Correspondence

Loss of Expectancy of Life

In the May 1953 issue of the Canadian Bar Review (pp. 559-571) there is a discussion by Professors Albert Mayrand and R. Savatier of the judgment rendered by the Quebec Court of Queen's Bench (Appeal Side) in *Green and others* v. *Elmhurst Dairy Limited and others*, [1953] Q.B. 85, reversing the judgment of the Superior Court, which had maintained a partial demurrer made by the defendant.

Professor Mayrand points out that the court of appeal held that the heirs can demand all the damages caused to the person of the *de cujus*, taking into consideration her pain and suffering as well as the shortening of her life. The appellation he gives to this claim is *préjudice moral* (Savatier calls it *pretium doloris*). Mayrand's opinion is that before her death Mrs. Green undoubtedly had a right of action to recover damages for the moral prejudice suffered by her, but, he says, the real issue in the case is whether this claim is transmissible. He agrees with the conclusion arrived at by the court of appeal, and even favours a claim for *solatium doloris*.

Professor Savatier says that the victim of the accident, who had suffered painful wounds, who was incapable of moving about and who was deprived of her hopes of survival, had, in her lifetime, a claim in damages for her moral and physical sufferings. He, however, disagrees with the Quebec court of appeal, being of the opinion that the right of action is not transmissible. Savatier points out that in France the jurisprudence recognizes the right of members of the victim's family to claim *solatium doloris* or, as he puts it, "la réparation du préjudice directement subi par leurs propres sentiments affectifs". It is this claim which Savatier urges should be permitted to near relatives of the victim of a mortal accident caused by the tortious acts of another.

To me it seems that the important feature of the decision in *Green* v. *Elmhurst Dairy Limited* is that, for the first time, both the Superior Court and the Court of Queen's Bench (Appeal Side) impliedly recognized the existence of a cause of action for loss of expectancy of life, which vested in the deceased before her death. That the victim of an accident has a claim for damages (resulting

from the integrity of his life being impaired by the fault of another), such as disability, pain and suffering, and loss of enjoyment of life, is not disputed. Loss of enjoyment of life, however, did not, in Quebec jurisprudence, include a claim for being deprived of the normal expectancy of life or for the shortening of one's life, only for reduced enjoyment of life during the rest of the victim's lifetime, owing to the crippling injuries he had suffered.

The reporter's headnote to the court of appeal judgment refers to the claim of the Green heirs for $3,500, for the shortening or deprivation of the life of their late mother, as one for loss of enjoyment of life. The judgment itself does not use the words "loss of expectation of life" but only "loss of enjoyment of life". Mr. Justice Batshaw of the Superior Court and the defendants apparently also took it for granted that a person is injured when the period during which he had a normal expectation of life is cut short and that the loss is capable of being estimated in money. The only complaint, in the demurrer, was that this item of damages was purely personal to the deceased and that it could not be transmitted to Mrs. Green's legal heirs. With this contention the lower court agreed.

Mr. Justice Casey, a member of the bench of the court of appeal in *Green* v. *Elmhurst Dairy Limited*, remarks as follows (p. 89):

> There is no doubt that the claim for the items of pain and suffering and loss of life expectancy were personal to the victim. It may even be said that they were exclusively attached to the person within the meaning of C.C. 1031 and that the right to claim for these damages could not have been exercised by her creditors. But this does not mean that they were not transmissible.

We find that in England the courts have held that in assessing damages the judge is entitled to take into consideration, as one of the elements, the fact that the victim's normal expectation of life had been materially shortened. The Canadian Bar Review contains several contributions on this problem (1938), 16 Can. Bar Rev. 193; (1940), 18 Can. Bar Rev. 137; and (1941), 19 Can. Bar Rev. 141. References to demands for shortened expectation of life or for loss of expectancy of life, made by the victim himself or by his near relatives, can be found in several decisions rendered since these were written, but only from the point of view of *quantum*. See *Lytwyn* v. *Vincent*, [1945] 1 D.L.R. 32 (Man. C.A.); *Anderson* v. *Chasney*, [1949] 4 D.L.R. 71 (Man. C.A.); *Rodzinski* v. *Modern Dairies Ltd.*, [1949] 4 D.L.R. 328 (Man. K.B.); *Maltais* v. *C.P.R.*, [1950] 2 W.W.R. 145 (Alta.).

We now have a judgment of the highest court in Quebec which takes it for granted that loss of enjoyment of life is not limited to a claim by the victim for his or her lessened enjoyment of life itself, but that the victim may sue in damages for the shortened

expectation of his life or for loss of expectancy of life, a claim which is transmitted to his heirs. This change in Quebec jurisprudence apparently meets with the approval of Mr. Justice Edouard Rinfret of the court of appeal, who was a member of the bench in *Green* v. *Elmhurst Dairy Limited*, and who wrote in that case (p. 98):

> J'ai eu l'avantage de lire les notes de mes collègues les hon. juges St-Jacques et Casey; elles satisfont mon sens de justice et d'équité: la conclusion à laquelle ils en arrivent fait disparaître une anomalie qui m'a toujours frappé, en vertu de laquelle l'auteur d'un délit ou d'un quasi-délit s'en tirait à meilleur compte, si la victime décédait par suite d'un accident au lieu d'être simplement blessée.

It remains to be seen what effect the decision in *Green* v. *Elmhurst Dairy Limited* will have in Quebec on claims made by parents for the loss of a child, and by children for the loss of a parent, as a result of an accident. To date these claims have been maintained only for actual money loss, such as out-of-pocket expenses (medical and funeral disbursements) and for loss of possible future support. These close relatives, if they happen also to be heirs, which usually they will be, may now base a claim (if they do not renounce the succession of the victim), which they inherited from the deceased, as an item of personal injury, on the fact that their *auteur's* life was shortened—a claim which the victim had in his lifetime and which was made more certain by his death.

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Books Received

The mention of a book in the following list does not preclude a detailed review in a later issue.

A Book of Trials. By THE RT. HON. SIR TRAVERS HUMPHREYS. London: William Heinemann Ltd. Toronto: British Book Service (Canada) Ltd. 1953. Pp. xxiv, 243. ($3.50)

Canada and the United Nations: 1952-53. Department of External Affairs, Ottawa, Canada. Conference Series 1953, No. 1. Ottawa: Queen's Printer. 1953. Pp. x, 114. (50 cents)

A History of English Law. By SIR WILLIAM HOLDSWORTH, O.M., K.C., D.C.L., HON. LL.D. Volume XIII. Edited by A. L. GOODHART, K.B.E., K.C., D.C.L., LL.D., and H. G. HANBURY, D.C.L. London: Methuen & Co. Ltd. Toronto: British Book Service (Canada) Ltd. 1952. Pp. xlviii, 803. ($14.00)

The Oxford Book of English Talk. Edited by JAMES SUTHERLAND. Oxford: At the Clarendon Press. Toronto: Oxford University Press. 1953. Pp. xix, 453. ($3.75)

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