . . . I think that there is a high degree of probability that had their father not been killed, his counsel, advice and encouragement would very likely have kept them at their studies.[27]

Morse, J. of the Manitoba Queen's Bench, followed the *Trudel* case when assessing the loss of both parents in the case of *Clements v. Leslie Storage Ltd. (supra)*.

Conventional fixed sums have been recommended and adopted in several jurisdictions in order to avoid this type of judicial enquiry. Unlimited damages could lead to much the same problems of assessment as were created by the award of loss of expectation of life. Where "tradition provides a background against which such awards can be assess"[28] however, a fixed level for awards may be unnecessary. The body of case law in Canada on "loss of care, guidance and companionship" (see Appendix A) might provide the guidelines required.

CONCURRENT ACTIONS UNDER *"THE TRUSTEE ACT"* AND *"THE FATAL ACCIDENTS ACT"*

In practice, the award under *"The Trustee Act"* to a beneficiary of the estate is deducted from any award to that person as a dependent under *"The Fatal Accidents Act"*, C.C.S.M., c. F50, in order to avoid duplication of damages. It has been argued that compensation under *"The Fatal Accidents Act"* should be recovered in full, without regard to additional sums awarded under *"The Trustee Act"*. Section 55(4) of *"The Trustee Act"* is cited in support of this approach:

> The rights conferred by this Act are in addition to, and not in derogation of, any rights conferred on the dependants of deceased persons by The Fatal Accidents Act.

The identical provision in the English *Law Reform (Miscellaneous Provisions) Act, 1934*, section 1(5), was considered by the House of Lords in *Davies and another v. Powell Duffryn Associated Collieries Ltd.*, [1942] A.C. 601; 1 All E.R. 657. The counsel for the appellant argued that "the words 'not in derogation of' involved a direction that there was to be no taking away or deduction from or diminution of the damages obtainable under the Fatal Accidents Act".[29]

The House of Lords rejected this interpretation of the sub-section, restating the "general principle that the right of an individual defendant under these Acts is for damages to be assessed on a balance of loss and gain",[30] and that there was to be no duplication of damages.[31]

In *Gallant v. Boklaschuk (supra)*, Wright, J. reviewed the authorities on this point, citing *Ponyicki v. Sawayama*, [1943] S.C.R. 197, as approving of the comments by the House of Lords in the *Davies* case, and *Pollock v. Milbery et al (supra)*, in which the Manitoba Court of Appeal again affirmed the interpretation and practice outlined in the above-mentioned decisions. Indeed, with only one exception - the case of *Barr et al v. Miller et al*, [1938] 2 W.W.R. 563 - the courts in Manitoba have followed the general practice of taking into account damages recoverable under *"The Trustee Act"* when assessing damages under *"The Fatal Accidents Act"*.

The approach followed by the courts recognizes that damages due under *"The Trustee Act"* and under *"The Fatal Accidents Act"* are both awarded in respect of the same negligence, and that it is the net loss on balance which constitutes the measure of damages.

ABOLITION OF THE ESTATE CLAIM FOR LOSS OF EXPECTATION OF LIFE

Manitoba is now the only common law province which allows an estate claim for loss of expectation of life. In 1978, Alberta passed *"The Survival of Actions Act"*, S.A. 1978, c. 35, which provides for the survival of a cause of action for the benefit of the deceased's estate, and includes a provision that

> If a cause of action survives under section 2, only those damages that resulted in actual financial

> loss to the deceased or his estate are recoverable, and without restricting the generality of the foregoing, punitive or exemplary damages or damages for loss of expectation of life, pain and suffering physical disfigurement or loss of amenities are not recoverable. (emphasis added)

The Act adopts the form and content of the Uniform Survival of Actions Act (1963) which was drafted by the Alberta Commissioners of the Uniform Law Conference of Canada.

In April 1977, the Alberta Institute of Law Research and Reform published a report entitled Survival of Actions and Fatal Accidents Act Amendment. The Institute stated its opinion as follows:

> We think the estate's claim for damages for loss of expectation of life should be abolished. By its very nature it cannot go to the person who has suffered the injury because he is dead; it must be a windfall for others who may be creditors, non-dependent beneficiaries or dependent beneficiaries. It is against the whole conception of the common law to compensate a person who has not suffered. Second, the amount of the award is artificial and continues to create problems as *Naylor, Crosby v. O'Reilly* and *Milbery v. Pollock* show. Thirdly, the award does not help dependents because if they are beneficiaries of the estate the sum they receive is deducted from the amount they are entitled to under the Fatal Accidents Act.[32]

This recommendation for abolition of the estate claim for loss of expectation of life was in keeping with reforms suggested by other law reform commissions. In 1973, both the English and Scottish Law commissions published reports on damages for personal injury and death which included recommendations that claims for loss of expectation of life should not survive to the deceased's estate. The common opinion was that "the rule which permits transmission is inconsistent with the

principles of a law of reparation which seeks only to compensate for loss".[33] The Scottish Law Commission also pointed to the great difficulty of assessing the monetary value of "reasonable expectation of life", as shown by the English experience, and stated that "the relatively small awards allowed by the Courts in actions by executors for loss of a deceased's expectation of life" reflects their dissatisfaction with the claim".[34]

In Scotland, the claim for loss of expectation of life was not assessed as a separate head of damages, but was taken into account as an additional handicap on the enjoyment of life, and assessed as part of the general claim for "solatium" the award which provided acknowlegment of the grief and suffering of the dependent relatives. The Scottish Law Commission's recommendation for the abolition of the survival of this claim was incorporated in the *Damages (Scotland) Act, 1976*, section 2(3):

> There shall not be transmitted to the executor of a deceased person any right to damages in respect of personal injuries sustained by the deceased and vested in the deceased as aforesaid, being a right to damages -
>
> (a) by way of solatium . . . .

The English Royal Commission on Civil Liability and Compensation for Personal Injury expressed approval of the Scottish recommendations in its 1978 report. The comments of the Royal Commission on the claim for loss of expectation of life by the estate included evidence from several parents who had lost children in accidents:

> A number of them felt strongly that damages for loss of expectation of life, paid to them under English law as beneficiaries of their child's estate provided an inadequate - even derisory - acknowledgment of

> their loss. While we have some sympathy with this view, we do not think it would solve the problem to raise the present level of damages for loss of expectation of life.[35]

The Royal Commission agreed that the head of damages should be abolished but recognized that some replacement would be required. This Commission also could see no justification for this head of damages. Rather than venerating the life that had been lost it endeavoured to assess it in paltry monetary terms. Parents, for example, awarded a sum for their child's loss of expectation of life would generally regard it almost an insult that someone so dear to them was being evaluated in dollar terms. It might be regarded as "blood money" and therefore reprehensible. A replacement whereby parents or others in like position might receive an award acknowledging their grief and suffering appears much more acceptable.

LOSS OF SOCIETY AND BEREAVEMENT

The "replacement" which the Royal Commission suggested was one which the Scottish Commission had recommended in 1973, and which was incorporated in the *Damages (Scotland) Act, 1976*. The "solatium" award was replaced by an award for "loss of society" "by way of compensation for the loss of such non-patrimonial benefit as the relative might have been expected to derive from the deceased's society and guidance if he had not died" (section 1(4)).

The award was intended to reflect the Scottish Commission's view, subsequently endorsed by the Royal Commission, that:

> ...over and above the quantifiable loss of income which they sustain when a man is killed, we think that a wife and children suffer damage through the loss of his help as a member of the household and of his counsel and guidance as a husband and father. A similar situation arises when a wife is killed leaving her husband and young family: even if

> she was not herself earning, her husband and family suffer considerable loss on her death, which is only partially quantifiable in financial terms. These are facts which ought to be acknowledged by the law.[36]

As we have mentioned above,it has been the practice of the courts in Manitoba to interpret *"The Fatal Accidents Act"* as permitting damages for loss of this nature.

The change from "solatium" to "loss of society" in Scotland was described by one commentator as a "completely unnecessary and pointless change which one cannot call a reform". There was also the question of quantum of damages under this new head - should it be a modest acknowledgment or a substantial sum?[37] Some indication of the uncertainty created by this new award is found in a footnote to the *Damages Act* which states:

> The Act does not give any further guidance, by definition or otherwise, on what factors should be taken into account in determining a sum appropriate for "loss of society" award, nor on what size of awards should be made.

The Scottish Law Commission responded to the criticism by stating that "as the concept of 'loss of society' is wider than grief and suffering, the Commission envisages that there would be more variation than hitherto in fixing the level of the awards".[38] The Commission offered no further guidelines for assessment.

The idea of a "loss of society" award rather than an award directed at sorrow or suffering appealed to the Law Reform Commission of Western Australia as well. In its 1978 Report on Fatal Accidents, the Commission recommended the

adoption of a "loss of assistance and guidance" award along the lines of the Scottish award, to be recoverable under the *Fatal Accidents Act*.[39]

The English Law Commission, in its 1973 Report, recommended the adoption not of a "loss of society" award, but of an award for "bereavement" caused by the death of a close relative. In form however, the proposed award would appear to be similar to the "loss of society" idea, with the purpose of "compensating not only those forms of psychic damage, but also those other deprivations on which the Scottish Law Commission's proposal lays particular emphasis (ie. loss of help, loss of guidance and counselling)".[40] Claims were to be made under the *Fatal Accidents Act*.

The Alberta Institute of Law Research and Reform suggested that the compensation should take the form of an award for "bereavement", as solace and consolation for the relatives of the deceased. This recommendation resulted in a provision in *"The Survival of Actions Act"*, S.A. 1978, c. 35, for a conventional sum of $3,000, recoverable by each person specified, as damages for bereavement. The provision also constituted an amendment to *"The Fatal Accidents Act"*, R.S.A. 1970, c. 138.

The $3,000 figure was, as the Institute admitted, "artificial and arbitrary" as a result of the fact that "a money payment may be a recognition of grief but it cannot give true compensation". The choice of a conventional sum rather than judicial assessment of damages was based on the decision that "the consequences of requiring (the relatives) to come into court to prove their grief as a condition of recovering compensation would be worse than the consequences of the occasional windfall".[41]

The English Commission had also recommended that a conventional sum (£1000) should be recoverable, to avoid "judicial enquiry into the depths of grief". Professor Atiyah is critical of this approach:

> . . . [T]he Law Commission's insistence that 'there should be no judicial enquiry at all into the consequences of bereavement' means that the same sum would be awarded in a very wide variety of situations, e.g. to a mother for the death of a newly born child, to parents of an older child irrespective whether he was a comfort or a trial to his parents, and to a spouse irrespective of the age, state of health, or even relationship to the other spouse. The same sum would, indeed, be payable to a wife whose husband has deserted and refused to maintain her, as to a devoted and faithful husband still living with her - though in this latter case there would of course be a substantial difference in the sums awarded under the Fatal Accidents Acts.[42]

Our Commission felt, however, that it would be wrong to settle on an arbitrary figure and that an assessment should continue to be made by the courts.

PERSONS ENTITLED TO BENEFIT

The English Commission recommended that recovery under the new award for "bereavement" be limited to a "greatly restricted class of persons":

> . . . the parents of an unmarried minor child who is killed by another's wrong should be entitled to recover the sum of £1,000 from the wrongdoer in an action under the Fatal Accidents Act. If both parents are included in the claim, each should be awarded £500. . . .
>
> . . . where a person is killed by the wrongful act of another the surviving spouse should be entitled to recover £1000 from the wrongdoer.[43]

The Alberta Act extends the right of recovery to the spouse, the parent or parents, and the minor child or children of the deceased person (s. 9(2)). *The Damages (Scotland) Act, 1976,* provides that the "loss of society" award is available to the deceased's immediate family which includes the spouse, the parent(s), the child or children, and any person who was accepted by the deceased as a child of his family (Schedule 1, s. 1). The Scottish Law Commission expressed the hope that under the new award, the courts would award more to younger children "whose deprivation, in terms of the description of the award, is greater than older children".[44]

This Commission concluded that the category of those entitled to claim for loss of society should be fairly flexible so as to include any person who, in the view of the court, has suffered such a loss through the death of the deceased. Such a category would ensure that those who would have benefitted under *"The Trustee Act"* as beneficiaries of the estate will still be entitled to benefit, for example, an aunt or uncle, a guardian or close friend of the deceased. Commercial creditors, however, having suffered no personal loss, will not be entitled to compensation.

We would recommend that the court be given a discretion to determine the proper persons entitled to claim under *"The Fatal Accidents Act"* (see analogous section 231(b)(iv) of *"The Corporations Act"*, C.C.S.M. cap. C225).

SURVIVAL OF ACTION

There was general consensus among the Commissions that because the award for "loss of society" or "bereavement" is a personal award to the person who suffered the loss, a subsisting claim should not survive for the benefit of the estate of the claimants.

Scotland provided for this in section 3 of the *Damages (Scotland) Act, 1976:*

> There shall not be transmitted to the executor of a deceased person any right which has accrued to the deceased before his death, being a right to -
>
> (a) damages by way of solatium in respect of the death of any other person under the law in force before the commencement of this Act;
>
> (b) a loss of society award . . . .

Alberta makes similar provision in section 9(3) of *"The Survival of Actions Act, 1978"*: A cause of action conferred on a person by subsection (2) (dealing with "damages for bereavement") does not, on the death of that person, survive for the benefit of the estate".

Professor Atiyah has expressed two main objections to all awards by way of solatium or bereavement, which could apply to loss of society awards as well:

> The first is that they tend to be sought by vindictive survivors, either by way of penalizing the party thought to be responsible (although it is of course the insurers who will pay) or else as a form of distasteful gold-digging. The second main objection is that it seems so very arbitrary to select the death of a close relative as the criterion for paying what is still to many people a substantial sum of money . . . . [T]here is the further fundamental point that damages by way of *solatium* ought to be a very low priority in any legal system which still denies adequate compensation for loss of income to so many of those injured in accidents or crippled by disabling illness.[45]

Our Commission also felt that since this is a personal award it should not survive for the benefit of the estate of the claimants.

CONCLUSION

After consideration of all of the above, the majority of the Commissioners make the following recommendations (Prof. A.B. Bass dissenting):

1. The claim by the estate for damages for loss of expectation of life under section 55(1) of *"The Trustee Act"* should be abolished, subject to the proposed amendment of *"The Fatal Accidents Act"* as set out in recommendations 2 and 3.

2. *"The Fatal Accidents Act"* should be amended to provide that the damages recoverable for wrongful death may include an amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the deceased if the death had not occurred.

3. The persons entitled to benefit under this new head of damages should be specified as such persons as the court shall deem to have suffered such loss.

4. A cause of action conferred on a person under this new section should not, on the death of that person, survive for the benefit of the claimants' estate.

This is a Report pursuant to section 5(3) of *"The Law Reform Commission Act"* dated this 22nd day of October 1979.

Clifford H.C. Edwards, Chairman

R.G. Smethurst, Commissioner

Val Werier, Commissioner

Patricia G. Ritchie, Commissioner

David G. Newman, Commissioner

Evan H.L. Littler, Commissioner

MEMORANDUM OF DISSENT OF PROF. A.B. BASS

Lawyers pride themselves on being men of reason. After all, they postulate, it is the "reasonable man" who is enshrined at the apex of the Anglo-American legal system in the adjudication of civil disputes; it is the legally trained mind that proves so finely honed a tool in the area of problem-solving in private practice; the rational decisional process is the hallmark of the judicial mind.

It is from this type of "logical" thought process that the law relating to damages sustained by reason of death or injury has evolved. The concept of "fault" or culpability comprises, for the most part, in the field of common law torts, the substratum or very bedrock upon which the above legal system reposes. Fortuitously, in most instances, "logic" and "culpability" coincide. From a finding of legal responsibility judgment is rendered in favour of the innocent victim. The only matter then remaining to be decided is that of reparation.

In the civil sphere the common law has long civilized the type of reparation to be exacted by the victim. It is financial compensation - a sum of money which theoretically, at least, would serve to perhaps not fully, but in some adequate measure, redress the victim's injuries or losses. Reparation by methods other than monetary are not countenanced in civil damage actions. A civilized society could not adequately function if the "blood-feud" so prevalent in the old Anglo-Saxon and other ancient societies were allowed to manifest itself. If the over-riding public interest, as exemplified by a society's legal system, was to exact some form of retribution other than monetary this would be the proper function of the criminal, as opposed to the civil law. This, in essence, is the pristine legal theory.

Unfortunately, theory and practice do not always coincide. That famous American jurist, Oliver Weldell Holmes Jr., paraphrased this in a much more succinct manner when he stated: "The life of the law has not been logic: it has been experience".[46] As has been previously stated in the body of this report, a rule of long standing in the common law has been that "a personal action dies with the person". On the surface, this statement of the law appears very logical. Once a person is dead, what benefits could possibly be garnered to them with regard to their personal reputation or their purse?

Nevertheless, in spite of this seemingly irrefutable logic, *Lord Campbell's Act*, the precursor of our present *"Fatal Accidents Act"*, was initially promulgated in England. The purpose of this legislation was and is to grant to the victim's survivors economic compensation for any losses that might have been sustained by them due to injury and death inflicted upon the deceased. In order to fill what was deemed to be a vacuum in the law experience assumed paramountcy over logic. This was considered a necessary evolutionary step, as the application of pure legal logic would have inflicted economic hardship upon a victim's survivors.

However, the deceased, at least in a legal sense, did not benefit directly from claims put forth under fatal accidents legislation, as damages under this head were claimable by and paid only to the deceased's relatives. It was not until 1937 that damages were held payable directly to a deceased (ie. to his estate or his personal representative) for "loss of expectation of life". In the leading case of *Rose v. Ford*[47] Lord Wright stated in upholding an award under this head that:

> . . . [A] man has a legal right that his life should not be shortened by the tortious act of another. His

> normal expectancy is a thing of temporal value so that its impairment is something for which damages should be given.

Rose v. Ford is the basis upon which claims for expectation of life are founded pursuant to section 55 of our present *"Trustee Act"*.[48] Where is the illogic in Lord Wright's oft-quoted dictum? Why shouldn't a legal claim be allowable to a deceased's estate for the shortening of his life? I will not endeavour to be overly comprehensive in stating all of the objections that could possibly be raised in precluding a legal cause of action under this particular category of damages. Some of the more obvious ones are as follows:

1. Logically, it would appear that a dead person cannot benefit financially as his corporeal being is extinguished.

In theory, the foregoing statement is logically correct. In practice, however, we all know that human beings build edifices unto themselves. Memorial funds, complicated trust arrangements to take effect after death, tombstones and crypts, scholarship trusts, buildings, parks and memorials named after a deceased, and indeed, even the mere act of amassing an estate are some of the more obvious examples of this human phenomenon.

2. An award of damages under the head of "loss of expectation of life" in many instances leads to an economic "windfall" for a deceased's estate.

Except in the case of exemplary and punitive damages, damage awards, at least in this jurisdiction, have always been subject to judicial restraint. The law has always recognized

that damages, by their very nature, should be moderate, for, in point of fact, money can in no way adequately replace pain and suffering or a crushed limb. In order to avert any inordinately high awards, I propose that section 55 of *"The Trustee Act"* be amended by the imposition of a statutory bar which would set forth a maximum claim allowable in this regard. It has been stated that an estate's creditors are sometimes the only ones to benefit from an award granted under *"The Trustee Act"*. Where is the windfall in this regard? Surely it is the honourable discharge of an executor's or personal representative's duties to pay all debts that are justly incurred by the deceased. Most certainly, the deceased, if he were alive, would be gratified in having his economic liabilities discharged. This is in furtherance of a proper policy of the law, and in many instances would directly benefit a deceased's heirs and beneficiaries. It would lead, in many instances, to more money being available upon the ultimate distribution of an estate's assets to estate beneficiaries.

3. Courts, in awarding damages for loss of expectation of life, are, quite often, placed in an impossible quandary. They are dealing with imponderables, which are incapable of accurate assessment.

We all know this to be true, but this is really begging the question. A court's dilemma is no less difficult in assessing damages under *"The Fatal Accidents Act"*, just to use one pertinent example. This is probably the underlying reason for the muddying of the judicial waters in assessment of damages under both *"The Fatal Accidents Act"* and *"The Trustee Act"*. Our Manitoba courts presently feel constrained to follow the dictates of *Benham v. Gambling* and to strike a proper judicial "balance", thus, in effect, to some extent off-setting awards granted under both *"The Trustee Act"* and *"The Fatal Accidents Act"*. In my humble opinion, this is a misapplication

of the law in Manitoba, as section 55(4) of *"The Trustee Act"* lays down the specific legislative mandate that:

> The rights conferred by this Act are in addition to, and not in derogation of, any rights conferred on the dependents of deceased persons by the Fatal Accidents Act.

If a statutory bar were to be imposed in section 55 of the Act, as had previously been suggested, this would, in my opinion, serve to alleviate many of the apprehensions of the judiciary in this regard.

4. An award of damages for loss of expectation of life is not commensurate with the general principle of damage awards in that it does not represent, in actuality, financial compensation but rather punishment by way of retribution.

With all due respect, I do not envisage retribution as necessarily being one of man's baser instincts. Much is dependent on the circumstances involved. I am neither a philosopher nor a psychologist, but empirical observation would lead many to conclude that retribution is a primaeval instinct extant in all mankind. As I have previously stated, fault is the cornerstone of tort law. Society demands a certain amount of moral responsibility, and if this sense of responsibility is inculcated in the law by an award of damages, then a societal need is fulfilled. A statutory bar or maximum would serve to fulfil this basic need without transgressing on our criminal law of punishment. There is a continuum in the quantum of assessments where damages terminate and penalties begin. An upper limit of say, for the sake of argument, $20,000, coupled with a cost of living escalator clause, would serve to prevent the imposition of penalties.

5. Many would probably state further that society's retributive need is best fulfilled by the criminal, rather than the civil law.

This is indeed correct and proper. However, there are many instances in which the criminal law will not intervene, and quite properly so. There is a penumbra in civil injury cases wherein criminal charges would not be laid. The criminal law will intervene only in the most glaring and obvious instances of disrespect for human life. An example of this would be in those instances where a finding of "gross negligence" is established, and yet criminal charges are not laid.

6. The best method that the law can establish in benefitting "society" (which would encompass a deceased's dependents) would be to implement a method whereby any damage awards would be paid directly to the dependents rather than the deceased's estate.

In my respectful opinion, to award damages for loss of expectation of life under the guise of "solatium" or for "loss of guidance, care and companionship" is unconscious intellectual subterfuge. If a layman were to be asked why a deceased's estate should not receive a payment for loss of expectation of life, his probable response would be "why not?". This is no more illogical than other illogicalities in the field of law. It would appear to be the most direct, responsible and cogent method of awarding damages. It would serve, in most respects, to assuage the anomaly that is raised by the oft quoted maxim "it is cheaper to kill than to maim". A direct payment to the estate would not serve to fully eradicate this anomaly; but I do not think that it is the proper function of the law to attempt to do so. Man has learned to live with many of the hard facts of life, and no doubt he must learn to live with the hard facts of death. The law cannot accomplish

the impossible. But it can attempt to venerate, rather than disparage life. This is in accord with many of the religious dictates upon which our legal system is founded. I have previously made use of one of the many memorable legal statements propounded by Oliver Wendell Holmes Jr. I would like to conclude by utilizing yet another, where, in the course of a speech at a Bar Association dinner in the city of Boston in 1900 he stated:

> Life is an end in itself, and the only question as to whether it is worth living is whether you have enough of it.

A. Burton Bass, Commissioner

APPENDIX A

EXAMPLES OF AWARDS

St. Lawrence & Ottawa Railway Company v. Lett, (1885) 11 S.C.R. 422: loss of mother/wife

$ 600 - 21 year old daughter
$ 400 - 18 year old son
$ 800 - 16 year old son
$1200 - 14 year old son
$1300 - 11 year old son
$1500 - husband

Vana et al v. Tosta et al, [1968] S.C.R. 71: loss of mother/wife

$ 2,000 - 14 year old daughter
$ 1,500 - 11 year old son
$10,000 - husband

Kovats v. Ogilvie, (1970) 17 D.L.R. (3d) 343 (B.C.C.A.): loss of mother/wife

$ 3,000 - 5 year old daughter
$ 3,500 - 3 year old daughter
$10,000 - husband

Franco v. Woolfe (1974) 6 O.R. (2d) 227 (H.C.): loss of mother/wife

$12,500 - 13 year old daughter
$12,500 - 11 year old son
$25,000 - husband

Trudel v. Canamerican Auto Lease & Rental et al (1975), 59 D.L.R. (3d) 344 (Ont. H.C.): loss of both parents

$90,000 - global sum

Chapman v. Verstralte (1977) 4 W.W.R. 214 (B.C.S.C.): loss of mother/wife

$ 500 - 18 year old son
$6,500 - 9 year old daughter
$7,500 - 6 year old daughter

Clements v. Leslie Storage Ltd. (1977), 82 D.L.R. (3d) 469 (Man. Q.B.): loss of both parents

$ 9,000 - 13 year old son
$12,000 - 10 year old daughter
$14,000 - 9 year old daughter

FOOTNOTES

1. J.F. Fleming, *Law of Torts*, (5th ed. 1972) at 222.

2. Royal Commission on Civil Liability and Compensation for Personal Injury, Report, Volume I, (London 1978), p. 85.

3. *Supra*, n. 1, at 221.

4. *Rose v. Ford*, [1937] A.C. 826; 3 All E.R. 359 at 371.

5. C.A. Wright, "The Abolition of Claims for Shortened Expection of Life by a Deceased's Estate", 16 C.B.R. 193.

6. [1940] 1 All E.R. 7 at 13.

7. *Id.*, at 12.

8 *Id.*, at 13.

9. P.S. Atiyah, *Accidents, Compensation and the Law*, (2nd ed. 1975) at 83.

10. (1956), 20 W.W.R. 422 at 434.

11. *Id.*, at 445.

12. [1956] C.S. 426 at 431 (Que.)

13. [1973] 6 W.W.R. 632 at 638 (Alta. C.A.).

14. (1974), 2 N.R. 338; [1974] 6 W.W.R. 475 at 479 (S.C.C.)

15. *Pollock v. Milbery and M.P.I.C.*, [1976] 2 W.W.R. 481 at 489 (Man. C.A.); quoting *Yorkshire Electricity Board v. Naylor* [1968] A.C. 529; [1967] 2 All E.R. 1 at 13.

16. *Supra* n. 1, at 221.

17. 11 S.C.R. 422 at 426, 432.

18. 60 D.L.R. (2d) 97 at 105.

19. *Supra* n. 34 at 426.

20. *Id.*, at 434.

21. *Supra* n. 18, at 110.

22. *Id.*, at 116.

23. *Supra* n. 17, at 425.

24. *Supra* n. 18, at 110.

25. (1970), 17 D.L.R. (3d) 343 at 355 (B.C.C.A.).

26. (1974), 6 O.R. (2d) 227 at 231 (H.C.)

27. (1975), 59 (3d) 344 at 350 (Ont. H.C.).

28. *Supra* n. 2, at 98.

29. [1942] 1 All E.R. 657 at 658.

30. *Id.*, at 662.

31. *Id.*, at 658.

32. Alberta Institute of Law Research and Reform, *Report on Survival of Actions and Fatal Accidents Act Amendment*, 1977, at 14.

33. Scottish Law Commission, *Report on the Law Relating to Damages for Injuries Causing Death*, 1973, at 17.

34. *Ibid.*

35. *Supra* n. 2, at 87.

36. *Supra* n.33 , at 35

37. D.M. Walker, "The Damages (Scotland) Bill", 1976 *Scottish Law Times*, at 49.

38. Letter to the Editor, Secretary of the Scottish Law Commission, 1976 *Scottish Law Times*, at 72.

39. Law Reform Commission of Western Australia, *Report on Fatal Accidents*, 1978, at 29.

40. English Law Commission, *Report on Personal Injury Litigation - Assessment of Damages*, 1973, at 48.

41. *Supra* n. 32, at 20.

42. *Supra* n. 9, at 85.

43. *Supra* n. 40, at 49.

44. *Supra* n. 38.

45. *Supra* n. 9, at 85.

46. Holmes, Oliver Weldell Jr., *The Common Law* [1881].

47. [1937] 3 All E.R., 359.

48. C.C.S.M. cap. T160.