

CASE COMMENTS

LOST FUTURE INCOME AND THE EXPECTANCY OF LIFE: BALKOS ESTATE v. COOK¹

Law is composed of words, and words are the stuff of memory. Human memory is frail and the law commits its works to the printed page in an attempt to compensate for that weakness. But the knowledge of where the law is to be found and, once found, interpreted, is itself subject to the same deficiency. And so the law is always in a state not only of creation but of re-creation. Principles once well-understood by one generation of practising lawyers and judges are forgotten over time and have to be rediscovered and re-established by the next generation. The wheel is always being reinvented in the law. One such wheel was rediscovered in the case of *Balkos Estate v. Cook*.

The issue that arose in *Balkos* was whether the estate of a person killed by the tort of another could maintain a claim for the lost future income that the deceased would have made had that person not been killed. The advancement of such a claim was made possible in part because of the characterization of income-earning capacity as a capital asset that existed immediately prior to the accident;² and in part because of the development in England of case-law to the effect that such a claim was in fact possible.³ The effect of the argument would have been to permit two kinds of pecuniary-loss claims: those of the dependants, under the *Family Law Act, 1986*;⁴ and that of the estate, under the continuation provisions of the *Trustee Act*.⁵ The spectre that arose would have the defendant paying a judgment in respect of the lost future-earning capacity of the deceased twice over: once to the dependants of the deceased, and then to the beneficiaries of the estate (who would not necessarily

¹ (1990), 75 O.R. (2d) 593, 41 O.A.C. 151 (C.A.).

² *Andrews v. Grand & Toy Alberta Ltd.* (1978), 83 D.L.R. (3d) 452, [1978] 2 S.C.R. 229 at p. 252, [1978] 1 W.W.R. 577, per Dickson J.

³ This development reached its culmination in the decision of the House of Lords in *Gammell v. Wilson*, [1981] 1 All E.R. 578.

⁴ S.O. 1986, c. 4, s. 61(1).

⁵ R.S.O. 1980, c. 512, s. 38(1).

be the same). English courts, when faced with the same issue, had struggled to prevent such double recovery in cases where the two sets of claimants were the same,⁶ but the device worked only where the two were the same. In addition, the practice meant that claimants under the continuation provisions of legislation similar to the *Estates Act* could recover more than they could under fatal-accidents legislation (such as s. 61 of the *Family Law Act, 1986*). For example, the aged parents of a young man of 21 who was working and living at home would recover relatively little under the fatal-accidents legislation because they would be unable to prove much pecuniary loss. However, those same claimants could recover a substantial amount as beneficiaries of their son's estate, because the estate's claim was not limited to their reasonable loss.

To understand how the issue in *Balkos* arose one had to go back to the middle of the 1930s and, indeed, even earlier, to one of the ancient maxims of the common law: *actio personalis moritur cum persona*.

The Common Law and the Effect of Death

At common law death had two distinct though related consequences, which found their expression in the Latin maxim *actio personalis moritur cum persona*.

First, no-one could claim for any damages suffered as a result of the death of another.⁷ The most obvious losers of this branch of the maxim were the deceased's dependants. Their plight had been long recognized and was finally remedied in England by *Lord Campbell's Act*, the precursor of the fatal-accidents legislation (and of s. 61 of the *Family Law Act, 1986*) which worked itself into the law of the provinces of Canada, including Ontario.

Second, all causes of action against the deceased, as well as any

⁶ Before the repeal by Parliament of these principles in 1982, English courts had limited the extent of double payment by deducting the amount recovered by the claimants through the estate from the amount recovered by the same claimants under the fatal-accidents legislation: see, for example, *Gammell v. Wilson*, *supra*, footnote 3, at p. 582. That device obviously worked only where the beneficiaries under the former were the same as the claimants under the latter.

⁷ No civil action can be maintained at common law for an injury which results in death. The death of a human being, though clearly involving pecuniary loss, is not at common law the ground of an action for damages, and therefore until the passing of *Lord Campbell's Act*, 9-10 Vict. c. 93, there was in *England* no right of action for the recovery of damages in respect of an injury causing death nor until R. Stats. c. 128 in *Ontario*.

per Ritchie C.J.C. in Monahan v. Horn (1882), 7 S.C.R. 409 at pp. 420-1.

that the deceased might have had against others, terminated with his or her death.⁸

This branch of the doctrine was eroded piecemeal over the years. In Upper Canada legislation was first enacted in 1837 to permit the continuation after death of causes of action in respect of damage done to the deceased's real estate committed during their lifetime.⁹ In 1886 the legislation was expanded to include actions "for all torts or injuries to the person or to the real or personal estate of the deceased".¹⁰ The legislation then remained in essentially the same form until the amendment of 1938. Prior to that amendment, the legislation, which by that time had become s. 37(1) of the *Trustee Act*,¹¹ read as follows:

37(1) Except in cases of libel and slander, the executor or administrator of any deceased person may maintain an action for all torts or injuries to the person or to the property of the deceased in the same manner and with the same rights and remedies as the deceased would, if living, have been entitled to do, and the damages when recovered shall form part of the estate of the deceased.

Up until this point in time the Ontario courts had had a firm idea about what they thought the legislature had been trying to accomplish with this legislation. It was, as was remarked by Middleton J, "to prevent the wrongdoer escaping liability by reason of the death of the person injured, and not for the purpose of creating a new right of action".¹² The statute may have abolished the *actio personalis* rule but it had, as he noted, left intact the principle laid down in *Baker v. Bolton*:¹³ in a civil court "the death of a human being could not be complained of as an injury".¹⁴

The Court of Appeal appears to have accepted this approach in *McHugh v. Grand Trunk Co.*¹⁵ In that case the deceased, Patrick McHugh, was killed in the course of employment with the defendant. The administrator of his estate brought an action on behalf of the deceased's mother under the fatal-accidents legislation. However, the mother died shortly thereafter and an order of revivor was made

⁸ *British Electric Ry Co., Ltd. v. Gentile* (1914), 18 D.L.R. 264, [1914] A.C. 1034 at p. 1040, 18 C.R.C. 217, citing *Seward v. the "Vera Cruz"* (1884), 10 App. Cas. 59 at pp. 70-1.

⁹ "Act for the further amendment of the Law, and the better advancement of Justice", S.U.C. 1837, c. 3, s. 2.

¹⁰ *Statute Amendment Act*, S.O. 1886, c. 16, s. 23.

¹¹ R.S.O. 1937, c. 165, as amended.

¹² *England v. Lamb* (1918), 42 O.L.R. 60 at p. 61.

¹³ (1808), 1 Comp. 493, 170 E.R. 1033.

¹⁴ *Ibid.*, Lord Ellenborough, cited by Middleton J. in *England v. Lamb*, *supra*, at p. 62.

¹⁵ (1901), 2 O.L.R. 600, 2 C.R.C. 7 (C.A.).

allowing the administrator to continue the action as administrator of the estate of the mother as well as of the deceased.

The grant of the order appealed. The issue before the Court of Appeal, as characterized by Armour C.J.O.,¹⁶ was whether any cause of action survived to the plaintiff as administrator of the estate of the mother or as administrator of the estate of the deceased. The Court of Appeal held that neither estate had a claim.

Chief Justice Armour held that the fatal-accident's legislation existed only for a specified class of named beneficiaries. Since the administrator of an estate was not specifically mentioned as being within that class, no claim could be maintained on his behalf.¹⁷ Mr. Justice Osler reached the same conclusion.¹⁸

However, Armour C.J.O. also noted in passing that:¹⁹

I do not think that sec. 10 of R.S.O. 1897, ch. 129 [the *Trustee Act*] applies to a cause of action arising under Lord Campbell's Act [the fatal-accidents legislation], for the words therein used, "for all torts or injuries to the person," are capable of reasonable and sensible application *without extending them to include the death of the person.* [Emphasis added.]

Mr. Justice Osler also seemed to have similar doubts. He stated:²⁰

Under the *Trustee Act*, R.S.O. 1897, ch. 129, sec. 10, the administrator of any deceased person may sue for all torts or injuries to the person of his intestate, and recover damages therefor as the latter might have done if living: *Mason v. Peterborough* (1893), 20 O.A.R. 683, and such damages when recovered form part of the personal estate of the deceased. *But the fact that death may have afterwards resulted from the tort forms no element of the damages in such an action.* [Emphasis added.]

Finally, MacLennan J.A. noted that s. 10 of the *Trustee Act* "literally applied" might include a case like the one before the court. If so, he saw a conflict between the *Trustee Act* and the fatal-accidents legislation because in that event they would both cover the same ground. This could not have been the intention of the legislature.²¹ Accordingly, he concluded as follows:²²

I think, therefore, we should hold that Lord Campbell's Act, making express and special provision for a limited class of wrongs, viz., those cases in which death has been caused by the wrongful act, and for those only, those cases should

¹⁶ *Ibid.*, at p. 601.

¹⁷ *Ibid.*, at p. 602.

¹⁸ *Ibid.*, at p. 606.

¹⁹ *Ibid.*, at p. 603.

²⁰ *Ibid.*, at p. 607.

²¹ *Ibid.*, at pp. 609-10.

²² *Ibid.*, at p. 610.

be excepted from the the operation of s. 10 [of the *Trustee Act*], which applies only to torts and injuries unconnected with the death of the deceased: *Seward v. Vera Cruz*, 10 App. Cas. 59. [Emphasis added.]

It seems clear then that the commonly accepted interpretation of the Estate Act's provisions was that they applied only to those damages that the deceased had and could have claimed for as a living plaintiff; and that, accordingly, they left undisturbed the *actio personalis* principle in respect of the estate's claims.

This was not an interpretation restricted to Ontario. British Columbia introduced, in 1934, legislation²³ that was similar to that of Ontario in many respects.²⁴ In *Mah Ming Yu v. Terminal Cartage Ltd.*²⁵ Sloan J.A. remarked:²⁶

It must be clearly understood that the 1934 Act did not create any new right of action. Its purpose was to preserve from abatement whatever rights were vested in the deceased *at the time of his death* [Emphasis added.]

Hence, as the law developed in Ontario, the provisions of the *Trustee Act* and of the *Fatal Accidents Act* worked together as follows. The estate was entitled to recover all damages that the deceased suffered "down to the date of death which the deceased herself could have recovered" had she still been living at the date of trial; all pecuniary loss suffered by the dependants of the deceased from the date of her death forward could be claimed under the *Fatal Accidents Act*.²⁷

The point of emphasizing this interpretation is to highlight the problem that subsequently developed. Obviously, if no new cause of action was created, then no claim for lost future income could be made for what was such a claim but a claim for damages

²³ *Administration Act Amendment Act, 1934*, S.B.C. 1934, c. 2.

²⁴ However, the legislation differed in one fundamental respect from the Ontario Act: it specifically excluded "damages in respect of expectancy of earnings subsequent to the death of the deceased which might have been sustained if the deceased had not died:" see *Administration of Estates Act*, R.S.B.C. 1936, c. 5, s. 71(2). Had Ontario a similar wording the issue in *Balkos* would never have come up (though it is the burden of this comment that the issue should never have come up even with the wording as it stood).

²⁵ [1943] 2 D.L.R. 208, [1943] 1 W.W.R. 623, 58 B.C.R. 470 (C.A.).

²⁶ *Ibid.*, at p. 213 D.L.R.

²⁷ *Bowler v. Blake* (1929), 64 O.L.R. 499 at p. 504, *per* Garrow J. (Emphasis added.) In this case, the mother of the deceased, a young girl of about 18, recovered on behalf of her daughter's estate damages for the pain and suffering, and the lost wages, of her daughter down to the date of her death; and on her own behalf, under the *Fatal Accidents Act*, for her own pecuniary loss stemming from her daughters death. It seems clear from the words emphasized that Garrow J. did not contemplate at all that the daughter's estate could have claimed for the income that the girl would have made had she not died.

consequent on the deceased's death. If he were alive, his claim would have been for damages consequent upon his injuries, not his death. An estate could have argued that its claim was in fact based on the damages consequent upon the injuries of the deceased immediately prior to his or her death, since it was at that moment that the loss, when viewed as a capital loss, accrued. That analysis, however, would have blurred the line between what was in fact two separate actions: one for negligence causing injury, and the other for negligence causing death. The former had long been recognized, the latter never.

The Law in England

In 1934 Parliament enacted the *Law Reform (Miscellaneous Provisions) Act*.²⁸ Section 1 of that Act, in so far as it is relevant, provided as follows:

1(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate . . .

(2) Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person:—

(a) shall not include any exemplary damages;

.

(c) where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included.

The rights conferred by these provisions were “in addition to and not in derogation of” any rights conferred upon dependants by fatal-accidents legislation.²⁹

The source of the confusion was the decision of the Court of Appeal in *Flint v. Lovell*.³⁰ As is often the case with important cases, it had its beginnings in the inventiveness of a plaintiff's counsel desperately trying to defend a damages assessment on appeal.

The facts of the case were these. The plaintiff was a man of 69. He was involved in an accident for which the defendant was found

²⁸ 1934 (U.K.), c. 41.

²⁹ *Ibid.*, s. 1(5).

³⁰ [1934] All E.R. Rep. 200.

liable. The plaintiff was 70 at the time of trial. Medical evidence adduced at trial indicated that in ordinary course he might have been expected to live another eight or nine years but that, as a result of the injuries he sustained in the accident, he was not expected to live longer than a year. The trial judge awarded special damages of £400 and general damages of £4,000. In doing so he expressly found that the plaintiff³¹

. . . has lost the prospect of an enjoyable, vigorous, and happy old age which I am satisfied on the medical testimony might have gone on for a number of years if this unhappy accident had not occurred.

The defendant appealed the quantum. Two of the three judges upheld the assessment, though both had doubts.³² The point that ultimately stayed their hands, and the issue which consumed all three law lords, was whether the plaintiff was entitled to claim damages in respect of "a reasonable certainty that his life had been substantially shortened".³³ The issue which had to be resolved was whether this head of damage, as a separate head,³⁴ was barred by the *actio psonalis* rule or by the rule in *Bolton*.

Plaintiff's counsel, recognizing the threat to his client's judgment posed by these doctrines, argued that the damages were given "not in respect of his death, but in respect of the destruction of the prospect of future amenities of life which he might otherwise have enjoyed".³⁵

Lord Greer agreed that he was still bound by the words of Lord Parker in *Admiralty Com'rs v. Steamship Amerika (Owners)*:³⁶ "if death ensued, damage could be obtained up to the date of death only".³⁷ However, he was of the view that the principle applied only in cases of death. It had no application where the plaintiff was still alive at the date of trial and claimed not simply for the physical hurt he had received but also claimed for the conversion of what might have been eight or nine years' "pleasant life", into "a

³¹ Cited, *ibid.*, at p. 201; the judgment was apparently quite short, a feature commented upon by the Court of Appeal, which suggests that a longer judgment might have been reversed.

³² Lord Justice Greer characterized the award as being "on the generous side" and as being "a border-line case:" *ibid.*, at p. 202; Slessor L.J. would have set the award aside were it not for the question of whether the lost expectancy, as described below, was "a valid reason for giving or increasing damages:" *ibid.*, at p. 203.

³³ *Ibid.*, per Greer L.J. at p. 202.

³⁴ Separate, because all three law lords seemed in agreement that the assessment was, without such an additional element, too high.

³⁵ This is the submission as understood by Slessor L.J.; see *ibid.*, p. 204.

³⁶ [1917] A.C. 38.

³⁷ *Supra*, footnote 30, per Lord Parker, at p. 202.

precarious tenure not likely to exceed twelve months, during which he will continue to suffer severely . . .".³⁸

Lord Slesser was of essentially the same view. He reviewed the historical roots of both principles and concluded that their rationale had no application where the plaintiff was still living. Since the rule was in any event "highly artificial", there was no reason to extend it in such a way as to prevent a living plaintiff from claiming that the shortening of his life should be taken into account in assessing his damages.³⁹

Lord Roche dissented for two reasons. First, the logic of the analysis escaped him. If death could not ground a cause of action, he did not see how it could ground a head of damage. To allow the latter would be allow "to the shortening of life an efficacy which is denied to its extinction, and to death in the future an efficacy which is denied to death on the instant".⁴⁰

Second, there was the extreme difficulty in assessing such a head of damage. In particular, if an award of this amount were to be allowed an older man, much higher awards would have to be awarded younger men. Such awards would eventually involve compensating the plaintiff more than once under the various heads of damage.⁴¹

In the result, an award that was recognized by all three law lords as being, in all likelihood, too high was left undisturbed. The majority of the court justified the assessment on the ground that the plaintiff was to be allowed compensation for the shortening of his life, though how one was to assess the "destruction of the future amenities which otherwise might have been enjoyed" was not discussed. One suspects that the court was influenced by the usual reluctance of appellate courts to interfere with trial judges, especially in cases of damages assessments of plaintiffs where liability has been admitted.⁴² One also suspects that this first step upon what was ultimately to prove a very slippery slope was taken because the judges were dealing with a living plaintiff and were perhaps reluctant to tell the plaintiff that his "fear and trembling" in the face of impending and certain death (for such was the medical evidence) was not itself compensable and did not itself exacerbate the nature and degree of his injuries.

³⁸ *Ibid.*, at p. 202.

³⁹ *Ibid.*, at p. 205.

⁴⁰ *Ibid.*, at p. 206.

⁴¹ *Ibid.*, at pp. 206-7.

⁴² Certainly Greer L.J. expressly adverted to this principle: see *ibid.*, at pp. 201-2.

It was undoubtedly a similar kind of sympathy, though created by different facts, that drove the House of Lords to take the next step in what ultimately proved to be a direction impossible to reverse.

The issue that arose in *Rose v. Ford*⁴³ was whether the right to claim for the loss of expectation of life survived death for the benefit of the estate or whether it was barred by the principle enunciated in *Baker v. Bolton*.⁴⁴ The Court of Appeal in *Rose* (Slesser and Greener L.J.J.) had ruled that no such damages could be recovered *once* the plaintiff died; that is, that the cause of action was not continued by the *Law Reform (Miscellaneous Provisions) Act, 1934*. However, Greer L.J. had been of the view that the right to such damages accrued at the moment of injury and survived, in virtue of the provisions of that Act, to the estate. And it was Greer L.J.'s view that prevailed in the House of Lords in its decision in *Rose v. Ford*.

The facts and issues in the *Rose* case were these. A woman was involved in a motor vehicle accident. She was 23. Her leg was severely injured and two days later it was amputated because gangrene had set in. However, the amputation came too late, and she died two days after the operation. Her father brought action, both as her administrator under the *Law Reform (Miscellaneous Provisions) Act, 1934*, and in his own right under the fatal-accidents legislation. The issue addressed by the court concerned the nature of the cause of action, if any, that was vested in the woman at the time of death and whether any such cause of action survived in virtue of the 1934 Act for the benefit of her estate.⁴⁵

Upon consideration, the House of Lords held that:

- (a) a living person could claim for the loss of expectation of life;
- (b) such a right vested in the deceased during her lifetime and, on death, passed to her estate under s. 1 of the 1934 Act, and
- (c) there was no duplication in law of damages under the 1934 Act and the fatal-accidents legislation.

The stage was now set for an argument that the estate could claim for the lost income that the plaintiff would have made during the "lost years". But before moving to that development, it is worth

⁴³ [1937] 3 All E.R. 359 (H.L.).

⁴⁴ (1808), 1 Camp. 493, 170 E.R. 1033.

⁴⁵ These facts are collected from the headnote.

considering some of the observations of the House of Lords in *Rose v. Ford*⁴⁶ that stood in the way of such an argument.

First, a number of the law lords noted specifically that the Act had *not* created a new cause of action; it had simply preserved a right existing at the moment immediately prior to death.⁴⁷ Hence the focus of the inquiry on any assessment under this head had to be what the deceased, if living, could have claimed.⁴⁸

Second, the claim for lost expectation was different from any claim for lost wages. Indeed, there seemed to be some question in the minds of the law lords as to whether a claim for wages that would otherwise have been earned during the lost years could be maintained at all.

For example, Lord Atkin noted the words of s. 2(c) of the Act, which provided that damages "shall be calculated without reference to any loss or gain to this estate consequent on his death". His lordship raised the question of whether that provision would be sufficient to bar "a calculation of loss or income which the deceased would have received during normal expectation of life", but refrained from expressing any opinion as to the answer.⁴⁹ Lord Roche stated that, in assessing such damages to the estate, no regard should be had to the income that the deceased could have made during the lost years;⁵⁰ noting that it was under *Lord Campbell's Act*, rather than the Act of 1934, that it was proper "to deal with the deceased's future earning power, cut off by death",⁵¹ since if that was done there would be no overlapping in the claims of the estate and of the dependants.

The Amendment to the Trustee Act

The decision of the House of Lords in *Rose v. Ford* was adopted shortly thereafter by the Ontario Court of Appeal in *Major v. Bruer*.⁵² The result was an immediate stir in Ontario. The legislature responded by introducing a bill to amend the *Trustee Act* on March 3, 1938. Ian Strachan, Chief Whip for the then-reigning Liberals,

⁴⁶ *Supra*, footnote 43.

⁴⁷ *Ibid.*; in particular, see the decisions of Lord Russell, at p. 366A and D; Lord Roche at p. 376F; Lord Wright, however, seemed to be of the view that new rights were created, inasmuch as the Act did, after all, change the existing law.

⁴⁸ See Lord Wright, at p. 368F; Lord Roche, at p. 377B.

⁴⁹ *Ibid.*, at p. 363 C.

⁵⁰ See, *ibid.*, at p. 330H and 381A.

⁵¹ *Ibid.*, at p. 381E.

⁵² [1937] 4 D.L.R. 760, [1938] O.R. 1 (C.A.).

said in introducing the bill that the amendment was⁵³ "intended to overcome a decision of the House of Lords. It provides that no damages for loss of expectancy of life of a deceased person may be recovered for his estate."

It was observed that as a result of the decision in *Rose v. Ford*, and its introduction into Ontario, damages for the loss of expectancy of life were being calculated "chiefly upon the difference between the deceased's age at the time of death and 80 years".⁵⁴ The bill was designed to abolish this practice and restore "the old practice of assessing solely for out-of-pocket expenses".⁵⁵

In view of the current debate over the no-fault legislation in Ontario, it is perhaps interesting to note that the bill stirred up considerable controversy "especially by barrister members" in the House.⁵⁶ Its supporters claimed that the English law had promoted "ambulance chasing".⁵⁷ Its detractors, on the other hand, presented it simply as an attempt by the insurance industry, which had had to bear the brunt of the burden imposed by the new head of damages, to limit its exposure.⁵⁸ In particular, D. A. Croll, the former Labour-Welfare Minister, introduced an amendment to the bill so as to exempt from its scope the wife, husband, parent or child of the deceased.⁵⁹ Cross made an "impassioned plea" for the "poor people" of the province,⁶⁰ but his proposed amendment was defeated, and the bill was passed with its original wording.

Cecil A. Wright observed the debates with an ironic eye.⁶¹ He pointed out that Ontario had had legislation similar in effect to the *Law Reform (Miscellaneous Provisions) Act, 1934* for over 50 years and yet, during that time⁶²

... no one had thought that a personal representative could collect damages for the estate of a deceased person based solely on the fact that such person's life had been shortened or that he had been killed by the defendant's tortious

⁵³ Legislative Debates, *The Toronto Globe*, March 3, 1938.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ See the reports of the Legislative Debates in *The Toronto Globe*, April 2 and 8, 1938.

⁵⁹ See Bill No. 55 (20th Legislature, 2nd Sess., 2 Geo. VI, 1938), 2nd reading (April 1, 1938); and see Legislative Debates, *The Toronto Globe*, April 8, 1938.

⁶⁰ See the Legislative Debates, *The Toronto Globe*, April 8, 1938.

⁶¹ His observations and comments are found in his comment "The Abolition of Claims for Shortened Expectation of Life by a Deceased's Estate" (1938), 16 Can. Bar Rev 193.

⁶² *Ibid.*, at p. 193. Some support for this comment can be found in the fact that there is no reference to such a claim in 8 C.E.D. (Ontario), Negligence, paras. 86 and 87, p. 172, which deals with damages arising from death caused by negligence.

conduct. Immediately after the new English legislation and the decision of the House of Lords in *Rose v. Ford* we find all this gone . . . Presumably, therefore, this has been, in theory, the law of Ontario for over fifty year — only no one knew it until in England legislation similar to ours was passed.

The perhaps pointed irony of Cecil Wright's last statement is hard to miss.

In any event, the intent of the legislature, both in the debates and in the wording of the amendment, was clear: no damages were to be allowed "for the death or for the loss of the expectation of life". Shortly after the passage of the amendment the Court of Appeal in *Fewtrell v. Martin Transports Ltd.* barred a claim for "damages for the loss of expectation of life".⁶³ However, since the claim in question had been drafted in words that mirrored the barred claim there was no need to discuss just what effect the amendment had had on the law. There is some suggestion in the decision of Middleton J. that the amendment did not result in the return of the common law position but rather simply barred the new claim.⁶⁴ However, his decision did not deal with the point in any detail; and his comment was at variance with the earlier case-law, discussed above, which had arrived at a contrary conclusion.⁶⁵

From that point on the question seems to have been considered to have been definitively answered. But it was answered in the context of a legal system that had little or no experience with the massive claims for personal injury damages and, in particular, lost future income, that developed in the 1960s and 1970s. Accordingly, neither the legislature nor the courts had any need to address the question of whether the amendment had *also* barred claims for the income that the deceased would have made had he or she not been killed.⁶⁶ However, developments in England in this area made certain that the issue would come to the fore once more.

⁶³ *Fewtrell v. Martin Transports Ltd.*, [1938] 4 D.L.R. 305, [1938] O.R. 674, 48 C.R.C. 415 (C.A.).

⁶⁴ *Ibid.*, pp. 308-9 D.L.R.

⁶⁵ Of course, given the principle of *stare decisis*, and given that the Privy Council was the court of last resort for Ontario law, it is perhaps wrong to suggest that the House of Lords was "wrong" and the Ontario courts "right" in their respective interpretations of the intent and effect of this kind of legislation. Nevertheless, a decision of the House of Lords was not binding upon the Ontario Court of Appeal. And as the subsequent development of the law in England makes clear, it was England rather than Ontario that ultimately made the wrong decision.

⁶⁶ Although that is not to say that such a claim might not have been contemplated. Indeed, it must have, for else why would the B.C. legislature, during the same period, been at pains to bar expressly any claim for "damages in respect of expectancy of earnings subsequent to the death of the deceased which might have been sustained if the deceased

Double Recovery in England

Up until 1978 it had been the law in England that a plaintiff (either in his own right or through his estate) could not claim for the loss of the income that would have been made during the "lost years". That is, he could claim for the lost income that would probably accrue for the period between the trial date and the date of his projected death — but not for the period thereafter.⁶⁷ Hence a severely injured plaintiff could claim for the loss of future income only for the life left in him, not for the life that he would have had had he not been injured. Obviously, a plaintiff killed instantaneously, or very near death at trial, could expect to recover little if any future income. However, in 1978, this rule was overturned by the House of Lords in *Pickett v. British Rail Engineering Ltd.*⁶⁸

The issue in *Pickett* was this: could a plaintiff claim damages in respect of the future earnings that he or she would have made during the "lost years" (i.e., the years of lost expectancy)? The House of Lords answered the question in the affirmative, thereby overturning the earlier decision of the Court of Appeal in *Oliver v. Ashman*,⁶⁹ which had been understood as having ruled out such claims. As is often the case in decisions in this area, the House of Lords was driven to its conclusion by a peculiar and unfortunate lapse in the English legislative framework.

What had happened in *Pickett* was this: the plaintiff was a railway worker who, in virtue of his employment, inhaled asbestos dust and contracted as a result mesothelioma of the lung. He issued a writ in 1975. His action was tried in 1976, and judgment was rendered in his favour. He received an award in respect of general damages, together with an award for lost income from the date of trial to the date of expected death (the assumption was that the plaintiff would survive for only one year from the date of trial). He also received an award for the lost expectation of life.

had not died:" s. 71(2), *Administration of Estates Act*, R.S.B.C. 1936, c. 5. Unless one supposes that lawyers in British Columbia were more inventive than those in Ontario, one may conclude that the fact that the Ontario legislature did not include such words in its amendment is evidence of a view that to bar a claim for damages "for the death" was sufficient to cover such a claim. Indeed, Cecil Wright seemed to be of that view. In his comment, *supra*, footnote 62, he pointed out that "Theoretically the damages [claimed under *Rose v. Ford*] are not for the death. Death merely shows that the deceased's life was shortened. Practically the action is for the death": see footnote 4.

⁶⁷ This was the understood result of the decision of the Court of Appeal in *Oliver v. Ashman*, [1961] 3 All E.R. 323 (C.A.).

⁶⁸ [1979] 1 All E.R. 774 (H.L.)

⁶⁹ *Supra*, footnote 67.

Mr. Pickett appealed this judgment, but before his appeal could be heard in the Court of Appeal he died. His widow continued the action as administratrix of the estate.

Mr. Pickett's death after the judgment placed his wife in an unfortunate position. His cause of action had merged with the judgment. That brought with it the merger of the derivative claims of his dependants under the *Fatal Accidents Act*. Hence with his death his widow was unable to claim for the damages for lost dependency that she would otherwise have been able so to do. Hence the anomaly arose that Mr. Pickett, by commencing an action before his death, left his dependants in a worse position than they would have been in had he died before the judgment was rendered.⁷⁰

It was undoubtedly as a result of this injustice that the House of Lords felt compelled to reverse *Oliver* and allow a claim for the income that would have been made during the "lost years".

The House of Lords recognized that this claim could leave the plaintiff's dependants, who were in the usual course of things his beneficiaries as well, with double recovery for the same loss. This possibility was checked by ruling that whatever the dependants received by way of inheritance (*i.e.*, under the estate's claim) would be set off against their loss under the fatal accidents legislation.⁷¹ As a practical result of this approach, however, the fatal-accidents claim in such cases was almost always subsumed in the estate's claim, since the latter would generally produce a larger award.⁷²

The learned law lords also recognized that in so doing there was a risk of further anomalies. For example, Lord Wildberforce noted that there may be rare cases in which the deceased's beneficiaries under his estate were not the same as his dependants under the Fatal Accidents Acts. In such a case the tortfeasor ran the risk of having to pay damages twice over: once to the beneficiaries of the estate for the income that could have been made during the lost years; and once to the dependants under the *Fatal Accidents Act*. His Lordship shrugged off this "injustice . . . to the wrongdoer," on the

⁷⁰ This explanation of the factual underpinnings of the decision in *Pickett* is found not in that case, but in the later decision of the House of Lords in *Gammell v. Wilson*, [1981] 1 All E.R. 578, *per* Lord Diplock, at pp. 582-3.

⁷¹ *Pickett*, p. 781 *fg*.

⁷² This result stems from the fact that the estate claimed the entire loss of future income, while the fatal-accidents legislation awarded damages only in respect of the period of dependency — which in the case of children, for example, was always less than the period of lost income.

grounds that the occasions in which this might occur were likely to be few and far between:⁷³

... if there is a choice between taking a view of the law which mitigates a clear and recognized injustice of cases of normal occurrence, at the cost of the possibility in fewer cases of excess payments being made, or leaving the law as it is, I think that our duty is clear. We should carry the judicial process of seeking a just principle as far as we can, confident that a wise legislator will correct resultant anomalies.

As is so often the case when judges attempt to right a wrong in an individual case, the effort is often rewarded with future results never intended. In *Pickett* the plaintiff had been a middle-aged family man with a settled pattern of existence that would not likely have changed if he had survived. Hence the judgment in *Pickett* produced a judgment that in amount and nature was not much different than it would have been had his death come before the judgment, and the claim been maintained under the *Fatal Accidents Act* instead. But the House of Lords, as it later realized to its chagrin, had been blinded by the facts of the case and by its desire to do justice to the widow now suddenly deprived of her claim under the *Fatal Accidents Act* by the arcane rigours of the doctrine of merger. For not all injured or deceased plaintiffs matched Mr. Pickett. Many (indeed perhaps the bulk of them) were young, with no established patterns of income or family dependants (other than parents). Before the decision in *Pickett* a claim by the estate of such a plaintiff would be relatively small (since it did not include income earned during the lost years). And the claim of the parents under the *Fatal Accidents Act* would have been similarly small (since they would not likely prove much lost dependency). After *Pickett*, such claims suddenly blossomed and spread across the face of English practice.

In *Gammell v. Wilson*⁷⁴ the House of Lords faced the Frankenstein it had created and shrank from what it saw. The facts were these. There were two cases heard together. In the first, the parents of the deceased brought an action on behalf of his estate and in their own right. The deceased had been killed in a road accident. He was 15 at the time of his death, working as a casual labourer. His estate was awarded £6,656 in respect of his lost future income. In the second case, also brought by the deceased's parents, the deceased was 22, and was killed during the course of his employment. His estate was awarded £19,106. In both the awards in effect became

⁷³ *Pickett, supra*, footnote 68, at p. 781.

⁷⁴ *Supra*, footnote 70.

the parents', since they were the only beneficiaries. The defendants in both cases appealed on the grounds that the awards were too high because, given the relative youth of the deceased, the amount of their future earnings could only be speculative. They also tried to get the House to reconsider its decision in *Pickett* by arguing that the estate could not recover such claims because the cause of action was "a gain to the estate" and the loss of earnings "a loss to the estate", and accordingly barred by s. 1(2)(c) of the 1934 Act, which required that damages were to be "calculated without reference to any loss or gain to [the] estate consequent on [the deceased's] death".

The appeals were dismissed, though not without great heartache on the part of the majority of the House of Lords. Lord Diplock remarked that the law of damages "for death has, in my view, reached a state for which I can see no social, moral or logical justification".⁷⁵ Lord Fraser of Tullybelton found it⁷⁶

... difficult to justify a law whereby the deceased's estate, which may pass to persons or institutions in no way dependent on him for support, can recover damages for loss of earnings, or other income, which he would probably have received during the "lost years". It is particularly difficult to justify the law in cases such as the present, in each of which the deceased was a young man with no established earning capacity or settled pattern of life.

Lord Russell of Killowen and Lord Scarman made similar comments.⁷⁷ But none were able to see their way clear to reversing the law as it had become. They called upon Parliament to come to the law's assistance, and their cry was heard. Shortly after the decision in *Gammell*, the *Administration of Justice Act, 1982* (U.K.) was enacted, s. 4(2) of which amended the *Law Reform (Miscellaneous Provisions) Act, 1934*, to provide that a claim under its provisions could not include "any damages for loss of income in respect of any period after that person's death".

However, no such statutory change was made in Ontario. And it appears that enterprising plaintiffs' counsel were able to put the decision in *Gammell* to good use.⁷⁸ It was used to increase substantially the settlement figures in fatal accident cases of a particular type. In a case where, for example, both deceased were the parents of teenagers, the children could expect to receive

⁷⁵ *Ibid.*, at p. 581.

⁷⁶ *Ibid.*, at p. 588.

⁷⁷ *Ibid.*, at pp. 590 and 595, respectively.

⁷⁸ What follows is based on the author's understanding of the practice, based on conversations with other counsel. He has seen no reported cases in which the practice was reported.

relatively small amounts by way of their lost dependency, since little remained as of the date of death. However, if the estate were allowed to claim for the lost future income that the deceased would have earned had they not been killed, then the children, as the beneficiaries of the parents's estate, stood to gain a significantly larger award. The decision in *Gammell*, for all the handwringing of the House of Lords, certainly supported that conclusion. And claims of this kind were apparently settled in Ontario on that basis, at least by some plaintiff's firms. It was not until *Balkos Estate v. Cook*⁷⁹ that the practice was challenged.

The Case in Balkos

The deceased in *Balkos* was a young doctor. He was killed instantaneously. He left a young wife and two children. An action was commenced on behalf of his estate, under s. 38(1) of the *Trustee Act*, and on behalf of his dependants, under s. 61 of the *Family Law Act, 1986*. In the former his widow, as executrix of the estate, claimed general and special damages of \$5 million. Her claim under this head was expressed as follows in the statement of claim:⁸⁰

"As a result of the aforesaid collision, the . . . Estate of George Balkos, deceased, has suffered special damages on behalf of the estate including but not limited to property damage and funeral expenses. In addition . . . the [estate claims] *the loss of future income and other economic advantages suffered as a result of the death of George Balkos.*" [Emphasis added.]

It was no accident that the claims under the *Family Law Act, 1986*, and the *Trustee Act* should have been so close, since there was a substantial duplication in the two.

One of the defendants brought a motion to strike out the italicized portion of the claim on the grounds that it was barred by the proviso in s. 38(1) of the Act: that "if death results . . . no damages shall be allowed for the death . . ." The application came on before Arbour J, as she then was, who made the order, holding that the impugned claim⁸¹

" . . . is not available in law to the plaintiff by virtue of s. 38(1) of the *Trustee Act*. The claim made on behalf of the estate for loss of future income is, in my view, a claim for damages for the death of the deceased, within the meaning

⁷⁹ (1990), 75 O.R. (2d) 593, 41 O.A.C. 151 (C.A.).

⁸⁰ *Ibid.*, at p. 595 O.R.

⁸¹ *Ibid.*

of that provision in s. 38(1) of the *Trustee Act*, understood in its full historical context.”

The plaintiff appealed. She argued that following *Pickett and Gammell*, a claim for lost future earnings was a head of special damages separate from that of the lost expectation of life; and that a claim for lost earning *capacity*, which was a claim in respect of damage to a capital asset,⁸² vested in Dr. Balkos for the instant prior to his death; and therefore passed to his executrix in virtue of the provisions of the *Trustee Act*. Dr. Balko's death was just evidence that his life expectancy and thus his earning capacity had been damaged: it was not the cause of action, and so not barred by the proviso in s. 38(1).⁸³

Mr. Justice Catzman, who delivered the judgment of the Court of Appeal, did not agree. He reviewed the legislative history of the provision in question. He noted that had the legislature wished in 1938 only to repeal the effect of *Rose v. Ford*, it need only have used the expression “for the loss of the expectation of life”. In his view, the phrase “for the death” was “wider and more general and effected a correspondingly wider and more general object”.⁸⁴ The fact that claims for loss future income or loss of earning capacity might be different from those for loss of expectation of life did not assist the plaintiff: “claims for such losses resulting from and for the period following the death of the deceased are embraced within this wider object and fall within the compass of the expression ‘damages . . . for the death’ in the proviso”.⁸⁵ His Lordship concluded, with respect rightly, that the reasoning in *Pickett and Gammell*:⁸⁶

. . . cannot be called in aid of such claims for, with the 1938 amendment to the section, the law of this province took a different direction from that in

⁸² Following upon the comments of Dickson J in *Andrews v. Grand & Toy Alberta Ltd.* (1978), 83 D.L.R. (3d) 452, [1978] 2 S.C.R. 229 at p. 252, [1978] 1 W.W.R. 577. The question there involved a severely injured but alive plaintiff, and turned on the issue of his life expectancy, for the purpose of determining his future wage loss. His Lordship posed the issue as follows:

The controversial question immediately arises whether the capitalization of future earning capacity should be based on the expected working life span prior to the accident, or the shortened life expectancy. Does one give credit for the “lost years”? When viewed as the loss of a capital asset consisting of income-earning capacity rather than a loss of income, the answer is apparent: it must be the loss of that capacity which existed prior to the accident.

⁸³ The argument is collected from *Balkos*, p. 601 O.R.

⁸⁴ *Ibid.*, p. 601.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

England. It was their law, not ours, that went astray, and it was their law that stood judicially condemned and had to be restored by their Parliament in 1982 to the position where ours had stood consistently since the adoption of the proviso.

And so the appeal was dismissed. The effect of the decision was to reaffirm both the legal and the legislative understanding and intent which had existed in Ontario prior to the decision of the House of Lords in the *Rose* case: death, and damages consequent on death, were not to ground a cause of action for anyone other than those claimants recognized under the fatal-accidents legislation. It made sense to permit the survival of causes of action which the deceased had suffered *while alive*, so as to prevent the wrongdoer from fortuitously escaping the consequences of his or her act. But there was no reason to apply the same approach to damages which were experienced *by the estate alone*, and which by their very nature could never be suffered by the deceased while alive. The law, once known and then forgotten by the profession, had been called to mind once again.

W. Augustus Richardson*

RELIEF FOR A TENANT THAT ASSIGNS OR SUBLETS WITHOUT LEAVE: PINK PANTHER FOOD CORP. v. N.D. McLENNAN LTD.¹

Introduction

The *Pink Panther* decision has brought to a head the issue of the availability of relief from forfeiture for a commercial tenant that has breached a covenant in its lease not to assign or sublet without leave. Despite the actual ruling, the decision represents a recognition by the court of the possibility of such relief notwithstanding s. 20(7) of the *Landlord and Tenant Act* (the "Act"),² which would appear to expressly exclude it.

The relevant portions of s. 20 of the Act provide as follows:

20(1) Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture, whether for non-payment of rent or for other cause, the lessee may, in the lessor's action, if any, or if there is no such action pending, then in an action or summary application to a judge of the Supreme Court brought by himself, apply to the court for relief, and the court may grant such

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¹ (1990), 75 O.R. (2d) 651 (C.A.).

² R.S.O. 1980, c. 232.