Assessment of Damages for Personal Injuries or Death in the Courts of the Common-law Provinces

E. R. E. CARTER*
Toronto

INTRODUCTION

An unhappy consequence of society's increasing mechanization is the rapid growth in the number of actions for personal injuries and death.[1] Many other claims are settled without court action. The result is that each year very large sums of money are paid to settle personal injury and death claims.

From the outset, the extreme difficulty in fixing the amount of damages was recognized and it was felt that the courts would be "very much at sea until by a long course of decisions some settled principles can be established".[2] Today, although the basic principles on which damage awards are made are defined and comparatively easy to state, their application with consistency remains most difficult.[3] Whether the claim arises out of personal injury or death, damage assessment is "one of the most difficult tasks which a judge has to perform because the elements which must be considered in any given case vary so infinitely from other cases that there can be no fixed and unalterable standard for assessing the amounts for those particular elements".[4] The result is that there must always be

*E. R. E. Carter, B. C. L. (U N. B. and Oxon), of Fennell, McLean & Seed, Toronto; of the Bars of New Brunswick and Ontario. The article that follows was awarded the first prize in the fifth Canadian Bar Association Essay Competition.

[1] It is estimated that in England nearly half of all actions coming for trial before the High Court are for damages for personal injuries (1953), 8 Industrial L. Rev. 106.

[2] *Armsworth* v *S. E. Rly. Co* (1847), 11 Jur 758, *per* Parke B. at p. 760.

[3] The assessment cannot be reduced to a "mathematical certainty": *Bothwell* v. *Galloway*, [1950] O.R 377, [1951] O.R 50. See also *Humphreys* v. *City of London*, [1935] O.R. 295, at p. 302.

[4] *Bird* v. *Cocking & Sons Ltd.*, [1951] 2 T.L.R. 1260, *per* Birkett L.J. at p. 1263.

an element of the arbitrary in any award,[5] and the award, in part, must be a matter of estimate and even speculation or conjecture.[6]

Although a precise ascertainment is impossible, the quantum cannot be taken "at random out of the air", but "must bear some practical relation to the realities of life [which] must have a foundation in the evidence".[7] Fixed rules being impractical, the courts have taken an approach to the problem reflecting common sense, experience and subtle guess work,[8] and developed certain general principles, within which there is room for honest difference of opinion,[9] but which have effected a measure of stability in the law. The degree of stability attained is attributable also to the modern tendency to have most awards determined by judges, rather than by juries,[10] and to the natural refinement of principle and partial

[5] *Glasgow Corporation* v. *Kelly*, [1951] 1 T.L.R 345, at p. 348 (Scot.)

[6] *Royal Trust Company* v. *C.P.R.* (1922), 38 T.L.R. 899, at p. 900; *Brennan* v. *Gale*, [1949] N.I. 178, at p. 196; *Marsden* v. *Pollock*, [1953] 1 S.C.R. 66, at p. 71. In many cases "the extent of loss depends upon data which cannot be ascertained with certainty, and must necessarily be matter of estimate, and it may be, partly of conjecture": *G.T.R.* v. *Jennings* (1888), 13 App. Cas. 800, *per* Lord Watson at p. 803 "Necessarily any figure one fixes must be highly speculative; that is a disadvantage which must necessarily accompany every effort to put into money that which is not assessable in money": *Hall* v. *Wilson*, [1939] 4 All E.R. 85, *per* Oliver J. at p. 87. But these difficulties are no reason for not awarding just and reasonable compensation: *St. Lawrence and Ottawa Railway Company* v. *Lett* (1885), 11 S.C.R. 422, at p. 434, *Proctor* v. *Dyck*, [1953] 1 S.C.R. 244.

[7] *Fick* v. *B.C. Electric Rly Co. Ltd.*, [1950] 1 W.W.R. 728, *per* O'Halloran J.A. at p. 731.

[8] *Fair* v. *L.N.W. Ry.* (1869), 21 L.T. 326, at p. 327; *Reich* v. *Northern Taxi Limited*, (1953-54) 10 W.W.R. (N.S.) 301.

[9] *Bateman* v. *County of Middlesex* (1912), 27 O.L.R. 125. Judicial suggestions have been made to realize greater uniformity in personal injury damage awards. Singleton L.J. in *Milliken* v. *Smith*, [1951] W.N. 422, proposes that the assessment be made by three judges of the Queen's Bench Division sitting together, whose decision should be final. In *Reist* v. *Gamble*, [1951] 4 D.L.R. 389, at pp. 401-2, O'Halloran J.A. suggests that the assessment difficulty might be "reduced by legislation providing inter alia (a) that an award should not be disturbed on appeal unless the Appellate Judges are unanimous and (b) the amount of the award should not be increased or decreased on appeal without an explanation in terms of annual money value related to the litigant in a manner that the parties affected may understand why the award has been increased or decreased".

[10] See: Judicature Act, R.S. Nfld., 1952, c. 114, ss. 9-18; Judicature Act, 1919 N.S. Statutes, c. 32; Judicature Act, R.S.P.E.I., 1951, c. 79, s. 32, Judicature Act, R.S.N.B., 1952, c. 114, s. 7; Judicature Act, R.S.O., 1950, c. 190, ss. 44, 55, 56; Queen's Bench Act, R.S.M., 1940, c. 44, ss.43, 65; Queen's Bench Act, R.S.S., 1953, c. 67; Jury Act, R.S.A., 1942, c. 130, s. 33; Supreme Court Act, R.S.B.C., 1948, c. 73, ss. 51, 56, 60; Exchequer Court Act, R.S.C., 1952, c. 98, s. 38. Judges are empowered to use assessors to assist them in determining proper awards; see, for example: Judicature Act, R.S. Nfld. (*supra*), s. 22; Judicature Act, R.S.O. (*supra*), ss. 67, 68, 74; Queen's Bench Act, R.S.M. (*supra*), s. 85; Queen's Bench Act, R.S.S. (*supra*), s. 49; Exchequer Court Act, R.S.C. (*supra*), s. 40; Admiralty Act, R.S.C., 1952, c. 1, s. 30(1). See also *Richard* v. *Gray Coach Lines Limited*, [1950] O.W.N. 136.

establishment of limits of damages that have resulted from the increased litigation.

Assessment of Damages for Personal Injuries

I. *Principles of Assessment*

1. *General*[11]

Damages will only be awarded for such loss as is the natural and probable result of the injury complained of; any other loss is regarded as too remote to be compensated.[12] Difficulty in assessing damages does not render them too remote; it is otherwise, however, when they are so entirely dependent on chance as to be altogether incapable of assessment.[13]

The tribunal must assess the damages without regard to the personal attributes of the plaintiff.[14] Also, the question of the amount of damages that ought to be allowed to an injured person is completely distinct from the question of apportioning fault or negligence under any prevailing negligence legislation.[15]

The plaintiff must sue in one action for all his loss, past, present and future, certain and contingent, and the damages will be assessed once and for all time. No subsequent action may be brought to increase or decrease the award, even though the loss appears greater or less than was anticipated.[16] The only proper award the tribunal can make is in the form of a lump sum.[17]

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[11] The assessment of damages requires the solution of the following three problems in the order stated: (a) Is there a breach of legal duty? (b) In respect of what consequences of an established breach of duty can the injured party recover? (c) How much compensation can the injured party recover for consequences of the breach of legal duty that have already been held to be not too remote? (1952), 15 Mod. L. Rev. 458.

[12] *Burton* v. *Dom. Steel & Coal Corpn* (1940), 14 M.P.R. 328; *Black* v. *C.P.R.*, [1941] 2 W.W.R. 621. See (1949), 65 L Q. Rev. 137; (1950), 13 Mod. L. Rev. 36

[13] Halsbury (2nd ed.) Vol. 23, para. 1024.

[14] It makes no difference whether he be a poor labourer or a highly paid professional man: *The Liesbosch*, [1933] A.C. 449. See also Gahan, Law of Damages (1936) p. 25; referred to later in this essay as "Gahan". The same principle applies to the defendant.

[15] *Bedford and Stanton* v. *Crapper*, [1949] O.W.N. 266; 5 C E.D. 338. Of course, the final amount received by the plaintiff is directly affected by any contributory negligence for which he is held responsible: *infra*, p. 751.

[16] Mayne on Damages (11th ed.) p. 138, referred to later in this essay as "Mayne"; 5 C.E.D. 334, 364; Halsbury, Vol. 10, para. 113; *Phillips* v. *L. & S. W. Ry.* (1879), 4 Q.B.D. 406, (1880), 5 Q.B.D. 78; *Fine* v. *T.T.C.*, [1945] O.W.N. 901; *Edmonds* v. *Cunard White Star Co.*, [1951] 2 Ll.L.R. 185, at p. 187.

[17] An award is improper that provides for periodical payments such as an annuity: *Fournier* v. *C.N.R.*, [1927] A.C. 167. Gahan, p. 1, points out that where earning capacity of the injured is affected some U.S. authorities award a sum to purchase an annuity equal to the annual loss during the period of incapacity and in the calculation life tables are used.

Damages are usually divided into special and general. Special damages "are exceptional in their character and must be claimed specially and proved strictly";[18] their calculation involves "but a rudimentary exercise in arithmetic"[19] because they represent the plaintiff's actual financial loss from the accident to the hearing of the action. General damages, on the other hand, do not permit of precise calculation, because they represent "all damage which up to the time of the hearing has not yet crystallized in actual disbursement",[20] and are meant to compensate the plaintiff for his injuries and future financial loss.

2. *Compensation cannot be "perfect" but must be "fair"*

The inherent difficulty in assessing damages with certainty is no ground for awarding only nominal damages.[21] The general rule is that "in calculating damages you are to consider what is the pecuniary sum which will make good to the sufferer, so far as money can do so, the loss which he has suffered as the natural result of the wrong done to him".[22] Money will not constitute *restitutio in integrum* in fact, because there cannot be "complete" or "perfect" compensation for physical or mental hurt.[23] But the award must be fair, just, commensurate with the injury sustained and sufficiently adequate to put the injured party, so far as money can place him, in the same position as if he had not been wronged, but not in a better one.[24]

This, as Gahan explains, is improper because such tables comprise an average of many cases, whereas it is clear from *Rowley* v. *L.N.W. Ry.* (1873), L R 8 Ex. 221, that the estimate of probabilities in any case must come only from a regard of the facts in that particular case.

[18] *Stroms Bruks etc.* v. *Hutchison*, [1905] A.C. 515, at pp. 525-6; *The Susquehanna*, [1926] A.C. 655, at pp. 661-2. See generally: Halsbury, Vol. 10, paras 103, 105, Vol. 23, para. 1015; 5 C.E.D. 361.

[19] (1953), 8 Industrial L Rev. 106.

[20] *Shearman* v. *Folland*, [1950] 2 K.B. 43, *per* Asquith L.J at p. 51. They "are such as the law will presume to be the direct, natural or probable consequence of the act complained of": *Stroms Bruks etc.* v. *Hutchison, supra*, footnote 18; *The Susquehanna, supra*, footnote 18; *Stebbe* v. *Laird*, [1937] 1 W.W.R. 173, at p 184; *Karas* v *Rowlett*, [1944] S.C.R 1. *per* Rand J. at p. 10: "The expression is at times used somewhat loosely to signify elements of special damages which, in a sense, are at large, and in the ascertainment of which the limits of estimation are indefinite. Such for instance, is the amount allowable for pain and suffering in the case of personal injury through negligence. These damages are actual but are lacking in precise measures or standards of determination "

[21] Halsbury, Vol 10, para 111.

[22] *The S. S. Valeria*, [1922] 2 A.C. 242, *per* Lord Dunedin at p. 248

[23] *Phillips* v *L & S. W. Ry., supra*, footnote 16; *Rushton* v. *National Coal Board*, [1953] 1 W.L.R. 292.

[24] *Harwood* v. *Wyken Colliery Co.*, [1913] 2 K B 158, at p. 170; *Owen* v. *Sykes*, [1936] 1 K.B. 192; *Roach* v. *Yates*, [1938] 1 K B 256; *Fine* v. *T T.C., supra*, foonote 16; *Aherne* v. *Kahtel*, [1945] 1 W.W.R 331, 3 W.W R 524; *Gillingham & Gillingham* v. *Ware's Taxi Ltd (No 2)*, [1949] 2

3. *Exceptions to the normal measure of damages*

The normal quantum of damages may be reduced or increased. An agreement between the parties[25] or a statute[26] may limit the damages recoverable. The conduct of the plaintiff and the wrongdoer may also affect the award: a provoking insult reduces the damages in an assault action,[27] and exemplary damages follow violent, malicious, oppressive or recklessly indifferent conduct showing a contempt of the plaintiff's right or disregarding every accepted principle of conduct.[28]

W.W.R. 1135; *Edmonds* v. *Cunard White Star Co.*, *supra*, footnote 16. "I must not attempt to give perfect compensation but only fair compensation. I must not give too much and I must not give too little": Williams C.J.K.B. in *Gray* v. *LaFleche*, [1950] 1 D.L.R. 337, at p. 345. See generally (1953), 70 S. Afr. L.J 77, and examples of awards in (1953), 103 L.J. 227, 229, 415, 751.

[25] This determines the injured's rights and any ambiguity is construed in his favour. *de Koning* v. *Boychuk*, [1951] 3 D.L R. 624: the essentials of an agreement must be present or the limitation on damages will be invalid. The cases considered *infra*, p. 735, in connection with fatal-accident legislation are applicable here. See· *Ludditt* v. *Ginger Coote Airways Limited*, [1942] S.C.R. 406; (1941), 19 Can. Bar Rev 576; (1947), 25 Can. Bar Rev. 394

[26] See generally (1953), 117 Justice of the Peace 314. Examples of such legislation are: (a) workmen's compensation acts prevent the courts assessing damages in defined circumstances; (b) the Canada Shipping Act, R.S.C , 1952, c. 29, provides (s. 657) that the owners of a ship, where without their actual fault or privity any loss of life or personal injury is caused to any person being carried in such ship or by reason of the improper navigation of the ship to any person being carried in any other vessel, are not liable in damages in respect of loss of life or personal injury either alone or together with loss or damage to vessels, goods, merchandise, or other things, to an aggregate amount exceeding $72.97 for each ton of their ship's tonnage (see also ss 649, 658); (c) the Railway Act, R.S.C., 1952, c. 234, permits the limiting of the carrier's liability towards passengers provided the terms of such limitation are approved by the Board of Transport Commissioners; (d) the Carriage by Air Act, R.S.C , 1952, c. 45, relates to international air traffic, and a carrier's liability for each passenger in the event of injury or death, provided he is not guilty of wilful misconduct, is limited to 125,000 francs, although by special contract the carrier and the passenger may agree to a higher limit of liability (see (1948), 26 Can. Bar Rev. 861; (1953), 117 Justice of the Peace 314; *Horaben* v. *British Airways Corporation*, [1952] 2 All E R. 1016); (e) the Aeronautics Act, R S.C., 1952, c. 2, s. 5, authorizes regulations stipulating the compensation to be paid for death or injury resulting directly from a flight undertaken in the course of duty in the public service of Canada of any person employed in the public service of Canada or employed under the direction of any department of the public service of Canada

[27] *Evans* v *Bradburn*, [1915] 9 W.W R. 281; *Slater* v. *Watts* (1911), 16 B C R. 36; *Murphy* v. *Dundas* (1905), 38 N.B.R. 563; *Greggs* v *Southside Hotel Limited*, [1946] O W.N 576; *Singer* v. *Charesh*, [1946] 3 W.W.R 174.

[28] Such damages are of a preventative nature, designed to restrain the wrongdoer and make it plain that the act is seriously regarded and as such cannot be done with impunity See generally: *Toronto Hockey Club Ltd.* v. *Arena Gardens*, [1926] 4 D.L.R. 1; *Whitehouse* v. *National Biscuit etc.*, [1943] 2 D.L.R. 540; *Loudon* v. *Ryder*, [1953] 2 W.L.R. 537; Halsbury, Vol. 10, paras. 108, 171; Mayne, p. 41; 5 C.E.D. 77-80. Exemplary

Furthermore, every claimant has the duty to mitigate damages and loss attributable to a breach of the duty is not recoverable.[29] This requires him to take all reasonable steps to mitigate his loss but not to injure himself, his character, his business or his property. He does not act at his peril and, if he acts reasonably, he can recover his increased loss and those expenses incurred in performing his duty.[30] What is reasonable is a question of fact and the burden of proof rests on the defendant.[31] Thus, if a plaintiff refused a reasonable operation his damages will be reduced because the continuance of the injury the operation would cure is due to his refusal and not to the original cause.[32]

The claimant need not act with perfect knowledge and ideal wisdom and, if what is done reasonably and carefully, and not wantonly, needlessly or carelessly, augments the injuries, it may be regarded as a natural consequence of the accident.[33] Accordingly, if a competent doctor is employed, the results of the treatment, even though unsuccessful because of an error of judgment, will be a proper head of damages.[34] Also, if an injured person incurs expense by reasonably following competent advice and it later develops that the treatment undertaken was unnecessary, he may recover the expenses incurred.[35]

4. *Classification of injuries*[36]

Damage awards indicate two recent tendencies, the realization

damages do not follow an extreme lack of skill accompanied by casualness but not indifference: *Gray* v. *LaFleche*, *supra*, footnote 24

[29] *A.-G.* v. *Valle Joncs*, [1935] 2 K.B. 209, at p. 219; Gahan, p. 112; Charlesworth, The Law of Negligence (2nd ed.), referred to later in this essay as "Charlesworth"; 5 C.E.D. 395; Halsbury, Vol. 10, para. 117.

[30] 5 C.E.D. 395. See *Hales* v. *L. N. W. Ry.* (1863), 4 B. & S 66. Cf. *Carliss* v. *Bolton*, [1939] O.R. 201.

[31] Halsbury, Vol. 10, para. 143. It is not reasonable for the Crown to mitigate its loss occasioned by the injury of its servant by discharging the latter immediately: *A.-G.* v. *Valle Jones*, *supra*, footnote 29. See also *Waterhouse* v. *H. Lange Bell & Co.*, [1952] 1 Ll. L. R. 140, at p. 143

[32] *Taylor* v. *Addems*, [1932] 1 W.W.R. 505.

[33] *Jones* v. *Watney, Combe, Reid & Co.* (1912), 28 T.L.R. 399 See Mayne, p 485: Halsbury, Vol 10, paras. 139, 144.

[34] Gahan, p. 141; *Mercer* v *Gray*, [1941] O.R 127, at p. 130 *Novus actus interveniens* where the treatment is so negligent as to be actionable, and the plaintiff then has his remedy against the wrongdoer: *Black* v. *Martin*, [1951] 4 D.L.R. 121. In *Clippens Oil Co.*, [1907] S.C. 9 (H.L.), Lord Collins said at p. 14: "The wrongdoer is not entitled to criticize the course honestly taken by the injured person on the advice of his experts, even though it should appear by the light of after events that another course might have saved loss. The loss he has to pay for is that which has actually followed under such circumstances upon his wrong."

[35] *Reubens* v. *Walker*, [1946] S.C. 215: the result might be different if the advice acted on was from a quack or if, considering all the advice received, no reasonable person would have taken the course followed

[36] See (1953), 103 L.J. 227.

that grave injuries should be adequately compensated has tended to increase assessments, and damages for minor injuries have been limited severely to bring them more in line with those for grave injuries.[37] Consequently, a three-fold classification of injuries is appearing: the "total wreck",[38] "partial wreck"[39] and miscellaneous[40] cases. Within these categories the courts are developing a normal range of awards, but circumstances peculiar to each case[41] naturally continue to introduce differences in the quanta awarded.

5. *Previous awards a guide—depreciation in the value of money*

Previous awards "do form some guide to the kind of figure which is appropriate to the facts of any particular case, it being for the Judge, or for the Appellate Court if they are reviewing the matter, to consider the special facts in each case".[42] Substantial differences in awards on similar facts frequently occurred when juries assessed the damages. To-day, with judges as the principal assessors, these discrepancies have decreased and there is a concerted effort, by a comparison of decided cases, to eradicate them. Consideration of similar cases is important for the future, since it would be inadvisable to permit an over-generous estimate of damages to be regarded as an example of the kind of damages that ought to be given.[43] This approach does not establish "a doctrine of precedent for damages [because] the Court does not look for precedents but for a formal guide to the current range of damage".[44]

Reference to similar cases, to be of value, must reflect any variation in the purchasing power of money. During the recent in-

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[37] 103 L.J. 415.

[38] A complete incapacity to work and no enjoyment of life as a result of severe paralysis or brain injury or multiple injuries which completely cripple: *Rowley* v. *Thorsteinson*, [1947] 1 W.W.R. 767; *Demko* v. *Sinnott*, [1949] 2 W.W.R. 868; *Norris* v. *Christmas*, [1949] 2 W.W R. 1104; *Mahoney* v. *W. H. Cockerline & Co.*, [1951] 2 Ll. L. R. 76.

[39] Although the whole person is affected, there is still a limited ability to work and enjoy life: *Martin* v. *Reitlo and Flin Flon Dairy Ltd.*, [1953] 9 W.W.R. 308

[40] Loss of limbs, eyes and various forms of minor injuries are involved here.

[41] The earning capacity of the injured is a fundamental consideration. Differences in age or sex play little part where those concerned are young, in the prime of life or middle-aged. After the age of fifty increasing age reduces awards.

[42] *Bird* v. *Cocking*, *supra*, footnote 4, at p. 1263; *Rushton* v. *National Coal Board*, *supra*, footnote 23, at p. 296.

[43] *Owen* v. *Sykes supra*, footnote 24, at p. 198; *Rushton* v. *National Coal Board*, *supra*, footnote 23.

[44] (1953), 103 L.J. 227: "It may be predicted with some certainty that Judges will not allow figures to be quoted at them higgledy-piggledy and without all necessary details". See (1948), 92 Sol.J. 464, for a discussion of how far current practice in awarding damages establishes a tariff.

flationary period the courts have considered this factor;[45] only an approximation can be made, however, because money values may fluctuate again.[46]

II. *Elements of Damage*[47]

The elements of damage normally considered may be divided into two main classes:[48] financial loss and personal loss. Each has various facets, some or all of which, depending on the circumstances, must be considered in each case of personal injuries.

1. *Financial loss*

Financial loss lends itself to fairly exact calculation, because those portions which cannot be established by clear evidence hinge on probabilities that permit relatively accurate assessment. Damages to reimburse such loss may involve:

Disbursements. The plaintiff is entitled to special damages for expenses reasonably incurred because of his injuries.[49] Generally, the disbursements concern medical and hospital expenses,[50] but reasonable non-professional nursing expenses are recoverable if the services were not rendered gratuitously and have been paid for or there is a legal obligation to pay for them.[51]

Future expenses. The cost of future operations,[52] medical and

[45] For example in *Donoghue* v. *Magee and Barron*, [1949] 1 W.W.R. 70, and *Rodzinski* v. *Modern Dairies Limited*, [1949] 2 W.W.R. 459, the amounts that would have been allowed in 1941 for similar injuries were increased by 33⅓% and 20 to 25%, respectively. See also p. 736, *infra*, and the cases cited there in awards made on death.

[46] *Gold* v. *Essex C.C.*, [1942] 2 K.B. 293, at p. 313; *Rodzinski* v. *Modern Dairies Limited*, *supra*, footnote 45, at p. 470: this is particularly so with the modern exercise of controls and subsidies.

[47] Comprehensive summaries of the normal elements considered are found in: *Phillips* v. *L & S. W. Ry Co*, *supra*, footnote 16; *Morgan* v. *City of Edmonton*, [1917] 2 W.W.R. 591; *Taylor* v. *Gray* (1937), 11 M.P.R. 538, *Battagin* v *Bird*, [1937] 1 W.W.R. 719; *Heaps* v. *Perrite Ltd.*, [1937] 2 All E.R. 60; *Martin* v *Deutch*, [1944] O.R. 186; *Aherne* v. *Kaliel*, *supra*, footnote 24; *Fine* v. *T.T.C.*, *supra*, footnote 16; *Richard* v. *Gray Coach Lines Limited*, *supra*, footnote 10.

[48] In *Jones* v *Livov Quarries Ltd*, [1952] 1 T.L.R. 1377, general damages were divided into two more limited components loss of earning capacity and loss of amenities.

[49] *Battagin* v. *Bird*, *supra*, footnote 47. *Bendel* v. *Danylchuk*, (1952) 6 W.W.R. (N.S.) 625: the expenses of and incidental to a visit from Regina to the Mayo Clinic in Rochester, U.S.A., were allowed, although the previous diagnosis was only confirmed there, since the trip was reasonable in the circumstances.

[50] *Clark* v. *Atherton*, [1939] 2 W.W.R. 593. these will be allowed in full except where a portion is attributable to a previous condition unconnected with the accident.

[51] *Carroll* v. *Barr*, [1924] 1 W.W.R. 1249: a unilateral intention to pay is insufficient. *Bowers* v. *I. Hollinger & Co. Limited*, [1946] O.R. 526. The value of gratuitous services is not recoverable: *Greenaway* v. *C.P.R.*, [1925] 1 W.W.R. 667.

[52] *Edwards* v. *Sydney* (1918), 52 N.S.R. 116; *Martini* v. *Hamilton Street Rly. Co.*, [1945] O.W.N. 207, 506.

nursing care,[53] an invalid diet, the employment of extra household or other assistance[54] and treatment to effect a cure or to lessen the amount of the injury[55] are recoverable, but the portion that will be borne by prevailing social legislation must be taken into account.[56]

Accumulated sick leave. Sick leave accumulated from employment and lost because of injuries is a proper subject for damages, even where the claimant is paid his wages for the time he is absent from work, because the allowance of sick leave is a part of the contract of employment and in effect a kind of insurance against illness.[57] It is questionable whether full compensation will be given for the time lost.[58]

Time lost up to the trial. The plaintiff may recover damages for wages or profits lost up to the time of trial because of the injuries,[59] but opinion varies whether such damages are special or an element in general damages. If the latter, they are calculated taking into account the contingencies that might have reduced his working time had he not in fact been injured,[60] but if special they result from multiplying the wage earned by the number of working days lost.[61] The court must consider whether the plaintiff could have

[53] *Aherne* v. *Kaliel, supra,* footnote 24; *Sheasgreen* v. *Morgan,* [1951] 3 W.W.R. 677.

[54] *Lindstedt* v. *Wimborne Steamship Co.* (1949), 83 Ll.L.R. 19.

[55] *Heaps* v. *Perrite Ltd., supra,* footnote 47; *Roach* v. *Yates, supra,* footnote 24; *Rodzinski* v. *Modern Dairies Limited, supra,* footnote 45; *Bird* v. *Cocking, supra,* footnote 4.

[56] *Shearman* v. *Folland, supra,* footnote 20.

[57] *Tubb* v. *Lief and Gordon,* [1932] 3 W.W.R. 245; Cf. *MacDonald* v. *Goderich,* [1948] 4 D.L.R. 579, [1949] 3 D.L.R. 788.

[58] In *Beacock and Beacock* v. *Lowes Transport and Hutchison,* [1952] O.W.N. 141, Chevrier J. reimbursed the plaintiff for all his lost sick-days at his daily rate of pay at the time of the accident (see also *Melling* v. *Morening,* [1953] O.W.N 193), but in *Cossitt* v. *C.P.R.* (1949), reported in [1952] O.W.N. 145, Barlow J. considered all the uncertainties and, although a month's sick leave was valued at $160, he allowed only $300 for six months where the plaintiff had sixteen years to retirement. This, it is submitted, is the proper approach.

[59] *Battagin* v. *Bird, supra,* footnote 47; *Martin* v. *Deutch, supra,* footnote 47; *Johnston* v. *Gibson,* (1953) 8 W.W R. (N.S) 403. See also *Hawkes* v. *Torquay Corpn*, [1938] 4 All E.R. 16.

[60] Advocates of this view contend that such damages are incapable of accurate proof and exact assessment because, whether the time be long or short, there is no certainty that, apart from the accident in question, the plaintiff would have been able to work, since illness or other causes might have incapacitated him or his employment might have terminated: *Trache* v. *C N.R*, [1929] 2 D.L.R. 321; *Taylor* v. *Addems, supra,* footnote 32; *Tubb* v. *Lief and Gordon, supra,* footnote 57; *Battagin* v. *Bird, supra,* footnote 47; *Kulyk* v *Rohachuk,* [1946] 2 W.W.R. 47; *Douglas* v. *Isenor* (1951), 29 M.P.R. 281; *Maltby* v. *Island Freight Service Limited,* [1949] 2 W.W.R. 715; *Weatherbee* v. *Brown* (1953), 31 M.P.R. 365.

[61] Gibb, Collisions on Land (4th ed.) p. 164; Gahan, p. 109; 5 C.E.D. 361; *Staats* v. *C.P.R* (1914), 17 D.L R. 309; *Brown* v. *C.P.R.,* [1938] O W.N. 4; *Pitt* v *Jackson,* [1939] 1 All E.R. 129; *Wersch* v. *Wersch,* [1945] 1 W W R 609; *MacIvor* v. *R,* [1948] 3 D.L.R. 509; *Dennis* v. *L.P.T B*,

minimized his loss by finding other employment that would be good for him and reasonable in the circumstances. If it was available, he must have done his best to procure it and if he has not, his claim will be reduced.[62] Similarly, a plaintiff who owns a business will not be allowed his full loss of profits from the business if he could have had others conduct it in his absence.[63] Unemployment pay received by a plaintiff during his incapacity must be deducted from the amount claimed.[64]

Probable future earnings. The impairment of the plaintiff's future financial condition because of his inability to attend to his regular work must be compensated[65] by the sum, which can only be arrived at by a broad estimate,[66] that he would have earned during what but for the accident would have been his normal life, subject to deductions for all contingencies.[67] Whether the injury is of a permanent or temporary nature and its effect on the plaintiff's ability to do the work he is trained for is important.[68] To determine a plaintiff's damages for lost earning capacity where he has been permanently incapacitated: (i) estimate what the plaintiff's future annual earnings would have amounted to in the ordinary

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[1948] 1 All E.R. 779; *Frederick* v. *Northern Taxi Limited* (1949), 57 Man. R 465, *McBride* v. *Ary Shipping Ltd.* (1949), 82 Ll.L.R. 715; *Pash* v. *Registrar of Motor Vehicles*, [1949] 1 W.W.R 235, 304; *Lindstedt* v. *Wimborne Steamship Co*, *supra*, footnote 54; *Rodzinski* v. *Modern Dairies Limited*, *supra*, footnote 45; *Johnston* v. *Gibson*, *supra*, footnote 59; *Driscoll* v *Breslin*, [1954] O R. 62. *Stevens* v *Biddington* (1943), 17 M.P.R. 53, "when loss of income up to the date of the trial is susceptible of reasonably accurate proof (though not necessarily with absolute mathematical exactness) it is properly claimed as special damage".

[62] *Lindstedt* v. *Wimborne Steamship Co.*, *supra*, footnote 54; *Waterhouse* v. *H. Lange Bell & Co.*, *supra*, footnote 31.

[63] *Black* v. *C P R*, *supra*, footnote 12.

[64] *Lindstedt* v *Wimborne Steamship Co*, *supra*, footnote 54, at p. 21

[65] *McGarry* v *Canada West Coal Co.* (1909), 11 W.L.R. 597; *Staats* v *C.P.R*, *supra*, footnote 61; *Battagin* v. *Bird*, *supra*, footnote 47; *Martin* v *Deutch*, *supra*, footnote 47; *Aherne* v *Kaliel*, *supra*, footnote 24; *Hrechkosy* v *Nelson*, [1949] 2 W W R 1098; *Johnston* v. *Gibson*, *supra*, footnote 59

[66] *Payne* v. *Railway Executive*, [1951] 1 T L.R. 921, at p. 924. But of all the elements on which an award of general damages for injuries is based, this one is capable of more precise assessment than others: *Bird* v. *Cocking*, *supra*, footnote 4, at p 1263 5 C.E.D. 364: "No exact rule can determine the prospective loss which a man may suffer in the pursuit of his profession. Such a calculation may vary from time to time and from place to place. Where occupation is difficult to obtain the damages may be higher than where there is a great demand for such services as the injured man can offer. Local conditions affect and qualify the amount which the Courts would regard as reasonable as recompense for loss in business or in profession."

[67] *Roach* v *Yates*, *supra*, footnote 24, at p 264. See also *Wright* v *Toronto R. W. Co.* (1910), 20 O.L.R. 498.

[68] *Phillips* v. *L. & S. W. Ry.*, *supra*, footnote 16; *Aherne* v. *Kaliel*, *supra*, footnote 24; *Girling* v. *Howden*, [1949] 3 D.L R. 622.

course, allowing for the possibility of an increase or a reduction,[69] (ii) multiply the amount of the annual earnings by the years of purchase,[70] and (iii) discount the sum so obtained for future contingencies[71] and the immediate receipt of a capital sum.[72] Where the incapacity is temporary, the calculation is fundamentally the same except that the estimated period and the degree of incapacity are of first importance.[73]

2. *Personal loss*

Various aspects of damage to the person may result from an injury. At times, the court will assess each separately, but the usual

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[69] *Fair* v. *L.N.W.Ry.*, *supra*, footnote 8; *Payne* v. *Railway Executive*, *supra*, footnote 66.

[70] These constitute that period during which the plaintiff would in all probability have continued to earn had he not been injured. The number of years of purchase varies with the circumstances and is dependent in part on the plaintiff's age, the nature of his occupation, his general health and manner of living Examples of awards of years of purchase are: *Billingham* v. *Hughes*, [1949] 1 K.B. 643: a doctor-radiologist aged 51, 15 years purchase; *Ferguson* v. *Durastic and Ben Line Steamers*, [1951] 1 Ll.L.R. 324: a ship labourer aged 30, 10 years purchase; *Johnston* v. *Gibson*, *supra*, footnote 59: a master painter aged 54, 8 years purchase; *Liffen* v. *Watson*, [1940] 1 K B. 556: a domestic servant under 30, 20 years purchase; *Lindstedt* v. *Wimborne*, *supra*, footnote 54: a ship's carpenter aged 52, 10 years purchase; *MacDonald* v. *Welsh* (1951), 29 M.P.R. 253: a labourer aged 76, 3 years purchase. All judgments do not disclose a conscious application of this principle, but it is an essential step in the determination of a proper assessment. *Harris* v. *Bright's Asphalt Contractors Ld.*, [1953] 1 W.L.R 341: no sum should be allowed for wages lost between the anticipated date of the plaintiff's death due to shortened expectation of life and the date to which he would normally have lived but for the accident.

[71] Since even the uninjured face the possibility of reduced earning capacity from increasing age, accident, sickness, death, failure in business, inability to work, early retirement or wage fluctuations, some allowance must be made for such uncertainties (In *Billingham* v. *Hughes*, *supra*, footnote 70, the trial judge deducted for contingencies one-third of the sum attained by multiplying annual savings by years of purchase, but the Court of Appeal increased this to one-half.) The court should act "on a reasonable average ordinary presumption of life"; the basis of calculation is not that as to every possibility "we will assume the worst thing for the plaintiff", because in average life everything does not go for the worst, or "we will assume any other thing and forget the best thing for the defendant or the best thing for the plaintiff": *Elston* v. *Southern Ry. Co.* (1933), 46 Ll.L.R. 71, at p. 78.

[72] *Billingham* v *Hughes*, *supra*, footnote 70; *Ferguson* v. *Durastic*, *supra*, footnote 70. But in conditions of continuing inflation the advantage of receiving future earnings all at once is somewhat counterbalanced.

[73] Allowance must be made for earnings the plaintiff may receive from another occupation for which he is qualified: *Billingham* v. *Hughes*, *supra*, footnote 70, but if his earnings stem from a position made available by his employer's charity this instability and his probable difficulty in finding other work must be considered: *McBride* v. *Ary Shipping Ltd.*, *supra*, footnote 61. The nature of an incapacity varies with the individual: a one-legged labourer may become "an odd lot in the labour market" and have to employ himself or live upon what he has got: *Lindstedt* v. *Wimborne Steamship Co.*, *supra*, footnote 54.

practice is to consider them as a whole and arrive at a single broad estimate. In any particular case certain elements will dominate. Those which normally will be relevant may be considered under the following general headings:

Nature of the injury sustained and its effect on the health of the injured because of its degree and duration. The injury itself,[74] whether it be the loss, impairment or malformation of a limb, disfigurement, shock[75] or traumatic neurosis following the shock,[76] must be compensated even though the claimant's earning capacity is not affected, because a man is entitled to his limbs as nature gave them to him and with their natural strength.[77] The wrongdoer will be liable for damage aggravated by physical delicacy or weakness.[78] The effect of the injury on the health of the sufferer, according to its degree and probable duration as likely to be temporary or permanent,[79] affects the quantum of damages, but if at the time of the injury the plaintiff's health was such that eventually he would have attained the condition that he reached because of the injury, this must be taken into account and the accident not treated as the sole cause of his condition.[80]

Pain and suffering. Although their feasibility has been questioned,[81] damages are awarded for past, present and prospective

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[74] *Fair* v. *L.N.W.Ry.*, *supra*, footnote 8; *Martin* v. *Deutch*, *supra*, footnote 47; *Aherne* v. *Kaliel*, *supra*, footnote 24 Pre-natal injuries are relevant: *Montreal Tramways* v. *Leveille*, [1933] 4 D L R. 337; Salmond on Torts (11th ed.) p. 387, referred to later in this essay as "Salmond"; (1942), 8 Camb. L.J. 76; (1939), 17 Can. Bar Rev 611.

[75] "It is now well recognized that an action will lie for injury by shock sustained through the medium of the eye or the ear without direct contact": *Bourhill* v. *Young*, [1943] A.C. 92, at p. 103, *Brown* v. *John Watson Ltd.*, [1915] A C.1; *Hogan* v. *City of Regina*, [1924] 2 W.W.R. 307; *Toronto Rly. Co.* v *Toms* (1911), 44 S.C.R. 268; *Strain* v. *T.T.C.*, [1945] O.W.N 870. Shock here "does not mean agony or distress of mind, but means a visible and probable illness or physical damage . . . although there was no actual impact upon the body of the plaintiff". Charlesworth, p. 564. See also *Loudon* v. *Ryder*, *supra*, footnote 28; (1939), 17 Can. Bar Rev. 56, 541; (1942), 20 Can. Bar Rev. 470, 794; (1943), 21 Can. Bar Rev 65, 417.

[76] *Ferguson* v. *Durastic etc.*, *supra*, footnote 70.

[77] *McGarry* v. *Canada West Coal Co.*, *supra*, footnote 65.

[78] Gahan, p. 110; *The Liesbosh*, *supra*, footnote 14.

[79] Mayne, p. 485, Charlesworth, p. 560, *Martin* v. *Deutch*, *supra*, footnote 47; *Aherne* v *Kaliel*, *supra*, footnote 24; *Mahoney* v. *W. H. Cockerline & Co.*, *supra*, footnote 38; *Edmonds* v. *Cunard White Star Co.*, *supra*, footnote 16; *Martin* v. *Rettlo and Flin Flon Dairy Ltd.*, *supra*, footnote 39;

[80] *McKinney* v *Roote*, [1929] 1 W.W.R. 884, 2 W.W.R 340, [1930] S.C R 337; cf. *Mitchell* v. *Fidelity and Casualty Co* (1916), 35 O.L.R 280, [1917] A.C. 592

[81] *The Mediana*, [1900] A.C. 113, at p. 116. In *Goldie* v. *Johannesburg*, 1948 (2) S.A. 913 (W), at p. 923, Ettinger A.J. said: "The whole conception of compensation for pain and suffering and loss of amenities is incongruous, for there is no relationship, for example, between pain and money which makes it possible to express the one in terms of the other"

physical pain and mental suffering,[82] including those caused by the shortened expectation of life.[83] Unconsciousness reduces the award.[84] The physical and mental make-up of the person injured must be considered, but that make-up cannot be determined by reference to his social or cultural or financial status.[85] The damages are incapable of exact estimation;[86] their assessment cannot be the result of any arithmetical or logical measure,[87] but only of common sense[88] and impression.[89]

Inconvenience and loss of enjoyment of life and amenities. The continuous inconvenience,[90] "the loss of enjoyment of life and the hampering effect of the injuries in the carrying on of the normal social and personal routine of life, with the probable effect on the health and spirits of the injured party, are proper to be taken into account".[91] There must be compensation for the probability that the injury may diminish the chances of marriage by disfiguring scars or the loss or malformation of limbs or an eye,[92] the pleasures of married life, the performance of a husband's marital duties,[93] the ability to create[94] or bear[95] children.

[82] *Blake* v. *Midland Railway* (1852), 18 Q.B. 93, at p. 111; *Morgan* v. *City of Edmonton, supra,* footnote 47; *Flint* v. *Lovell,* [1935] 1 K.B. 354; *Slater* v. *Spreag,* [1936] 1 K.B. 83; *Rose* v. *Ford,* [1937] A.C. 826; *Battagin* v. *Bird, supra,* footnote 47; *Martin* v. *Deutch, supra,* footnote 47; *Aherne* v. *Kaliel, supra,* footnote 24, *Gillingham* v. *Ware's Taxi Ltd. (No. 2), supra,* footnote 24;

[83] Provided it is proved the injured person was distressed by knowledge of this: *Slater* v. *Spreag, supra,* footnote 82.

[84] *Slater* v. *Spreag, supra,* footnote 82; *Rose* v. *Ford, supra,* footnote 82.

[85] *Radebe* v *Hough,* 1949 (1) S.A. 380 (A.D.), *per* Hoexter A.J.A., at pp. 385, 386.

[86] Charlesworth, p. 560.

[87] *The Mediana, supra,* footnote 81; *Oosthuizen* v. *Thomson & Son,* [1919] T.P.D. 124, at p. 130.

[88] Halsbury, Vol. 10, para 139.

[89] *Davies* v. *Powell Duffryn Associated Collieries Ltd.,* [1942] A.C. 600, *per* Lord Wright at p. 616.

[90] *Battagin* v. *Bird, supra,* footnote 47; *Gillingham* v. *Ware's Taxi Ltd, supra,* footnote 24; *Johnston* v *Gibson, supra,* footnote 59 The sum must be reasonable and determined by applying the rules of common sense and ordinary life. Halsbury, Vol. 10, para. 150

[91] Charlesworth, p 560; *Rushton* v. *National Coal Board, supra,* footnote 23, at p. 294 *Heaps* v. *Perrite, supra,* footnote 47. the loss of both hands prevented the usual forms of recreation. *Haygarth* v. *Grayson,* [1951] 1 Ll.L.R. 49· impairment of eyesight involves "an important loss of amenities". The plaintiff's age is important. *Bird* v *Cocking, supra,* footnote 4.

[92] Limbs: *Morin* v. *Ottawa Elec. R.W.Co.* (1909), 18 O.L.R. 209; *Gray* v. *LaFleche, supra,* footnote 24; *Weldon* v. *Steeves* (1934), 8 M.P.R. 53. Facial disfigurement. *Smorlie* v. *Harvey,* [1939] 2 W.W.R. 344; *Taylor* v. *Addems, supra,* footnote 32; *Price* v. *Wright* (1899), 35 N B.R. 26.

[93] *Gray* v *LaFleche, supra,* footnote 24.

[94] *Ibid*

[95] *Weldon* v. *Steeves, supra,* footnote 92; *Marano* v. *Lett,* [1929] 4 D.L.R. 314, 982. Where the injured is a child, allowance must be made for such contingencies as death before puberty.

Loss of expectation of life. Loss of "the prospect of an enjoyable, vigorous and happy old age" is a proper subject for damages.[96] The basis of assessment is not clear;[97] it is not how much the plaintiff would have taken for his life.[98] Compensation should be moderate.[99] Consideration should be given to the circumstances of the injured person's life before the accident,[100] and to the earnings that would have been earned after death.[101] It is not relevant, however, that as a result of the accident he is either incapable of appreciating that his life has been shortened or even glad that it has been shortened and his sufferings will the sooner end.[102] Double compensation must not be awarded for wages that would have been earned during a normal life and loss of expectation of life.[103]

III. *Recovery of Damages by Third Party*

A husband or parent may recover damages for his expense resulting from personal injuries sustained by his wife or child and an employer for the loss sustained because of injury to his servant.[104]

[96] Charlesworth, p. 561; Salmond, pp. 384-7. A full discussion will be found at pp. 748 ff., *infra*. In England, this claim was acknowledged first in *Flint* v. *Lovell*, *supra*, footnote 82, although in Canada recognition was much earlier: *McGarry* v. *Canada West Coal Co.*, *supra*, footnote 65; *McKinney* v. *Roote*, *supra*, footnote 80.

[97] *Reid* v. *Lanarkshire Traction Co.*, [1934] S.C. 79 (Lord Reid): ". . . the matter is so hedged with metaphysics that, were I charging a jury, I think I should be disposed to be content to tell them that the shortening of life was an element which they were entitled to take into consideration in measuring the damage suffered by the deceased, and to leave it to them, without any strict analysis of the content of the idea, to assess the damages, contenting myself with warning them that the weight to be given to this element must be moderate, and that they must not consider what price the man would have put upon his life"

[98] *Reid* v. *Lanarkshire Traction Co.*, *supra*, footnote 97.

[99] *McGarry* v. *Canada West Coal Co.*, *supra*, footnote 65, at p. 603 This has been the tendency since *Benham* v *Gambling*, [1941] A.C 161, which emphasized that such awards must be kept to a minimum. Although this case involved a survival action, Goddard L J. in *Cumper* v. *Pothecary*, [1941] 2 All E.R. 519, stated that the reasoning applied to all cases brought for loss of expectation of life.

[100] *Rodzinski* v. *Modern Dairies Limited*, *supra*, footnote 45: the plaintiff had lived a life of crime and laziness, and enjoyed it. Only $1,000 was awarded under this head, because, looking at his past life, which is all there is to go on, and allowing for the remote possibility of a reformation, the quality and usefulness of his life, based on the average for the country in which he lived, was not such as to justify the court in awarding a substantial sum

[101] A minor element but relevant as they "indicate that a person earning a reasonable livelihood is more likely to have an enjoyable life: *Harris* v *Bright's Asphalt Contractors Ltd.*, *supra*, footnote 70.

[102] *Roach* v. *Yates*, *supra*, footnote 24, at pp. 262-3. See (1937), 1 Mod L Rev 247

[103] *Roach* v. *Yates*, *supra*, footnote 24, at p 271.

[104] Charlesworth, p. 575: "The exact boundary line between gratuitous assistance given by a stranger, which is not recoverable, and the assistance given by a parent relative person in loco parentis guardian, master or

By injured person's husband. A husband may recover special damages to cover medical and other expenses to which he has been put by his wife's injuries,[105] notwithstanding that he has not actually paid them at the date of the trial, provided he is liable to pay them and incurring them was reasonable.[106] Wages lost while attending his incapacitated wife are recoverable[107] and he is entitled to damages for loss of his wife's consortium[108] and services.[109]

By injured person's parent. A parent will be reimbursed his reasonable out-of-pocket expenses resulting from his child's injuries, provided he was maintaining him in whole or in part and was legally obligated to do so.[110] The travelling and hotel expenses incurred by a parent when he accompanies his child from the accident to a distant hospital, and later when he makes the same journey to consult doctors concerning his child's condition, are recoverable.[111]

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other person, which is recoverable, has not been determined, but it would seem that a person who has in fact incurred expense in providing for the cure and restoration to health of the injured person will be entitled to recover such expense, provided that the expense was reasonably incurred and that it was reasonable that it should be incurred by the person claiming it". *Thomas* v. *City of Winnipeg*, [1937] 3 W.W.R. 141.

[105] *Fox* v. *St. John* (1883), 23 N.B.R. 244; *Welch* v. *Grant*, [1936] 1 W.W.R. 312.

[106] *Allen* v. *Waters*, [1935] 1 K.B. 200, at pp. 206, 215. The expense of a housekeeper and the additional cost of running the household by a housekeeper and not by his wife is recoverable: *Feay* v. *Barnwell*, [1938] 1 All E.R. 31; *Berry* v. *Humm & Co.*, [1915] 1 K.B 627; as is the expense of office assistance when before her accident the wife assisted her husband there (*Fox* v. *St John*, *supra*, footnote 105)

[107] *Gibson* v *The King*, [1947] 4 D.L.R. 39. See also *Sunston* v. *Russell*, [1921] O.W.N 160; cf. *Price* v *Gebert*, (1952-53) 7 W.W.R. (N.S.) 423.

[108] *Baker* v. *Bolton* (1808), 1 Camp. 493; *Crissall* v *Burton and Basi*, (1953) 8 W.W.R. (N S.) 409; *Fox* v *St. John*, *supra*, footnote 105; *Adams* v. *Railway Executive* (1952), 96 Sol. J. 360. But a wife has no right of action against a person who negligently injures her husband and causes him to lose his sexual capacity: *Best* v. *Samual Fox & Co*, [1952] 2 All E.R. 394.

[109] *MacDonald* v *McNeil*, [1953] 1 D.L.R 755, 2 D.L.R. 248.

[110] *Banks* v. *Shedden Forwarding Co.* (1906), 11 O L R. 483; *Young* v. *Town of Gravenhurst* (1911), 24 O.L R 467; *Deziel* v. *Deziel*, [1953] 1 D.L R. 651.

[111] The child's welfare demands his parents' presence. In *Sheasgreen* v. *Morgan*, *supra*, footnote 53, also allowed were the mother's travelling expenses by airplane from Arizona where she was staying to her injured son's bedside, the expenses involved in bringing home in the least expensive way her car and belongings, and two-thirds of the rent of a hotel suite which the father took near the hospital so that the child's mother and sister might be near him while he was in hospital, although the rent of the suite was less than the cost of the mother's living quarters in Arizona before the accident; but only two-thirds of the cost of the suite was allowed because, although the mother was ill and it was necessary that her daughter be with her, her illness and the daughter's subsequent attendance on her were not attributable to the accident. See also: *Salt* v. *Cardston* (1920), 60 S.C.R. 612; *Whitten* v *Burtwell* (1920), 47 O.L.R. 210; *Mazepa* v. *Ewaskiw*, (1953) 10 W.W.R. (N.S.) 565.

By injured servant's master. The wrongdoer must pay the master his reasonable expenses incurred because of his servant's injuries. These may include medical and hospital expenses, wages and allowances paid to, and the cost of rations used by, the servant during his incapacity[112] and the increased cost of his pension attributable to the injury accelerating its commencement.[113] The employer's loss through the deprivation of his employee's services is also recoverable.[114]

IV. *Inadmissibility of Collateral Matter to Reduce Damages Payable by Wrongdoer*

"Matter completely collateral, and merely *res inter alios acta*, cannot be used in mitigation of damages."[115] The more prominent illustrations of this are:

1. *Insurance*

Accident insurance. Damages are not reduced where a plaintiff has insured his life against accident and recovered full or partial compensation for his injury. He is entitled to retain the benefit for which he paid and the damages he recovers on account of the defendant's negligence,[116] since "he does not receive that sum of money because of the accident, but because he has made a contract providing for the contingency; an accident must occur to entitle him to it, but it is not the accident, but his contract, which is the cause of his receiving it".[117] If a deduction were allowed, the wrongdoer would take the benefit of the insurance policy without paying the premium,[118] and the injured person would be worse off, to the amount of the premium and interest, than if he had never insured his life.[119]

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[112] *A-G.* v. *Valle Jones*, *supra*, footnote 29; *Bradford Corporation* v. *Webster*, [1920] 2 K.B 135.

[113] *Bradford Corporation* v. *Webster*, *supra*, footnote 112.

[114] *Mankin* v. *Scala Theodrome Co Ltd.* (1946), 62 T.L.R. 728. See (1947), 63 L Q. Rev. 18.

[115] Mayne, p. 151. The statement of this maxim is easier than its application, which is often beset with difficulties.

[116] *Bradburn* v. *G.W. Ry Co.* (1874), L R. 10 Ex 1; *Millard* v. *Toronto Rly. Co.* (1914), 31 O.L.R 526; *Jackson* v. *Joel and Wilkens*, [1947] 2 W.W.R. 659, [1948] 1 W.W.R. 156. See Mayne, p 487

[117] Pigott B. in *Bradburn* v. *G. W. Ry. Co.*, *supra*, footnote 116, at p. 3; *British Westinghouse etc.* v. *Underground Electric Railways*, [1912] A.C. 673, at p. 690

[118] *Simpson* v. *Thomson* (1877), 3 App. Cas. 279, at p 285.

[119] Mayne, p. 487. This principle does not apply where the injured person has received compensation under the Government Employees Compensation Act and then sues the Crown under s. 19 (1)(c) of the Exchequer Court Act: *Bender* v. *The King*, [1949] 2 D L.R 318 —"The employee does not receive his compensation under a contract for which he has paid

Hospital insurance. A wrongdoer derives no benefit where the plaintiff's hospital and medical expenses are paid under a group insurance policy.[120] If, however, the plaintiff is not legally liable to pay such expenses,[121] as where a health scheme prevails,[122] the defendant's liability is reduced, even though the plaintiff has paid to participate in the scheme.

2. *Income-tax and unemployment assessments*

The calculation of the plaintiff's lost wages or professional fees does not involve a deduction of an amount representing income tax, which would have been payable or deducted at the source, because income tax is a matter between the plaintiff and the Crown and is of no concern to the wrongdoer.[123] Similarly, the unem-

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a premium but by reason of a statutory obligation which Parliament has imposed upon the Crown in his interest and without any payment on his part". Nor does the principle apply to moneys received by the injured under the Automobile Accident Insurance Act of Saskatchewan: *Honan* v. *McLean*, (1953) 8 W.W.R. (N.S.) 523; *Stinson* v. *Clark & Baylis*, (1952) CCH ILR 1-081, *Andrejcin* v *B A. Oil Company Ltd*, (1951) CCH ILR 1-042. This act creates a fund subscribed to through a compulsory tax on owners of licensed motor vehicles out of which fixed sums are paid to persons suffering loss or damage as a result of a motor-vehicle accident. The principle is inapplicable here because "the plaintiff did absolutely nothing, voluntarily or otherwise, to entitle her to payment under the Act. It was the defendant and the class to which it belongs albeit compulsorily, which provided the insurance . . . no difference *in the result* in the payments made under the Act and payments made under a private policy of insurance taken out by the defendant."

[120] *Jackson* v. *Joel and Wilkins*, *supra*, footnote 116. See *Douglas* v. *Isenor*, *supra*, footnote 60· even where the policy is between employer and insurer for the employee's protection and the employee pays his own expenses and is then reimbursed by the employer with funds obtained from the policy. Also where hospital expenses are paid by a contributory service for company employees to which monthly premiums are paid, the service is "in the position of an insurer": *Sheasgreen* v *Morgan*, *supra*, footnote 53.

[121] *Carroll* v. *Bari*, *supra*, footnote 51. See also *Hebson* v. *Sutherland*, (1952-53) 7 W W.R (N.S) 382 where D V A hospital expenses not chargeable to the defendant, as the plaintiff was entitled to D.V.A. treatment without obligation.

[122] *Schaeffer* v *Mish*, [1950] 2 W W.R. 948. See *Schiffner* v. *C.P.R*, (1951) 2 W.W R (N S.) 193. Saskatchewan Hospitalization Act, 1949, c 102, obligated the province to pay for the services. The injured was under no obligation to pay the hospital charges, his only obligation was to pay the tax. Followed in British Columbia in *Flaherty* v. *Hughes*, (1952) 6 W.W.R. (N.S) 289. See also *Reist* v. *Gamble*, *supra*, footnote 9; *Dambrowsky* v *Olson*, (1952) 6 W W R. (N S) 493, 8 W.W.R (N.S.) 716.

[123] *Fine* v. *T.T.C*, *supra*, footnote 16, *Bowers* v. *I. Hollinger & Co Limited*, *supra*, footnote 51; *Fairholme* v. *Firth and Brown Ltd.* (1933), 49 T.L.R. 470; *Jordan* v *Limmer and Trinidad Lake Asphalt Co*, [1946] 1 K.B. 356; *Billingham* v *Hughes*, *supra*, footnote 70 In "Damages and P.A.Y.E" (1953), 103 L.J. 666, the English cases are analyzed and a strong contention made that to comply with the principle of *restitutio in integrum*, as stated by Lord Blackburn in *Livingstone* v. *Rawyards Coal Co.* (1880), 5 App. Cas 25, it is necessary, in calculating the loss to an employee who, so far as can reasonably be foreseen, never would have

ployment assessments that would have been deducted had he continued to work are not relevant.[124]

3. *Gratuitous payments by a third person*

A wrongdoer's liability is not reduced where the plaintiff's wages have been made up to him by his employer who voluntarily pays him.[125] If, however, the circumstances of payment indicate a moral, but not a legal, obligation on the plaintiff to repay to the third party the money received from the defendant the court may direct payment[126] or, if not, the plaintiff will be regarded as a trustee of the moneys for the third party. A defendant, moreover, does not obtain advantage from payments received by the plaintiff from a fund set up to compensate him among others.[127]

4 *Pensions*

A disablement pension received by the plaintiff for his injuries, unless furnished by the defendant, is not relevant to the calculation of damages, for it arises not because of the accident but as one of the incidents of his employment.[128]

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received his salary in full owing to P.A.Y.E., to make some deduction on that account The cited Ontario cases expressly, and the English cases impliedly, are contrary to this submission

[124] *Bowers* v *I Hollinger & Co. Limited, supra*, footnote 51.

[125] Gahan, p 110, *Tubb* v. *Lief and Gordon, supra*, footnote 57; *Dawson* v. *Sawatzky*, [1946] 1 W.W.R. 33; *Bowers* v. *I. Hollinger & Co. Limited, supra*, footnote 51; *Mazepa* v. *Ewaskiw, supra*, footnote 111 Cf. *A.-G.* v. *Valle Jones, supra*, footnote 29 The same principle applies where a third party pays the hospital, surgical and nursing expenses of the plaintiff· *Kovinsky* v *Kovinsky* (1925), 29 O.W.N. 179.

[126] *Dennis* v. *L.P.T.B., supra*, footnote 61.

[127] *Redpath* v. *Belfast & County Down Ry.*, [1947] N. Ir. 167, at p. 175 (Andrews L.C.J.): "The possibility of such a fund being formed is a contingency altogether too remote to enter into the calculation and assessment of damages. The creation of the fund was a circumstance of a wholly independent or collateral character to the defendant's negligence· and from it there could at the time of the accident have been no reasonable expectation of pecuniary benefit."

[128] *Payne* v. *Railway Executive, supra*, footnote 66; *Rushton* v. *National Coal Board, supra*, footnote 23; *Oleniuk* v. *Pound*, [1948] 2 W.W.R. 979 A different result occurs in claims under the Fatal Accidents Act, see *infra*, p. 741. See (1952), 68 L.Q. Rev. 150. Where the pension is awarded under the Pension Act, R.S.O., 1952, c. 207, the amount of the pension is determined by the damages collected by the claimant from the wrongdoer (ss. 20, 22). In England, the Law Reform (Personal Injuries) Act, 1948, provides (s. 2) that in a personal injury action there must be taken into account for the purpose of assessing damages, against any loss of earnings or profits, which has accrued or probably will accrue, one-half of the value of any rights in respect of individual injury benefit or industrial disablement (conferred by the National Insurance Personal Injuries Act, 1946) or sickness benefit (conferred by the National Insurance Act, 1946) for a period of five years beginning with the time when the cause of action accrued. See (1948), 98 L.J. 697; (1952), 116 Justice of the Peace 600.

5. *Miscellaneous*

The courts consider as collateral: a domestic's receipt of free board and lodging from a third party when she claims lost board and lodging provided by her employer,[129] the possibility that charitable institutions may eventually care for the plaintiff,[130] his private income,[131] his probable living habits and consequent expenses had he not been injured,[132] and that a damage award to an infant may accumulate with interest before he receives it.[133]

Assessment of Damages for Death

At common law, two rules prevented the recovery of damages for death: to cause the death of a human being was not a civil wrong;[134] and no person had a legally protected interest in the life of another.

The second rule has been changed in each province by fatal-accident legislation,[135] which has created a new right with novel results for damages.[136] The basis of a claim under the legislation is "injury"[137] to stipulated relations[138] of a deceased because of his death. It is not a claim that the deceased could have pursued in his lifetime, but the circumstances must be such that he would have had a right of action had he been merely injured.

Legislation in New Brunswick, Ontario, Manitoba, Alberta and

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[129] *Liffen* v. *Watson*, *supra*, footnote 70.

[130] *Roach* v. *Yates*, *supra*, footnote 24.

[131] *Phillips* v. *L. & S. W. Ry.*, *supra*, footnote 16; Charlesworth, p. 563.

[132] *Shearman* v. *Folland*, *supra*, footnote 20, at p. 47. See also (1950), 100 L.J. 245, 495.

[133] *Gold* v. *Essex C.C.*, *supra*, footnote 46.

[134] *Baker* v. *Bolton* (1808), 1 Camp. 493. For the origin of this rule see (1917), 33 L.Q. Rev. 431.

[135] The original Fatal Accidents Act was enacted in England in 1846 (Lord Campbell's Act). Prevailing Canadian legislation is: Fatal Accidents Act, R. S. Nfld., 1952, c. 256; Fatal Injuries Act, R.S.N.S., 1923, c. 229; Fatal Accidents Act, R.S.N.B., 1952, c. 82; Fatal Accidents Act, R.S.O., 1950, c. 132; Fatal Accidents Act, R.S.M., 1940, c. 74; Fatal Accidents Act, R.S.S., 1953, c. 102; Fatal Accidents Act, R.S.A., 1942, c. 125; Families Compensation Act, R.S.B.C., 1948, c. 116; Canada Shipping Act, R.S.C., 1952, c. 29, Part XVII—Fatal Accidents.

[136] *Barnett* v. *Cohen*, [1921] 2 K.B. 461, at p. 463. It is "not the transfer of any existing right of the dead man": *Baker* v. *Dalgleish Steam Shipping Company*, [1922] 1 K.B. 361, at p. 371.

[137] "Injury" is pecuniary loss, actual or reasonably probable.

[138] Each province makes the action available to the deceased's father, mother, son, daughter, grandfather, grandmother, grandson and granddaughter. It is extended to the deceased's stepfather, stepmother, stepson and stepdaughter by all provinces except N.B., to the deceased's adopted child by N.B., P.E.I., Ont., Man., Sask. and Alta., to the deceased's illegitimate child by Man. and Alta., to the deceased's brother and sister by Man., and to a person to whom the deceased stood *in loco parentis* and a person who stood *in loco parentis* to the deceased by P.E.I., Ont. and Sask.

British Columbia[139] has modified the rule that a wrong done to the deceased by injuring him and taking away his life dies with him—*actio personalis moritur cum persona*—and there a right of action accrues to his estate.[140] There is no such right in the other provinces.

These two statutory rights of action must be carefully distinguished because, although they both deal with obtaining compensation from a tortious killer, compensation in the one case passes to specified dependents and in the other to the deceased's estate.[141] This being their nature, it is possible to maintain both actions at the same time.[142] The assessment of damages for death must be considered therefore in the light of the respective remedies afforded by fatal-accident and survival legislation to a deceased's relatives and estate

I. *Assessment under Fatal-accident Legislation*

1. *Principles of assessment*

First assess, then apportion. Fatal-accident legislation provides that in a single action, brought by the deceased's personal representative, or on his default a prescribed dependant, the entire damages sustained by all those entitled to be compensated shall be determined. Where the action is brought for the benefit of a single claimant, the fruits of the litigation are his alone. But where the proceedings are for the benefit of more than one party, the damages of all those interested are assessed in one lump sum,[143]

[139] Survival of Actions Act, R.S.N.B., 1952, c. 223; Trustee Act, R.S.O., 1950, c. 400; Trustee Act, R.S.M., 1940, c. 221, Trustee Act, R.S.A., 1942, c. 215; Administration Act, R.S.B.C., 1948, c. 6. The situation in Saskatchewan is anomalous: see *infra*, p. 746, and the Trustee Act, R.S.S., 1953, c. 123. In England, the corresponding statute is the Law Reform (Miscellaneous Provisions) Act, 1934.

[140] Halsbury, Vol. 23, para. 975; *Baker* v. *Bolton*, *supra*, footnote 103; *Osborne* v. *Gillett* (1873), L.R. 8 Ex. 88, *The America*, [1917] A.C. 38. See (1917), 33 L.Q. Rev. 107. The position is different where the injury results from breach of contract: *Jackson* v. *Watson & Sons*, [1909] 2 K.B. 193. The legislation, however, does not change the common-law position that a person, whether husband or master of the deceased, cannot recover from the wrongdoer special damage he has sustained by reason of injuries to the deceased resulting in his death.

[141] Salmond, p. 82; *Davies* v. *Powell Duffryn Associated Collieries Ltd.*, [1942] A.C. 601, at p. 620.

[142] The survival legislation of N.B. (s. 9), Ont. (s. 37), Man. (s. 49) and B.C. (s. 71) expressly provides for this. For example the N.B. legislation states: "The rights conferred by this Act for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the relatives of deceased persons by The Fatal Accidents Act".

[143] "Although the loss sustained by each individual dependant must be assessed separately since each individual's claim is in respect of his

which, after deducting any costs not recovered from the wrongdoer,[144] is apportioned among the claimants in such shares as is determined at the trial.[145] There is no formula governing the apportionment of damages among dependants and the individual circumstances of each case govern.[146]

Compensation for pecuniary loss.[147] Clear guidance to the assessment of damages is not given by the legislation: the statutes provide that the damages awarded shall be "proportioned to the injury" resulting from the death to the parties for whose benefit the action is brought.[148] Judicial interpretation of this provision shows that the assessment is not influenced by the material assets of either the wrongdoer[149] or the claimant[150] and, although the statute does not restrict the loss to a pecuniary one, loss to be compensated must in fact be pecuniary.[151] This interpretation,

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own loss and is not to be a proportion of a limited sum yet in cases where the dependants are the widow and children of the deceased it is quite usual in practice to fix a lump sum as representing the loss which the family as a whole have sustained by the death, and then to apportion it among the dependants. In such cases this course is not likely to lead to any error or hardship."—*Brennan* v. *Gale, supra*, footnote 6, at pp. 181-2 (Black L.J.). Cf. Luxmoore L.J. in *Yelland* v. *Powell Duffryn Associated Collieries (No. 2)*, [1941] 1 K.B. 519, at p. 527, and *MacLean* v. *MacDougall* (1944), 18 M.P.R 11. See also Charlesworth, p. 554; Salmond, p. 397

[144] P.E.I. (s 3); N.S. (s. 5); N.B. (s. 9); Ont. (s 3); Man. (s. 4); Sask. (s. 4); B C. (s. 4).

[145] Nfld. (s. 5); P E.I. (ss. 8, 9); N S. (s. 5); N.B. (s. 9); Ont. (ss. 8, 9); Man. (ss. 9, 10); Sask. (s. 4); Alta (s. 4); B.C. (s. 4). It is no concern of the defendant how the total sum is apportioned: *Eifert* v. *Holt's Transport Co.*, [1951] 2 All E.R. 655. See *Royal Trust Co.* v. *C.P.R., supra*, footnote 6; *Johnson* v. *Hill* (1945), 61 T.L.R. 398; *Bishop* v. *Cunard White Star Company*, [1950] P. 240, at p. 248.

[146] *In re Soderlund*, [1950] 2 W.W.R. 407, at p. 409; *McDonald* v. *Mason*, (1953) 8 W.W.R. (N.S.) 553, at p. 554. Apportionment among dependent children need not be the same: *Glasgow Corporation* v. *Kelly, supra*, footnote 5 In *Hall* v. *Wilson, supra*, footnote 6, a boy was awarded more than his sister, although he was older, since the girl's education "will be obviously much less costly . . , in the ordinary way she will be living with her mother and be looked after by her family".

[147] See generally Charlesworth, pp. 551-3; Mayne, p 565; Salmond, p. 397; Halsbury, Vol. 23, paras. 983, 984.

[148] Nfld. (s. 5); P.E.I. (s. 3); N.S. (s. 5); Ont. (s 3); Man. (s. 4); Alta. (s. 4); Sask. (s. 4); B.C. (s. 4). The N.B. act is slightly different because, as will be seen, it merely spells out the judicial interpretation of the other legislation.

[149] *Armsworth* v. *S. E. Rly. Co., supra*, footnote 2, at p. 760.

[150] *Cruickshank* v. *Sheils*, [1953] 1 W.L.R. 533, at p. 536 (Lord Normand): the deceased's contribution to the dependent's support in the past and likely to be afforded in the future is material, "but that does not make it permissible to inquire what the amount of the wife's estate was and whether her own private income which she enjoyed before her husband's death and continued to enjoy after it would enable her to maintain herself in future, or to make out of it a larger contribution to her maintenance than she had done in the past".

[151] *Barnett* v. *Cohen, supra*, footnote 136, at p. 469: "All that can be

however, is not restricted to an immediate loss of money or property,[152] but embraces any pecuniary benefit, whether or not reducible to money value,[153] which would have been received if the deceased had remained alive.[154]

To establish pecuniary injury does not require that the claimant have a legal right to receive the benefit[155] or be financially dependent on the deceased,[156] or that the deceased before his death had earned money[157] or had actually contributed any such benefit to him.[158] What must be shown is that he had a reasonable expectation of deriving pecuniary advantage from the deceased's remaining alive, which has been disappointed by his death;[159] in determining this all the circumstances of the case and all the contingencies and uncertainties that may arise must be taken into account.[160] The advantage may be actual or prospective,[161] but if prospective the tribunal must be satisfied that there has been a loss of a "sensible and appreciable pecuniary benefit".[162] Straightfor-

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assessed is pecuniary loss". See *Baker* v. *Dalgleish etc., supra*, footnote 136, at p. 371; *Littley* v. *Brooks*, [1932] S.C.R. 462, at p. 470; *Agnew* v. *Ellis*, [1936] 3 W.W.R. 337, at p. 343.

[152] *St Lawrence and Ottawa Rly. Co.* v. *Lett*, *supra*, footnote 6; *Berry* v. *Humm & Co.*, *supra*, footnote 106, at p. 631; *Agnew* v. *Ellis*, *supra*, footnote 151.

[153] *Davies* v. *Powell etc.*, *supra*, footnote 89, at p. 611. See *Healey* v. *Beach*, [1942] O.W.N. 288, at p. 290 (Henderson J.A.): "The plaintiff is not required to prove his loss in dollars, but only that he has suffered appreciable injury capable of pecuniary compensation".

[154] *Pym* v. *G.N. Ry. Co.* (1862), 2 B. & S. 759. This includes, for example, monetary loss incurred by replacing services rendered gratuitously by the deceased, if there was a reasonable prospect of their being rendered freely in the future but for the death: *Berry* v. *Humm & Co.*, *supra*, footnote 106; *Ponyicki* v. *Sawayama*, [1943] S.C.R. 197.

[155] *Dalton* v. *S.E. Ry.* (1858), 4 C.B. (N.S.) 296, at p. 305; *Proctor* v. *Dyck*, *supra*, footnote 6, at p. 249.

[156] *Proctor* v. *Dyck*, *supra*, footnote 6.

[157] *Taff Vale Ry. Co* v. *Jenkins*, [1913] A.C. 1, at p. 4.

[158] *Ibid*, at p. 10 (Lord Moulton): "The fact of past contribution may be important in strengthening the probability of future pecuniary advantage, but it cannot be a condition precedent to the existence of such a probability".

[159] *Proctor* v. *Dyck*, *supra*, footnote 6. See *Hetherington* v. *N.E. Ry.* (1882), 9 Q.B.D. 160, at p. 162; *G.T.R.* v. *Jennings*, *supra*, footnote 6; *Baker* v. *Dalgleish etc.*, *supra*, footnote 136; *Littley* v. *Brooks*, *supra*, footnote 151; *Ponyicki* v. *Sawayama*, *supra*, footnote 154. In *Dalton* v. *S.E. Ry. Co.*, *supra*, footnote 155, Willes J. put the question succinctly: "Aye or No, was there a reasonable expectation of pecuniary advantage".

[160] *Harrison* v. *L. & N.W. Ry.* (1885), Cab. & El. 540, at p. 541.

[161] *Taff Vale Ry.* v. *Jenkins*, *supra*, footnote 157 *Brennan* v. *Gale*, *supra*, footnote 6, at p. 181 (Black L.J.): ". . . not tied down to the actual amounts by which the dependents chanced to be benefitting at the date. They are entitled to have regard to the probabilities of the future and to take into account any increase of benefits which on the evidence they may be justified in thinking would have accrued to the dependents if the deceased had lived".

[162] *Franklin* v. *S.E. Ry* (1858), 3 H. & N. 211, at pp. 214-5.

ward is the statement of principle, but its application is difficult; it is of paramount importance to take a reasonable view of each case and ensure a fair compensation.[163]

Limited compensation. Damages recoverable under fatal-accident legislation may be limited by a contract entered into by the deceased with the wrongdoer or by statute.[164] If the deceased, before his death, agrees that he shall have no right to damages should he die from the defendant's negligence, his relatives will have no claim to compensation under the statute, because for them to possess such a right the deceased must himself have been able to sue at the time of his death.[165] On the other hand, if the agreement merely limits the amount that may be recovered, the claim of a deceased's dependent is not affected.[166]

Relevancy of events occurring after death but before judgment. Although the measure of damages must be determined as at the date of the death, the court should consider any subsequent events, occurring before the trial, which make more certain the calculation of the loss.[167] These may be the premature death[168] or remarriage[169]

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[163] *Armsworth* v. *S. E. Rly. Co.*, *supra*, footnote 2, at p. 760; applied in *Rowley* v. *L. & N. W Ry.*, *supra*, footnote 17; *Jones* v. *Tersigni* (1930), 38 O.W.N. 315. *Royal Trust Company* v. *C.P.R.*, *supra*, footnote 6, at p. 900 (Lord Parmoor): "The difficulty arises not in the statement of the principle, but in its application to a case in which the extent of the actual pecuniary loss is largely a matter of estimate, founded on probabilities, of which no accurate forecast is possible".

[164] See the statutes cited in footnote 26 *supra*, which also limit compensation in the case of death With respect to such a claim under the Canada Shipping Act, see *The Satanita*, [1897] A.C. 59; *Beauchamp* v. *Turrell*, [1952] 2 Q.B. 207.

[165] *Haigh* v. *Royal Mail Steam Packet Boat Company* (1883), 52 L.J.Q.B. 640; *The Stella*, [1900] P 161; *Conrad* v. *The King* (1914), 49 S.C.R. 577. It is, of course, different if the deceased's release was obtained by fraud; fraud may be pleaded and, if the plea is upheld, damages awarded: *British Columbia Electric Rly. Co* v. *Turner* (1914), 49 S.C.R. 470.

[166] Halsbury, Vol. 23, para. 986; 5 C.E.D. 407; Charlesworth, p 557. *Nunan* v. *Southern Railway*, [1924] 1 K.B. 223, at p. 228 (Scrutton L.J.): "I agree that it looks odd that he should be able to bar his dependents entirely, and yet should not be able to bar them in part, but one must be guided by the words of the statute". See (1938), 16 Can. Bar Rev. 688. See also *Grein* v. *Imperial Airways Ltd.* (1935), 52 T.L.R. 28, revsd on other grounds, [1937] 1 K B 50, and comment thereon in (1937), 1 Mod. L. Rev. 156.

[167] *Williamson* v. *John I. Thornycroft and Company, Limited*, [1940] 2 K.B 658, at p. 659; *Re North Settled Estates*, [1947] Ch 13, at p. 17; *Brennan* v. *Gale*, *supra*, footnote 6 See (1950), 13 Mod. L. Rev. 508.

[168] Here the dependent's actual loss may be determined and not a sum based upon her whole expectation of life at the date of her husband's death: *Williamson* v. *Thornycroft etc.*, *supra*, footnote 167. See also *Ponyicki* v. *Sawayama*, *supra*, footnote 154.

[169] *Fleming* v. *Markovich*, [1942] O.W.N. 525. This has not the same effect as premature death, which defines the term over which the loss should be computed. Remarriage is different because (Robertson C.J.O., at p. 526) "even if it is assumed that the second husband is as well able

of the dependent, the very large increase in wages the deceased would have received had he lived and the extensive alterations in exchange rates,[170] or the deceased's children becoming orphans from the surviving parent's death.[171]

Depreciation in value of money. A damage assessment, guided as it is by the previous conduct of the courts in similar cases, must not adhere to the limits laid down when the purchasing power of money was greater, and any large and relatively permanent variations in the value of money should be taken into account.[172]

Matters for which no compensation awarded. Since damages are restricted to the claimants' pecuniary loss from the deceased's death, there is no recovery for hospital, nursing and doctor expenses,[173] the cost of a grave watcher,[174] or putting on mourning,[175] the travelling expenses of the deceased's father,[176] mental suffering or the loss of the deceased's society,[177] the claimants' monetary loss

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as the first husband to provide for her, there is still the uncertain factor that no one can say with certainty how long that state of affairs will continue He may die or suffer disability from illness or accident, he may lose his job. . . All the usual contingencies apply, and they are material."

[170] *The Swynfleet* (1947), 81 Ll.L.R. 116. the action was brought after a seven-year lapse, when the inflationary trends were evident and different exchange rates applied to the conversion of wages quoted in francs into sterling

[171] *Glasgow Corporation* v. *Kelly*, *supra*, footnote 5, at p. 347. "The mother's death, besides depriving the children of her support and care, left them exposed to additional risk of complete orphanhood if their father should die By the date when their claims fell to be assessed this risk had become an actuality sounding in increased damages."

[172] *Sands* v. *Devon*, [1945] S.C. 380, at p. 381: *Hart* v. *Griffiths-Jones*, [1948] 2 All E.R 729; *Pash* v *Registrar of Motor Vehicles*, [1949] 1 W.W.R. 225, at pp 235, 304; *Maltais* v *C P.R*, [1950] 2 W W R 145, at p 162; *Drewry* v. *Towns*, (1951) 2 W W.R. (N.S) 217, at p 228; *Bechthold* v. *Osbaldeston*, [1953] 2 S C R 177, at pp. 180-1. In *Bishop* v *Cunard etc.*, *supra*, footnote 145, Hodson J refused to apply this principle, since there the damages had to be assessed as of the date of the accident, which was before the last inflationary trend commenced.

[173] *Mayer* v *Prince Albert*, [1926] 3 W.W.R. 622; *Agnew* v. *Ellis*, *supra*, footnote 151, *Batog* v. *Mundy*, [1939] 2 W.W R. 1. Such expenses are not pecuniary losses resulting from death, as they were incurred before death and regardless of whether death would or would not ensue. The Saskatchewan statute—s 4(2)(a)—permits the recovery of such expenses, provided the deceased could have recovered them had he lived and they have been incurred by a party for whose benefit the action is brought.

[174] *Barnett* v. *Cohen*, *supra*, footnote 136

[175] *Dalton* v *S E. Ry.*, *supra*, footnote 155. See Mayne, p. 566.

[176] *Bedwell* v *Golding* (1902), 18 T L.R. 436; *Clark* v. *London General Omnibus Co.*, [1906] 2 K B. 648

[177] "There is no question here of what may be called sentimental damage, bereavement or pain and suffering. It is a hard matter of pounds, shillings and pence, subject to the element of reasonable future probabilities": *Davies* v *Powell etc*, *supra*, footnote 89, at p. 614. See also *Runciman* v. *The Star Line Steamship Company* (*Limited*) (1902), 35 N.B R. 123, at p. 129; *Blake* v. *Midland Ry.* (1852), 18 Q.B. 93, at pp. 111-112; *Berry* v. *Humm & Co.*, *supra*, footnote 106; *Royal Trust Company* v.

for abstaining from business for a period after the death,[178] the injury to[179] or the pain and suffering of the deceased.[180] The deceased's funeral expenses are not recoverable in Newfoundland, Nova Scotia, Alberta and British Columbia,[181] but are in the other provinces.[182]

2. *Calculation of damages*

The infinite variety of circumstances does not permit the evolution of a formula for the calculation of damages that will solve all problems. More commonly, a husband and father, a wife and mother, or a minor child is lost, and the judicial techniques employed here, with variations demanded by particular facts, are of use in all claims.[183]

(a) *Loss of a husband and father*

The quantum of damages suffered by a wife and children depends on the answers to two questions:[184] if the deceased had lived what otherwise would have been his normal life, (1) What moneys out of his annual earnings would he have contributed to them? and (2) What portion of any additional savings he would or might

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C.P R., *supra*, footnote 6, at p. 900; *Tarasoff* v. *Zielinsky* (1921), 59 D.L.R. 177; *Gallagher* v *Canada Coach Lines Limited*, [1945] O.W.N. 202, at p. 203; *Brennan* v. *Gale*, *supra*, footnote 6, at p. 181. In Scotland, the claim for solatium has long been recognized: *Glasgow Corporation* v. *Kelly*, *supra*, footnote 5.

[178] *Barnett* v. *Cohen*, *supra*, footnote 136.

[179] *Berry* v. *Humm & Co.*, *supra*, footnote 106.

[180] *Blake* v *Midland Ry.*, *supra*, footnote 82. See Charlesworth, p. 551.

[181] *Batog* v *Mundy*, *supra*, footnote 173; *Agnew* v. *Ellis*, *supra*, footnote 151 This was the position in England until s 2(3) of the Law Reform (Miscellaneous Provisions) Act, 1934, permitted recovery in an action brought under the Fatal Accidents Acts, 1846 to 1908. In *Hart* v. *Griffiths-Jones*, *supra*, footnote 172, "funeral expenses" was held to include the expense of embalming but not of a tombstone; see (1949), 12 Mod. L. Rev. 91.

[182] P.E.I (s. 10)· "reasonable funeral expenses"; N B. (ss 3, 5): "a reasonable amount to cover the funeral expenses"; Ont. (s 3): "not exceeding $250 for necessary expenses of the burial . . . including transportation and things supplied and services rendered in connection therewith"; Sask. (s. 4): "the funeral expenses of the deceased"; Man. (Trustee Act, R.S.M., 1940, c 221, s. 49): "a sum in respect of funeral expenses may be allowed"—a reasonable amount may be recovered *Drewry* v *Towns*, *supra*, footnote 172 ($490); *Rivard* v. *Toronto General Trusts Corporation*, (1953) 9 W.W.R (N.S.) 370 ($545); *Chabot* v. *Toronto General Trusts Corporation*, (1953-54) 10 W.W.R. 529 ($560).

[183] Space permits an examination of only these factual situations Even these factual situations may be simple or complicated, but an understanding of the basic principles will permit their application to the facts at hand. The text-books and cases are confusing because their treatment of the problem is either too general (see Charlesworth, p. 554) or limited by the facts in issue.

[184] *Nance* v. *B C. Electric Railway Co. Ltd*, [1951] A.C. 601, at p. 614.

have accumulated would probably have accrued to them either on his intestacy or under his will?

The method of calculating the interest of the wife and children in the deceased's annual earnings is indicated by the following quotation:

> The starting point is the amount of wages which the deceased was earning. . . Then there is an estimate of how much was required or expended for his own personal and living expenses. The balance will give a datum or basic figure which will generally be turned into a lump sum by taking a certain number of years purchase. That sum . . . has to be taxed down by having due regard to uncertainties. [185]

The general characteristics of the datum figure, the number of years purchase and the required deductions must now be considered.[186] The basic or datum amount represents that portion of the deceased's annual earnings which, had he lived, he probably would have applied to the benefit of the claimants. The answer is really a speculation,[187] but it must be arrived at as best one can on the evidence.[188] Relevant considerations are the past earnings of

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[185] *Davies* v. *Powell etc., supra*, footnote 89, at p. 614, *per* Lord Wright. Black L.J. in *Brennan* v. *Gale, supra*, footnote 6, at p. 181, pointed out that "this is a method which can be readily followed in the case of a weekly wage earner who leaves a widow and a family of young children but it is not . capable of providing a simple and complete solution in a complicated case. . . And even in cases where the method is appropriate difficulties arise in its application." He contends that the more usual practice is to settle the basic annual figure and apply to it such a multiplier "as will be thought to take into account all the doubts and uncertainties which point to a reduction in the sum to be awarded", rather than to tax down the sum resulting from the application of the number of years purchase to the datum figure. Viscount Simon in *Nance* v. *B C. Electric Rly. Co Ltd., supra*, footnote 184, at p. 615, evidently preferred Lord Wright's approach: "estimate what was the deceased man's expectation of life if he had not been killed when he was; (let this be "*X*" years) and next what sums during these next years he would probably have applied to the support of his wife. . . Supposing by this method an estimated annual sum of *$Y* is arrived at as the sum which would have been applied for the benefit of the plaintiff for *X* more years, the sum to be awarded is not simply *$Y* multiplied by *X* because [it must be discounted by the existence or possible existence of certain factors]." It is submitted that both approaches are necessary: the multiplier must reflect certain discounting probabilities, but also there are specific sums which must be deducted from the result of *$Y* multiplied by *X*

[186] Although expressed here solely in monetary terms, a child's loss will include maintenance, educational benefits, personal comforts and conveniences of life, security and protection of a father's home and assistance for advancement in life: *Pym* v. *G.N.R., supra*, footnote 154, at p. 767; *Castonquay* v. *Hull Electric Co.* (1920), 17 O.W.N. 218; *Bothwell* v *Galloway, supra*, footnote 3; *In re Soderlund, supra*, footnote 146; *McLean* v. *Lutz*, [1952] 1 D.L.R. 770.

[187] *Roughead* v. *Railway Executive* (1949), 65 T.L R. 435.

[188] *Davies* v. *Powell etc., supra*, footnote 89, at p. 614, applied in *Johnson* v. *Hill, supra*, footnote 145. See also *Mackie* v. *Can. Skate Mfg. Co.*, [1950] O.R. 683; *Nance* v. *B.C Electric Rly. Co. Ltd., supra*, footnote 184,

the deceased,[189] the incidence of income tax, the nature and regularity of his employment,[190] his possible illness or unemployment,[191] the amounts he expended annually on himself[192] and had been accustomed to apply to the claimant's benefit[193] and the probability that his earnings or liberality would have increased or decreased had he lived.[194]

There is no real yardstick to measure the number of years purchase[195] and no case has or can lay down the number to be taken.[196] Those adopted by individual judges and juries vary greatly, with juries being more liberal, and, although the normal is ten,[197] sixteen "will approach the upper limit of any calculation of damages which has received the sanction of an appellate court".[198] Factors of importance[199] are the deceased's age, expectation of life,[200] state of health,[201] occupation,[202] probable duration of earning capacity,[203]

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at pp. 614, 615; *Heatley* v. *Steel Company of Wales Ld.*, [1953] 1 W.L.R. 405.

[189] *Bothwell* v. *Galloway*, *supra*, footnote 3 If the deceased was a railway porter, his gratuities are included. *G.W.R.* v. *Helps*, [1918] A.C. 141.

[190] *Davies* v. *Powell etc.*, *supra*, footnote 89; *Bothwell* v. *Galloway*, *supra*, footnote 3.

[191] *Rowley* v *L.N.W. Ry.*, *supra*, footnote 17; *Bothwell* v. *Galloway*, *supra*, footnote 3.

[192] *Jones* v. *Tersigni*, *supra*, footnote 163; *Bishop* v. *Cunard etc.*, *supra*, footnote 145; *Heatley* v *Steel Company of Wales Ld.*, *supra*, footnote 188.

[193] *Nance* v. *B.C. Electric Ry. Co. Ltd.*, *supra*, footnote 184.

[194] *Jones* v. *Tersigni*, *supra*, footnote 163; *Bothwell* v. *Galloway*, *supra*, footnote 3; *Roughead* v *Railway Executive*, *supra*, footnote 187; *Nance* v. *B.C. Electric Ry. Co. Ltd.*, *supra*, footnote 184. *Bishop* v. *Cunard etc.*, *supra*, footnote 145: employment after naval retirement would bring increased wages, but these must be discounted by increased living costs and income tax. *Brennan* v. *Gale*, *supra*, footnote 6: the deceased's financial status is important, because the more ample his means the less likely his entire "net free spending income" would be given to his family.

[195] *Brennan* v. *Gale*, *supra*, footnote 6, at p. 184. Only the legislation of N.B. stipulates the maximum number which can be taken. S. 3(1) provides: "the reasonable expectation of pecuniary benefit from the continuance of the life of the deceased shall not be estimated for a period exceeding 10 years". See *Noble* v. *Bath, Bristol etc., Hydro Electric Commrs.*, [1935] 2 D.L.R. 615.

[196] *Heatley* v. *Steel Company of Wales Ld.*, *supra*, footnote 188, at p. 408 (Lord Goddard): the number taken is "entirely arbitrary" and "entirely a matter of speculation".

[197] *Roughead* v. *Railway Executive*, *supra*, footnote 187.

[198] *Brennan* v. *Gale*, *supra*, footnote 6, at p 184. Examples: *Roughead* v. *Railway Executive*, *supra*, footnote 187, deceased 43, his wife 29, he had great ability, high reputation and excellent prospects—15 years purchase; *Goodwin* v. *Michigan Central R.R. Co.* (1913), 29 O.L.R. 422, deceased 82, but in unusually good health—5 years purchase; *Davies* v. *Powell etc.*, *supra*, footnote 89, deceased 42, left widow and three children—10½ years purchase; *Johnson* v. *Hill*, *supra*, footnote 145, deceased 39, left widow and four children—16 years purchase.

[199] See *Brennan* v *Gale*, *supra*, footnote 6; *Nance* v. *B.C. Electric Rly. Co. Ltd.*, *supra*, footnote 184, at p. 615.

[200] *Bothwell* v. *Galloway*, *supra*, footnote 3.

[201] *Rowley* v *L. & N. W. Ry.*, *supra*, footnote 17; *Goodwin* v. *Michigan*

the possibility of his life being prematurely determined by a later accident, the joint expectation of life of the deceased and the claimant,[204] the claimant's expectation of life and state of health,[205] the possibility that had the deceased continued to live the claimant might have predeceased him,[206] "and all the other probabilities and chances which should be taken into consideration in endeavouring to fix a fair compensation for the pecuniary loss".

Where appropriate, allowance must be made for the probable remarriage of a surviving husband or wife, provided the survivor's financial condition would be improved.[207] In most cases the allowance is incapable of evaluation,[208] but the court must act upon reasonable probabilities, remembering that the second marriage is subject to all the usual contingencies and may terminate.[209]

All circumstances, which may be legitimately pleaded in diminution of the damages, must be considered[210] and, in calculating the

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etc., supra, footnote 198; *Bothwell* v. *Galloway, supra*, footnote 3. In *Mackie* v. *Can. Skate Mfg Co., supra*, footnote 188, the deceased, 45, had a life expectancy of 26.76, which was greatly reduced owing to the disease from which he suffered

[202] If it was hazardous, allowance must be made: *Aiz Kaiai Mendi*, [1938] 3 All E R. 483. In *Hall* v. *Wilson, supra*, footnote 6, the award was discounted because the deceased, even though he died before the war, might have been killed in an accident or in the war either as a combatant or civilian But in *Bishop* v. *Cunard etc , supra*, footnote 145, where the deceased were wartime sailors, Hodson J. did not reduce the award because "during the last great war the hazards of life at sea were not conspicuously greater than risks run by many other persons on shore". See (1950), 13 Mod L. Rev. 508; (1939), 17 Can Bar Rev. 688.

[203] *Mackie* v *Can. Skate Mfg. Co., supra*, footnote 188, at p. 696.

[204] *Humphreys* v. *The City of London, supra*, footnote 3, at p 302, *Feay* v. *Barnwell, supra*, footnote 106; *Gauley* v. *H E P C* , [1940] O.W N. 100; *Mackie* v *Can. Skate Mfg. Co , supra*, footnote 188

[205] *Rowley* v. *L. & N. W. Ry , supra*, footnote 17, *Price* v. *Glynea and Castle Coal Co.* (1915), 9 B.W.C C. 188, at p. 198; *Barnett* v *Cohen, supra*, footnote 136; *Williamson* v *Thorneycroft etc , supra*, footnote 167; *Bothwell* v. *Galloway, supra*, footnote 3

[206] *Nance* v. *B C. Electric Rly Co , supra*, footnote 184, at p 615

[207] *Watts* v. *City of St. Thomas* (1925), 29 O.W.N 251; *Davies* v. *Powell etc , supra*, footnote 89, at p 614; *Bothwell* v *Galloway, supra*, footnote 3, *Nance* v. *B.C Electric Rly. Co., supra*, footnote 184; *Wallis* v *Lichty*, [1952] O W N 116

[208] *Gallagher* v *Canada Coach Lines Limited, supra*, footnote 177 The age, attractiveness or eligibility of the survivor, but not his or her opinion on remarriage, are relevant· *Hall* v. *Wilson, supra*, footnote 6, *Wallis* v. *Lichty, supra*, footnote 207, *McDonald* v. *Mason, supra*, footnote 146.

[209] *Fleming* v *Markovich, supra*, footnote 169: no allowance as the remarriage was to a man of over 60 whose earning capacity might end from illness, accident or death

[210] Charlesworth, p 555, Salmond, p 397; *Davies* v. *Powell etc , supra*, footnote 89. The damages awarded must constitute: "the balance of loss and gain" (Lord Russell of Killowen, p 606); "the net loss on balance" (Lord Macmillan, p. 609); or "the balance of profit and loss" (Lord Wright, p. 614). See also *Baker* v *Dalgleish etc , supra*, footnote 136, at pp. 367, 368, 372

damages, a deduction made for any pecuniary benefit a dependent has received or probably will receive in consequence of the death by setting it off against the loss suffered by that dependent.[211] The courts are concerned chiefly with the following benefits.

Pensions.[212] Contributory,[213] statutory,[214] or private[215] pensions must be examined, since they come into present enjoyment through the deceased's death as part of his estate.[216] A pension's value varies as its payment is voluntary or obligatory:

> Less weight will be given to voluntary contributions than to those made under legal obligations, just because they are voluntary. Still less weight will be given to voluntary contributions in instalments, because they are obviously terminable; and still less weight if the contributor announces he will reduce his contribution by the amount of compensation obtained from a wrongdoer who causes the death.[217]

Where the damage assessment has been delayed, increases of pensions, granted to meet the increased cost of living, will not be brought into account.[218]

Charitable donations. The voluntary gifts of individuals to members of the deceased's family are not subject to accounting because "the death is not the cause in any proper sense of the voluntary contribution of funds".[219]

Insurance on deceased's life. Where the statute does not refer

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[211] *Brennan* v. *Gale, supra*, footnote 6.

[212] See (1950), 100 L.J. 312, at p. 327; (1952), 68 L Q. Rev 150.

[213] *Smith* v. *British European Airways Corporation*, [1951] 2 K.B. 893, at p 894: they are not considered contracts of insurance.

[214] *Carling* v. *Lebbon*, [1927] W.N. 123; *Lory* v. *G. W. Ry.*, [1942] 1 All E.R. 230. *Humphreys* v. *City of London, supra*, footnote 3: "The existence of mothers' pensions and widows' allowances cannot be ignored". In England, payments made under the Widows', Orphans' and Old Age Contributory Pensions Act, 1929, are exempted.

[215] *Lory* v. *G. W Ry., supra*, footnote 214.

[216] Mayne, p. 566; Halsbury, Vol. 23, para. 986.

[217] *Baker* v *Dalgleish etc., supra*, footnote 136, at p. 372, *per* Scrutton L.J. At p 381, Younger L J. explains why the estimation of the value of future payments of voluntary pensions is a matter of conjecture and must be severely discounted. See Pension Act, R.S.C , 1952, c 207, ss. 20, 22. Du Parcq L J. in *Johnson* v. *Hill, supra*, footnote 145, deals as follows with the problem where the amount of the pension will depend on the amount of damages awarded: "Logically the problem seems to be insoluble. The practical way of resolving the difficulty is to make no allowance at all unless payments have already been made, or it can be affirmed on the evidence with reasonable certainty that they will be made".

[218] *Bishop* v. *Cunard etc , supra*, footnote 145. Against this concession, Hodson J. ruled that "the amounts actually paid do not represent the limit of deduction in cases where the number of years purchase taken into account in arriving at the starting sum is greater than the number of years in respect of which pension has been paid".

[219] *Baker* v. *Dalgleish etc.*, [1921] 3 K.B. at pp. 485-6 *per* Greer J., [1922] 1 K.B. 369, *per* Bankes L J., *Lory* v. *G W Ry., supra*, footnote 214. See also Beven on Negligence (4th ed.) pp. 261-2; *Greymount Point etc. Co.* v. *McIvor* (1897), 16 N.Z.L.R. 258, at p. 267.

to life insurance moneys payable on the assured's death, they must be deducted in an award made under the statute to a dependent who benefits thereby.[220] This is the position in Newfoundland, Nova Scotia, New Brunswick and British Columbia,[221] but legislation of the other provinces removes from the category of matters that have to be taken into account in assessing compensation any sum paid or payable on the death of the deceased and, except in Alberta, any future premiums payable under any contract of insurance.[222]

Acceleration of devolution of claimant's interest in deceased's estate. Where the claimant derives pecuniary advantage from the deceased's estate, the value to him of the acceleration of the devolution of his interest, speculative though it be, must be taken into account.[223] The interest does not include the family home and furniture formerly used by a wife;[224] on the other hand, inherited income-producing investments are included.[225]

Receipt of an immediate lump-sum award. Since damages are calculated on the basis of a sum spread over a period of years, they must be discounted to arrive at the equivalent in the form of a lump sum payable at the date of death.[226]

Award under survival legislation. There can be no duplication

[220] *Bradburn* v. *G. W. Ry.*, *supra*, footnote 116; *Hick's* v. *Newport etc. Ry Co.* (1857), 4 B. & S. 403; *G.T.R.* v. *Jennings*, *supra*, footnote 6; *Millard* v. *Toronto Rly Co.* (1914), 31 O L.R 526; *Baker* v *Dalgleish etc*, *supra*, footnote 136, at pp. 367, 381

[221] *Nance* v *B C. Electric Rly. Co Ld*, *supra*, footnote 184, at p. 614; *McLean* v *Lutz*, *supra*, footnote 186, *McDonald* v *Mason*, *supra*, footnote 146

[222] P E I., s 3(2); Ont., s. 7(3); Man., s 4(2), Sask., s 4(4); Alta., s 6. The law of England is similar to that of Alberta. Such legislation must not be given any wider meaning than the ordinary meaning of the language conveys *Smith* v *British European Airways Corporation*, *supra*, footnote 213

[223] See (1950), 13 Mod. L. Rev. 508 The value of the estate is not deducted because that would result in a wealthy man having to pay for the consequences of the defendant's wrongdoing: *Drewry* v. *Towns*, *supra*, footnote 172. In *Roughead* v. *Railway Executive*, *supra*, footnote 187, Humphreys J. considered this a "grisly" approach and was not satisfied "that it is a universal rule which could possibly be applied to all cases for in some cases it is conceivable that if he died at the proper time she would have got much more".

[224] *Heatley* v. *Steel Company of Wales Ld.*, *supra*, footnote 188; *Bishop* v. *Cunard etc.*, *supra*, footnote 145. Depending on her previous use of them, all personal effects of the deceased will be treated similarly.

[225] *Bishop* v. *Cunard etc.*, *supra*, footnote 145, at p. 248. The widow who takes a husband's entire estate when the family income has been derived wholly from his investments has no claim under the Fatal Accidents Act: *G.T.R.* v. *Jennings*, *supra*, footnote 6, at p. 804.

[226] *Goodwin* v. *Michigan etc.*, *supra*, footnote 198; *Nance* v. *B.C. Electric Rly. Co*. *supra*, footnote 184. See also *Heatley* v. *Steel Company of Wales Ld.*, *supra*, footnote 188, at p. 406: "discount . . . it because one is paying down a lump sum at once . one has to find the present value".

of damages,[227] and any benefit taken by a dependent under the deceased's will or on intestacy by way of participation in an award under survival legislation must be taken into account in estimating the damages awarded to the dependent under fatal-accident legislation.[228] This may involve complicated inquiries into the financial affairs of the estate or a difficult interpretation of the deceased's will, but nevertheless they must be resolved at least by a fair estimate or even a conjecture.[229] The deduction made is not necessarily the exact amount awarded under the survival legislation because allowance must be made for estate debts,[230] death duties,[231] solicitor's costs,[232] administration expenses,[233] the cost of taking out administration letters[234] and funeral expenses. The fact that fatal-accident proceedings are brought before a survival action will not impede any necessary deduction, because the probability of such an action will be considered and the appropriate allowance estimated.[235] Since the damages awarded to the deceased's estate are liable to succession duty and those recovered under fatal-accident legislation are not, the better practice, where possible, is to claim the whole of the damages under the legislation.[236]

[227] *Rose* v. *Ford*, *supra*, footnote 82, at p. 835. See generally Salmond, p. 85; Charlesworth, p. 581.

[228] *Davies* v. *Powell etc.*, *supra*, footnote 89, at p. 610. If there is no such benefit, any increase to the deceased's estate will not affect the measure of damages to which such claimants are entitled under the Fatal Accidents Act. Whether the benefit's exact monetary value will be deducted varies with the circumstances: *Bishop* v. *Cunard etc*, *supra*, footnote 145, at p. 248. See also: *May* v. *McAlpine & Sons*, [1938] 3 All E.R. 85; *Ellis* v. *Raine*, [1939] 2 K.B. 180, at p. 185; *Sershall* v. *T.T.C.*, [1939] S.C.R 287; *Dellaert* v. *C.N.R.*, [1939] 2 W.W.R. 166, at p. 169, *Foster* v. *Kerr*, [1940] 1 W.W.R. 385; *Ponyicki* v *Sawayama*, *supra*, footnote 154; *Dawhy* v. *Lamontagne*, [1945] 1 W.W.R. 385; *Maltais* v. *C.P.R.*, [1950] 2 W.W.R. 145, at p. 162; *Kerschman* v. *Nichols*, [1950] 2 W.W.R. 420; *Drewry* v. *Towns*, *supra*, footnote 172, at p. 228.

[229] *Dawhy* v. *Lamontagne*, *supra*, footnote 228; *Pash* v. *Registrar of Motor Vehicles*, *supra*, footnote 61. Cf. *Maltais* v. *C.P.R.*, *supra*, footnote 172.

[230] *Davies* v *Powell*, *supra*, footnote 89, at p. 613.

[231] *Feay* v. *Barnwell*, *supra*, footnote 106.

[232] *Dawhy* v. *Lamontagne*, *supra*, footnote 228; *Drewry* v. *Towns*, *supra*, footnote 172.

[233] *Feay* v. *Barnwell*, *supra*, footnote 106. Cf. *Thomas* v. *Cunard White Star Ltd.*, [1951] P. 153; *Drewry* v. *Towns*, *supra*, footnote 172.

[234] *Damack* v. *Kenick*, (1953) 9 W.W.R. (N.S.) 429.

[235] *Davies* v. *Powell etc.*, *supra*, footnote 89, at pp. 607-8, 613 If the actions are brought at the same time, the damages recovered under the Fatal Accidents Act will be *pro tanto* reduced.

[236] *Hall* v. *Wilson*, *supra*, footnote 6, at p. 86; *Feay* v. *Barnwell*, *supra*, footnote 106, at p. 36; *Hutchinson* v. *L. & N. E. Ry.*, [1942] 1 K.B. 481, at p. 491. In *Corfield* v. *Groves*, [1950] 1 All E.R. 488, Hilberry J. assessed damages at £5,250 and gave £5,249 under the Fatal Accidents Act and £1 under the Law Reform (Miscellaneous Provisions) Act, 1934. See (1941), 5 Mod L. Rev. 68, and the suggestions by Dr. Glanville Williams on how the greatest amount of money may be secured

The second question to be answered in assessing the damages suffered by a wife and children for the loss of a husband and father is their interest in his accumulated savings. The probability of additional accumulated savings depends on whether the deceased would have surplus earnings, had he lived, after providing for himself and his family. This is ascertained when considering the answer to the first question just discussed. Whether his family would participate on his death and, if so, to what amount, must be decided after considering all the pertinent circumstances, including the legal necessity to provide, the ages of the deceased and his family, the tranquility of the matrimonial home[237] and the provisions of any existing will. The amount so calculated must be discounted for the immediate receipt of a capital sum and the possibility that the deceased might have outlived his family, but such "reducing factors would have been to some extent offset by any interest carried by the savings usually set aside".[238]

(b) *Loss of a wife and mother*

The husband who loses the care and management of a household by an industrious, careful, frugal and intelligent wife,[239] and the child who in his formative years loses the guidance, comfort, care, protection, education and moral training of his mother,[240] must be compensated. Where his wife performed household or nursing services[241] or assisted in his office,[242] a husband will re-

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[237] *Harrison* v *L. & N. W Ry.*, *supra*, footnote 160; *Stimpson* v. *Wood and Sons* (1888), 59 L.T. 218; *Nowakowski* v. *Martin*, [1951] O R. 67

[238] *Nance* v *B.C Electric Rly Co.*, *supra*, footnote 184, at pp. 614, 617. See also *Pym* v. *G N Ry. Co.*, *supra*, footnote 154, at p. 768, *Goodwin* v. *Michigan Central R R Co.*, *supra*, footnote 198; *Royal Trust Company* v. *C P R.*, *supra*, footnote 6; *Roughead* v. *Railway Executive*, *supra*, footnote 187; *Proctor* v. *Dyck*, *supra*, footnote 6, at pp. 249-250.

[239] *St. Lawrence and Ottawa Rly. Co* v. *Lett*, *supra*, footnote 6, at p. 435.

[240] The child's age and the duties discharged by the mother are important in measuring the damages. Where the mother is incompetent or her conduct and example injurious, there is no compensation See *Tarasoff* v. *Zielinsky*, *supra*, footnote 177; *St Lawrence and Ottawa Rly Co.* v. *Lett*, *supra* footnote 6, *Dellaert* v *C.N R.*, *supra*, footnote 228, at p. 169; *Gallagher* v *Canada Coach Lines Limited*, *supra*, footnote 177; *Maltais* v. *C P R.*, *supra*, footnote 172; *Wallis* v. *Lichty*, *supra*, footnote 207. The death of one parent makes the possible death of the other more vital: *Glasgow Corporation* v *Kelly*, *supra*, footnote 5

[241] *Feay* v *Barnwell*, *supra*, footnote 106; *Agnew* v. *Ellis*, *supra*, footnote 151, *Berry* v *Humm & Co.*, *supra*, footnote 106; His expenses before installing a housekeeper are recoverable *Wallis* v *Lichty*, *supra*, footnote 207 The extra expenses incurred by the husband in the house must be discounted to the extent that he is saved the expense of maintaining a wife *Gallagher* v *Canada Coach Lines Limited*, *supra*, footnote 177; *Shybunka* v *Kapalka*, (1951) 4 W W R (N S) 673.

[242] *Wallis* v *Lichty*, *supra*, footnote 207.

cover damages for her loss, provided her services were worth more than the cost of maintaining her with food, clothing, and the like.[243]

(c) *Loss of a child*

Whether a minor child's death resulting in the loss of pecuniary benefit is a mere speculative possibility or a reasonable expectation depends on the circumstances of each case. Compensation does not follow, however, from the mere proof that a child was healthy and strong.

The courts have held, on the one hand, that in the case of a young child damages are only awarded by "a process of speculation and by a mere guess without any premise upon which they can find that there was a reasonable expectation"[244] and any claim, therefore, is "pressed to extinction by the weight of multiplied contingencies".[245] Factors contributing to this view have been the child's extreme youth,[246] his possible early marriage or premature death, the additional years of schooling planned for him,[247] his parents' favourable financial position[248] and the expense of educating and maintaining him during the intervening years.[249]

Where damages have been allowed for a child's death, influencing circumstances have been his previous monetary contributions and his promise to pay more in the future,[250] combined with

[243] *Ponyicki* v *Sawayama, supra,* footnote 154, at pp. 202, 207.

[244] *Kleisenger* v *Demonyatz,* [1937] 3 W W.R 481 (girl aged 2)

[245] *Barnett* v. *Cohen, supra,* footnote 136 (boy aged 4). See *Schroeder* v. *Johnson,* [1949] O W N. 551, at p. 552, for a typical analysis of the problem. See also *Pedlar* v *Toronto Power Co* (1913), 29 O L.R. 527; *Hogan* v. *City of Regina,* [1924] 2 W W.R 307; *Craig* v. *C Nor. Pac R. Co.,* [1934] 1 D.L.R. 484; *Cashin* v. *MacKenzie,* [1951] 3 D.L R. 495; *Thomson* v. *Staherland Parcels,* (1952-53) 7 W.W.R (N S) 510; *Rivard* v. *Toronto General Trusts Co., supra,* footnote 182

[246] *McKeown* v. *Toronto Ry. Co* (1908), 19 O L R 361 (boy aged 4): "as a matter of law youth is no bar but the younger the child is the more difficult it is to determine whether there is such a reasonable and well founded expectation of pecuniary benefit as can be estimated in money" (*per* Meredith C.J O.).

[247] *Barnett* v. *Cohen, supra,* footnote 136, *Cranston* v *The King,* [1948] 2 D.L.R. 248 (girl aged 11); *Chabot* v. *Toronto General Trusts Corp., supra,* footnote 182 (boy aged 20).

[248] *Cranston* v. *The King, supra,* footnote 247.

[249] *Barnett* v. *Cohen, supra,* footnote 136 *Riopelle* v. *Desjardins,* [1950] O R. 93, *per* Schroeder J. at p. 102 (boy aged 7): ". . . for many years he will be a liability. . more going out than there would be coming in so far as any contribution from this boy is concerned. . . . taking into account the contingencies and uncertainties of life, any such expectation is pared down to a minimum . . balancing the losses against the gains . . . the damages in the case of a very young child almost approach the vanishing point" See also: *Burbidge* v *Starr Mfg Co.* (1921), 56 D L R. 658; *Clement* v *Northern Navigation Co.* (1918), 43 D L R. 433; *Watts* v. *City of St. Thomas, supra,* footnote 207.

[250] *Duckworth* v. *Johnson* (1860), 29 L J. Ex. 25; *Spiers* v. *McGregor* (1930), 37 O.W.N. 317; *Durant* v. *Ontario and Minnesota Power Co.*

his good prospects,[251] the congenial family relations[252] and the unusual manual assistance rendered by him with a consequent monetary saving to the parents.[253]

II. *Assessment under Survival Legislation*

1. *General*

The common-law rule, *actio personalis moritur cum persona*, requires a tortious action for personal injury to be concluded in the joint lifetime of the wrongdoer and the person injured or it dies with the parties to the cause of action. Consequently, where the injured person dies before he recovers judgment, his estate cannot be compensated either for the loss suffered by the deceased before his death or for his loss in having his normal expectation of life shortened. This is the law today in Newfoundland, Nova Scotia and Prince Edward Island. In Saskatchewan,[254] the right of the deceased's estate to sue is limited to those torts or injuries to the person of the deceased not resulting in death.

Sweeping changes in the common-law rule were made in England in 1934,[255] with the result that it is no longer "cheaper to kill than to maim or cripple". That legislation was followed shortly, with various modifications, in New Brunswick, Ontario, Manitoba and British Columbia.[256] The general effect is that the deceased's executor or administrator may sue for all[257] torts and injuries to the person of the deceased in the same manner and with the same

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(1917), 41 O.L.R. 130, at p. 137; *Damack* v. *Kenick*, *supra*, footnote 234.

[251] *Taff Vale Ry* v. *Jenkins*, *supra*, footnote 157: damages awarded to the parents of a girl aged 16, who on her death was completing her apprenticeship as a dressmaker and would likely have earned a substantial remuneration.

[252] *London and Western Trusts Co.* v. *G T R.* (1910), 22 O.L.R. 262.

[253] *Batog* v. *Mundy*, *supra*, footnote 173 (girl aged 12); *Wolfe* v. *G. N. Ry.* (1890-91), 26 L.R. Ir. 548; *Bedwell* v. *Golding*, *supra*, footnote 176: girl aged 11 whose death necessitated employment of a servant. See also: *Franklin* v. *S. E. Ry.*, *supra*, footnote 162; *Sykes* v. *N E. Ry.* (1875), 44 L.J.C.P. 191; *Marsden* v. *Pollock*, [1953] 1 S C.R. 66: illegitimate son aged 17 working in father's business at less wages than would another person.

[254] Trustee Act, R.S.S., 1953, c. 123, s. 52(1). Thus, where a person is injured and dies before he recovers compensation his estate, to recover, must show that the injury received did not result in the death. If this is proved, the estate receives compensation for all those elements of loss the deceased would have been entitled to had he lived and sued.

[255] Law Reform (Miscellaneous Provisions) Act, 1934.

[256] N.B.: Survival of Actions Act, R.S N.B., 1952, c. 223; Ont.: Trustee Act, R.S.O., 1950, c 400; Man.: Trustee Act, R.S.M., 1940, c. 221; Alta.: Trustee Act, R.S.A., 1942, c 215; B.C.: Administration Act, R.S.B.C., 1948, c. 6

[257] Except as noted *infra* because of special statutory provisions.

rights and remedies as the deceased would, if living, have been entitled to.[258]

2. *Principles of assessment*

The right to sue being statutory, the provisions of the governing legislation define the elements of damage that may be compensated. These vary in each of the provinces that has enacted a survival statute.

The basic rule is that damages are assessed according to the ordinary rules previously considered on damages for personal injuries,[259] so that, for example, effect must be given to depreciation in the value of money[260] and an agreement made by the deceased before his death under which compensation payable by the wrongdoer is limited.[261] The damages recoverable for the benefit of the deceased do not include, however, exemplary damages in New Brunswick[262] and Manitoba.[263]

Manitoba,[264] following the corresponding English statute, prohibits account being taken of any loss or gain to the deceased's estate consequent on the deceased's death, with the result that the earnings he would have made or moneys he would have acquired had he not died (such as annuity payments or a life interest terminable on death), the moneys payable on his death to his estate under life or accident insurance policies and the moneys no longer required to be paid as premiums on insurance are not relevant in the calculation of the award to be made to his estate.

3. *Elements of damage*

As in an action between living persons, the deceased's estate, except where forbidden by statute,[265] may seek compensation for such matters as the deceased's pain and suffering or physical disfigurement,[266] the loss of or injury to his personal effects, his incapacity during the period between the injury and death, the hospital and medical expenses incurred by him,[267] his loss of earn-

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[258] N.B., s. 1; Ont., s 37(1); Man., s. 49(1); Alta., s. 32; B.C., s. 71(2).
[259] Mayne, p. 559.
[260] See *supra*, footnote 172
[261] See *supra*, footnotes 164-166.
[262] N.B., s. 3.
[263] Man., s. 49(1).
[264] Man., s. 49(1) See generally Charlesworth, p. 580; Mayne, p. 559; Salmond, p. 85.
[265] Of the provinces of Canada, only in Alberta is the right of a deceased's estate to sue completely unrestricted.
[266] This cannot be a head of damage in British Columbia: s. 71(2).
[267] *Batog* v. *Mundy*, *supra*, footnote 173.

ings[268] and the loss or shortening of his expectation of life. Of these, only three require special comment.

Loss of personal property. The value of the deceased's personal property lost or damaged in the accident is recoverable. Although the tribunal is entitled, when considering such a claim, to rely on its knowledge and experience and write down the amount claimed, the amount cannot be in the nature of a flat deduction in all cases.[269]

Pain and suffering. Except in British Columbia,[270] the deceased's pain and suffering must be compensated by reasonable damages,[271] the amount of which depends on the length of time the suffering is endured and its severity,[272] remembering always that certain suffering cannot be compensated by any monetary award. When almost instantaneous death follows the injury,[273] or when the deceased was unconscious from the time of the accident to his death,[274] no damages are recoverable for pain and suffering, since none have been sustained.

Loss of expectation of life.[275] Since a living person has a right to damages for loss of expectation of life,[276] survival legislation,

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[268] In British Columbia (s 71(2)) damages are not allowed for expectancy of earnings subsequent to the death of a deceased that might have been sustained if the deceased had not died. The law is similar in Manitoba: see footnote 264, *supra*.

[269] *Bishop* v *Cunard etc.*, *supra*, footnote 145, at p. 247.

[270] S. 71(2) provides that "recovery shall not extend to damages in respect of pain or suffering caused to the deceased".

[271] The court will be moderate in its award because it is made not to the deceased but to his relatives or even his creditors. The point was not discussed in *Benham* v. *Gambling*, *supra*, footnote 99, as there the child was unconscious the whole time, but the restraint shown there applies equally here. See (1950), 100 L J. 312, at p. 327

[272] *Bishop* v. *Cunard etc*, *supra*, footnote 145, at p 247: here it was impossible to ascertain the circumstances of death and the time of survival — "in the absence of clear evidence of reasonably prolonged suffering there should be no award under this head" In *Roughead* v. *Railway Executive*, *supra*, footnote 187, where there was severe pain for a very short period, only £50 was awarded. See also *Turbeyfield* v. *G W.R. Co.* (1937), 54 T L R. 221.

[273] *Maltais* v *C P.R*, *supra*, footnote 172, at p. 162; *Shybunka* v. *Kapalka*, *supra*, footnote 241.

[274] *Rose* v *Ford*, *supra*, footnote 82: only £20 was awarded for pain and suffering when the deceased survived the accident by four days, but was in a coma. See also *Benham* v. *Gambling*, *supra*, footnote 99, *Drewry* v. *Towns*, *supra*, footnote 172; *Damack* v. *Kenick*, *supra*, footnote 234; *Bechthold* v. *Osbaldeston*, *supra*, footnote 172, at p. 181.

[275] Typical examples of the extensive writing on this subject are found in: (1935), 51 L Q Rev. 268; (1936), 52 L Q Rev 3; (1938), 54 L.Q Rev. 1; (1941), 57 L Q Rev. 153, 297, 462, 465; (1942), 58 L.Q. Rev 53; (1943), 59 L Q. Rev 101, (1949), 65 L Q Rev. 10; (1953), 8 Industrial L. Rev. 106; (1937), 1 Mod L. Rev 247; (1938), 2 Mod L. Rev. 14, 62; (1941), 5 Mod L Rev. 68, 81; (1950), 13 Mod. L. Rev 508; (1938), 16 Can. Bar Rev. 67, 119, 193, 499; (1941), 19 Can. Bar Rev. 141; (1950), 100 L.J. 312, 327; Charlesworth, p. 579; Mayne, p. 487; Salmond, pp. 84, 384-5.

[276] See *supra*, footnotes 97-103.

which endows a deceased's personal representative with the rights the deceased would have if living, empowers his estate, notwithstanding that death was instantaneous,[277] to claim damages for such loss.[278] Although this is the law today in Manitoba and Alberta,[279] in New Brunswick, Ontario and British Columbia[280] the right to claim for loss of expectation of life has been expressly abolished and in Saskatchewan the legislation does not embrace it.[281]

From the outset there was apprehension lest this element of damage would appear too frequently and prominently in litigation, with a resulting inflation of damages. This fear was justified;[282] awards were regarded as complete gambles[283] and widely varying sums were granted. In an effort to clarify the guiding principles, the courts laid down the following approach to the assessment of damages for shortening of life.[284]

[277] *Morgan* v. *Scoulding*, [1938] 1 All E R. 28.

[278] *Rose* v. *Ford*, *supra*, footnote 82, at pp 847-8 (Lord Wright): "A man has a legal right in his own life. I think he has a legal interest entitling him to complain if the integrity of his life is impaired by tortious acts not only in regard to pain, suffering and disability, but in regard to the continuance of life for its normal expectancy. A man has a legal right that his life should not be shortened by the tortious act of another. His normal expectancy of life is a thing of temporal value, so that its impairment is something for which damages should be given." (Lord Roche, p 859): "In such a loss there is a loss of a temporal good, capable of evaluation in money though the evaluation is difficult" But see the criticism of this approach by Stone, The Province and Function of Law (Sydney, 1946) pp. 196, 197.

[279] Man , s 49(1); Alta , s. 32

[280] N.B., s 3; Ont., s. 37(1)—the original provision, enacted in 1937, permitted the claim, but this was amended by the Trustee Amendment Act, 1938, 2 Geo. VI, c. 44; B.C., s. 71(2)—the effective date of the prohibition is February 12th, 1942—before that time this was a valid claim: *Ponyicki* v *Sawayama*, *supra*, footnote 154

[281] *Jansen* v *C N.R* , [1942] 2 W.W R. 368.

[282] Examples of early awards that the English courts would now regard as excessive are. *Turbeyfield* v. *G.W R Co.* (1937), 54 T L R. 221: £1,500 for a child of 8; *Morgan* v. *Scoulding*, *supra*, footnote 277: £1,000 for a man of 23; *Feay* v. *Barnwell*, *supra*, footnote 106 £600 for a wife of 71; *Bailey* v. *Howard*, [1939] 1 K.B 453: £1,000 for a child of 3. Corresponding Canadian awards were: *Batog* v. *Mundy*, *supra*, footnote 173: $3,000 for a girl of 12, *Stebbe* v. *Laird*, [1937] 1 W.W.R 173· $5,000 for a girl of 11; *McGinnis* v. *Murphy*, [1940] 1 W.W.R 92: $5,000 for a boy of 10; *Hordal* v *Buors* (1941), 48 Man. R 208: $3,000 for a man of 31.

[283] In *Mills* v. *Stanway Coaches*, [1940] 2 All E R. at p. 594, Goddard L J. likened the calculation of an assessment to "a blind man looking for a black hat in a dark room".

[284] The unanimous opinion of the House of Lords in *Benham* v. *Gambling*, *supra*, footnote 99, which has been adopted in Canada see *Bechthold* v. *Osbaldeston*, [1953] 2 S C.R. 177, which impliedly overrules the departure from it in *Anderson* v. *Chasney*, [1949] 2 W.W.R. 337, and *Maltais* v. *C.P.R.*, [1950] 2 W W R. 145. Kerwin J points out at p. 180 that, although there is a difference between English and Canadian conditions, "they may be taken into account without departing from the ratio of the House of Lords decision". *Benham* v. *Gambling* has been described as "a sobering in-

The proper result will not be reached by applying statistical or actuarial tests, because they represent averages and the resulting figure is not necessarily applicable to a given individual.[285] Moreover, it is not "the prospect of length of days" that is to be valued but "the prospect of a predominately happy life". On occasions, the individual's age may be important, but even in the case of old age arithmetical calculation should be avoided, because it does not assist to know how many years may have been lost, unless it is known how to place a value on those years. Human life is not a continuously enjoyable thing and therefore the damages should not be calculated solely, or even mainly, on the basis of the length of life lost.[286] Rather, "the ups and downs of life, its pains and sorrows as well as its joys and pleasures—all that makes up 'life's fitful fever'—have to be allowed for in the estimate". The vital question is not whether the individual had the capacity or ability to appreciate that his further life on earth would bring him happiness, but whether the circumstances of the individual were calculated on balance to lead to a positive measure of happiness.[287] That is, the test is objective not subjective, and if it appears, for example, that his character or habits would probably lead him to an unhappy or unsuccessful future, a smaller award is justified.[288] No account must be taken of financial losses or gains during the period of which he has been deprived, because the damages are solely for loss of life and not of future pecuniary prospects. A distinction must be drawn between a very young child, whose life is surrounded with so much uncertainty as to the future that "no confident estimate of prospective happiness can be made", and an individual who has successfully passed through those risks and

fluence" and "the most remarkable instance of judicial legislation to be found in the books".

[285] See *Bechthold* v. *Osbaldeston*, *supra*, footnote 172, at pp. 179, 180.

[286] See *Bishop* v. *Cunard etc.*, *supra*, footnote 145, at p. 247, "where men in the prime of life are concerned the measure of damages does not vary with the number of years of the allotted span which may be said to lie in front of the deceased persons". Here £350 and £500 were awarded where men 39 and 19½ were killed; the awards stood although it was pointed out that if the difference was solely because of the age differential it was wrong. Contrast *Aiz Karai Mendi*, [1938] 3 All E.R. 483, where awards in the case of men of varying ages were based solely on their ages.

[287] See, for example, *Hart* v. *Griffiths-Jones*, *supra*, footnote 172: in the case of a 4-year old girl, for whom future happiness was not indicated because she lived in a slum area and had separated parents, only £200 was awarded, even in the post-1941 inflationary period. *Jordan* v. *Mullis* (The Times, December 2nd, 1952): on the ground that the expectation of a happy life was questionable where the deceased had been separated from his Roman Catholic wife, who would not divorce him, and lived with another woman, only £75 was awarded.

[288] See *Rodzinski* v. *Modern Dairies Limited*, *supra*, footnote 45.

with age attained to some extent an established character and firmer hopes, and for whom an estimate becomes less incalculable. Since the degree of happiness to be attained by a human being does not depend on wealth or status, the fact that the social position or prospects of worldly possessions will be greater in the case of the older than the younger person does not affect an award.

These principles do not provide any scientific rule to guide the court in assessing damages, but "for what is in fact incapable of being measured in coin of the realm with any approach to real accuracy" they do approve a lower standard of measurement, which would have led to reduced awards in earlier cases and which calls for moderation in the future. There must be moderation because, stripped of technicalities, the compensation is not going to the injured person but to his estate, and it is attempting to equate incommensurables to set a money value on the prospective balance of happiness in the years that the deceased might otherwise have lived.[289]

To determine the moderate figure applicable is not easy. There is no principle of law upon which either a maximum or minimum award can be fixed and it remains as true today as it was before that mathematical standards are not useful, being purely arbitrary and bearing no relation to any facts whatsoever.[290] In practice, although there is still room for considerable divergence in the amounts to be awarded, the tendency of the courts both in England and in those provinces of Canada where the claim is allowed is to keep the assessment to very moderate amounts.[291]

Contributory Negligence and Damage Assessment

Each province[292] has legislation that affects the damages recoverable

[289] *Benham* v. *Gambling*, *supra*, footnote 99, *per* Viscount Simon Damages that would be proper where there was only a disabling injury are not a guide because they may be greater than for deprivation of life.

[290] *Ware* v *Cunard White Star Ltd.*, [1950] LI.L.Rep. 59.

[291] This is particularly so in England where as a result of *Benham* v. *Gambling* £200 was regarded as the standard and today, even allowing for the depreciation in the value of the pound sterling, £500 is generally recognized as the maximum sum recoverable: *Garcia* v. *Harland & Wolff Ltd.*, [1943] 2 All E.R. 477. See also *Lory* v. *G W.R. Co.*, *supra*, footnote 214; *Smith* v *British European Airways Corporation*, *supra*, footnote 213. In Canada, although the principles in *Benham* v. *Gambling* have been adopted, the awards have been higher, which may be explained by different living conditions. For example: *Rivard* v. *Toronto General Trusts Co.*, *supra*, footnote 182: $3,500 for an 18-year old girl living at home; *Thomson* v. *Stahlerand Parcels*, *supra*, footnote 245: $7,500 for a healthy, active and intelligent boy; *Damack* v. *Kenick*, *supra*, footnote 234: $6,000 for a boy of 19; *Drewry* v. *Towns*, *supra*, footnote 172: $7,500 for a young man.

[292] Contributory Negligence Act, R.S. Nfld., 1952, c. 159; Contribu-

in a personal injury action or a suit brought under fatal-accident or survival legislation where the plaintiff's negligence, or the negligence of another imputed to the plaintiff, has contributed to the injury or death. The more usual situations involving contributory negligence are discussed now.

Contributory negligence of plaintiff in a personal injury action. The common-law rule, under which a plaintiff's contributory negligence defeated his claim, has been replaced in each province by legislation providing that, where damages have been caused by the fault of two or more persons, the liability to make good the damage shall be in proportion to the degree in which each was at fault, and if it is not possible, having regard to all the circumstances, to establish different degrees of fault, the liability shall be apportioned equally.[293]

Contributory negligence of plaintiff's child or wife in a personal injury action for special damages. Opinion varies on the effect of contributory negligence of a child or wife on the claim of a father or husband for out-of-pocket expenses incurred by him because of injuries suffered by the child or wife. The more prominent view[294] is that such contributory negligence must be imputed to, and affects any damages sustained by and assessed in favour of, the father or husband, and they must be reduced in proportion to the degree of fault of the child or wife, because, although the plaintiff is in no way associated with the events that inflicted the injury, "his has

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tory Negligence Act, R.S.P.E.I., 1951, c. 30; Contributory Negligence Act, 1926 N.S., c. 3; Contributory Negligence Act, R.S.N.B., 1952, c. 36, Negligence Act, R.S.O., 1950, c. 52; Tortfeasors and Contributory Negligence Act, R.S.M., 1940, c. 75, Contributory Negligence Act, R.S.S., 1953, c. 83; Contributory Negligence Act, R.S.A., 1942, c. 116; Contributory Negligence Act, R.S.B.C., 1948, c. 68

[293] Nfld., s. 2; P.E.I., s. 1; N.S., s. 2; N.B., s. 1, Man., s. 4; Sask., s. 2; Alta., s. 2, B.C., s. 2. This principle is equally applicable when the negligent plaintiff claims damages for his own injuries and for his out-of-pocket expenses when his wife is injured: *Ferguson* v. *Macdonald*, [1949] 2 W.W.R. 1130.

[294] It is endorsed by the Ontario courts: *Knowlton* v. *H.E.P.C.* (1925-26), 58 O.L.R. 80; *McKittrick* v. *Byers* (1925-26), 58 O.L.R. 158; *Dority* v. *Ottawa Catholic Separate Schools Trustees* (1929-30), 65 O.L.R. 360; *Spencer* v. *Defazio*, [1938] O.W.N. 128; *Gargotch* v. *Cohen*, [1940] O.W.N. 479; *Graham* v. *T.T.C.*, [1945] O.W.N. 904, [1946] O.W.N. 274; *Oliver Blais Company Limited* v. *Yachuk*, [1946] 1 D.L.R. 5. In British Columbia, D.A. McDonald J. in *Bowes* v. *Hawke*, [1937] 1 W.W.R. 191, at p. 192, followed these authorities reluctantly, and in *McLaughlin* v. *Long* (1926), 53 N.B.R. 203, the New Brunswick Court of Appeal reached the same conclusion, although in the Supreme Court of Canada Anglin C.J.C. entered an obiter caveat against this principle being taken as decided. In the *Oliver Blais* case Estey J. favoured the principle but the Privy Council, [1947] A.C. 378, did not consider the point. *Gibson* v. *The King*, [1947] 4 D.L.R. 39 (Man.), and *Young* v. *Otto*, [1948] 1 D.L.R. 285 (Alta.), are to the same effect.

been regarded as a consequential or dependant action", and since at common law the contributory negligence would bar his claim altogether, the most he can recover under the negligence legislation is damages reduced in the same proportion as those of his injured relative would be.[295] The contrary view proceeds from the fact that the statute in express terms applies only to a claim by a person who suffers as the result partly of his own fault.[296]

Contributory negligence of deceased.[297] Before the introduction of contributory-negligence legislation, a deceased's contributory negligence was a complete defence to his relatives' action under the Fatal Accidents Act.[298] Contributory-negligence legislation has merely modified this defence and a wrongdoer must now contribute to the total damages in proportion to the fault attributable to him[299] and the remaining damages must be borne by the relatives even though not negligent.[300] When action is brought under survival legislation, recovery by the deceased's estate is similarly limited.[301]

Contributory negligence of one spouse in a personal injury, fatal-

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[295] *Oliver Blais Company Limited* v. *Yachuk, supra,* footnote 294, *per* Estey J. at p. 18.

[296] *Wasney* v. *Jurazsky,* [1933] 1 D.L.R. 616; *Mallett* v. *Dunn,* [1949] 1 All E.R. 973; *MacDonald* v *McNeil,* [1953] 1 D.L.R 755, 2 D.L.R. 248. A full discussion of the Canadian, English and American authorities is found in (1950), 13 Mod. L. Rev. 213. See also (1949), 27 Can Bar Rev. 710.

[297] See a discussion of the problems involved in (1941), 19 Can. Bar Rev. 291.

[298] *Littley* v *Brooks, supra,* footnote 151, *per* Rinfret J. at p. 475.

[299] The reason advanced for this limitation is that under the legislation "the limitation as to damages is only consequential. The true purport . . . is a limitation as to responsibility": *Littley* v. *Brooks, supra,* footnote 151, at p. 477. See also: *Jones* v. *Tersigni, supra,* footnote 163; *Price* v. *B C. Transportation Limited,* [1932] S C R. 310, *Newell* v. *Gemmell,* [1938] O W.N. 1; *Campbell* v *Perry* (1940), 14 M P R 89, *Foster* v. *Kerr, supra,* footnote 228; *Chapman* v. *C.N R and Parry Sound,* [1943] 2 D L R 98; *Stewart* v. *Ottawa Electric Rly. Co.,* [1945] O W.N. 639; *Wiskech* v *General News Company,* [1947] O.W.N. 3; *Kerschman* v. *Nichols,* [1950] 2 W W R. 420; *McDonald* v. *Mason,* (1953) 8 W.W.R. (N.S) 553.

[300] The contrary argument (see (1943), 21 Can. Bar Rev 416) is that, since negligence legislation provides for apportionment only if fault is found on the part of the "plaintiff", where the plaintiff has not been negligent it is a "forced construction" to reduce his claim by imputing to him the deceased's negligence. For the law of Quebec see (1946), 24 Can. Bar Rev. 153.

[301] *Kerschman* v. *Nichols, supra,* footnote 228; *Foster* v *Kerr, supra,* footnote 228. Chevrier J. in *Wiskech* v. *General News Company, supra,* footnote 299, at p. 5, explained this approach as follows: "Perhaps the word 'plaintiff' in S 3 [Contributory Negligence Act of Ontario] is not specially appropriate to describe the deceased . . . when the plaintiff sues as administratrix of his estate—but she nevertheless does in fact represent her husband's estate, and the jury's finding of negligence on the part of the deceased husband is in effect a finding of 'fault or negligence' on the part of the plaintiff as representing her husband's estate".

accident or survival action. The negligence legislation of each province,[302] except Prince Edward Island and Nova Scotia,[303] provides that, where action is brought for damage resulting from bodily injury to or the death of any married person, and one of the persons found to be negligent is his or her spouse, no damages are recoverable for the portion of the damage caused by the negligence of the spouse.[304]

Contributory negligence of gratuitous passenger's driver in a personal injury, fatal-accident or survival action. Legislation in all provinces,[305] except Prince Edward Island and Nova Scotia, provides in effect that where, because of prevailing legislation, no cause of action lies for loss or damage resulting from bodily injury to or the death of a gratuitous passenger against the owner or driver of a motor vehicle in which he was a passenger, no damages are recoverable from "any" person for the portion of the damage caused by the negligence of the owner or driver. Thus, where the gratuitous passenger's injuries or death result from the combined negligence of his driver and the defendant, there cannot be recovered from the defendant any of the share of the damage apportioned to the driver.[306] In the two named provinces it would appear that, whereas the gratuitous passenger's right to recover damages for personal injuries is unaffected by his driver's contributory negligence,[307] a claim under fatal-accident or survival legislation is affected.[308]

Contributory negligence of claimant in a fatal-accident action. A relative, claiming under the Fatal Accidents Act, whose contributory negligence has contributed to the death, will have his claim reduced in proportion to his negligence.[309]

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[302] Nfld., s. 9, N.B., s. 3; Ont., s. 2(3); Man., s. 6; Sask., s. 9; Alta., s. 3(3); B.C., s. 6A. Such portion so caused shall be determined although the spouse is not a party to the action.

[303] Here the spouse's negligence is immaterial because the cause of action relied on is independent of and unrelated to the negligent spouse: *Ferguson* v. *Macdonald*, *supra*, footnote 293.

[304] Although authority is lacking, it would seem that this would apply in a claim under the Fatal Accidents Act brought on behalf of a non-negligent relative (not the spouse) of the deceased. There is no valid reason, it is submitted, why the spouse's negligence should limit such a claim.

[305] Nfld., s. 8, N.B., s. 2; Ont., 2(2); Man., s. 5; Sask., s. 8; Alta., s. 3(2); B.C., s. 6. Such portion so caused shall be determined although the owner or driver is not a party to the action.

[306] *Schiffner* v. *C.P.R.*, *supra*, footnote 122; *Mann* v. *Wilkes* (1949), 57 Man. R. 465, at p. 467; *Drewry* v. *Towns*, *supra*, footnote 172.

[307] *Smorlie* v. *Harvey*, [1939] 3 D.L.R. 795.

[308] *Littley* v. *Brooks*, *supra*, footnote 151; *Drewry* v. *Towns*, *supra*, footnote 172.

[309] *Trueman* v. *H.E.P.C.*, [1924] 1 D.L.R. 405.

REVIEWING DAMAGE ASSESSMENTS ON APPEAL[309A]

The principles observed by an appellate court when deciding whether justification exists for disturbing the quantum of damages determined by the court of first instance (whether a judge with or without a jury) are not in doubt,[310] but their application is always a matter of some difficulty.[311]

A great difference exists between a finding by a judge alone and by a jury. Where the jury finds the facts an appellate court cannot be substituted for it, because the parties have agreed that the facts shall be decided by a jury and its verdict on damages will only be set aside if it "is such that it is out of all proportion to the circumstances of the case".[312] Where, however, a judge determines the quantum, the appeal is by way of a re-hearing on damages; nevertheless, since a damage assessment involves considerable discretion, speculation and estimate, the appellate court is reluctant to vary his conclusion and will do so only in very exceptional circumstances.[313]

Regardless of what tribunal determines the award at first instance, a court of appeal is not justified in substituting a figure of its own simply because it would have granted a different amount had it tried the case;[314] it should not interfere unless the conclusions reached at the trial are "clearly erroneous" from the evidence adduced, because it has not the advantage of seeing the witnesses, which is particularly important in drawing conclusions from the

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[309A] See generally 5 C E.D. 400-3; Charlesworth, p. 573-4; Halsbury, Vol. 10, paras. 188-198.

[310] *Nance* v. *B C. Electric Rly Co. Ltd*, *supra*, footnote 184, at pp. 613-4.

[311] *Rushton* v. *National Coal Board*, *supra*, footnote 23, at p. 296.

[312] *Davies* v. *Powell etc.*, *supra*, footnote 89, *per* Lord Wright at p. 616. Unless expressly authorized by statute, an appellate court, when it considers that the damages given by the jury are excessive or inadequate, has no jurisdiction without the consent of the parties to fix the amount of the damages, but only to set aside the jury's verdict and direct a new trial: *Watt* v. *Watt*, [1905] A C 115 In B.C., for example, Rule 7 of the Court of Appeal Rules qualifies this substantive right and the Court of Appeal may itself fix the amount of damages awarded by a jury if they are deemed excessive: *Collins* v. *B.C. Motor Transportation Limited*, (1952) 5 W.W.R. (N.S.) 508.

[313] *Davies* v. *Powell etc.*, *supra*, footnote 89, *per* Lord Macmillan at p. 611. See also *Jones* v. *Hough* (1879), 5 Ex.D. 115, at p 122; applied in *Bateman* v. *County of Middlesex*, *supra*, footnote 9. To the same effect is *Flint* v. *Lovell*, *supra*, footnote 82, at pp 359-60; applied in *Worcester* v. *Bell* (1949), 19 M.P R. 82. *Reaney* v. *C.W.S. Ltd*, [1932] W.N. 78.

[314] *Nance* v. *B.C. Electric Rly. Co. Ltd*, *supra*, footnote 184. See also *Mechanical and General Inventions Co. Ld.* v. *Austin*, [1935] A.C. 346; *Johnston* v. *G.W.R. Co.*, [1904] 2 K.B 250; *C.P.R.* v. *Jackson* (1915-16), 52 S.C.R. 281

evidence on the quantum of damages.[315] It has been said that "it is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere."[316] This is particularly so where a second appellate court is asked to interfere with the assessment of damages made at the trial when that assessment has been affirmed by the first court of appeal. To induce such interference a "very plain case of error" must be shown and, although the court will be extremely slow to do so, it is its duty to interfere in a proper case.[317]

Where at first instance a judge alone has determined the quantum, an appellate tribunal, to interfere, must be satisfied that in assessing the damages he applied a wrong principle of law[318] or misapprehended the facts,[319] or that the amount awarded is "either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage".[320]

On the other hand, the court of appeal will interfere with an award assessed by a jury[321] if it is clear that the jury misunderstood or disregarded its duty. The misunderstanding or disregard may comprise an award of damages so excessive or insufficient as

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[315] *McHugh* v *Union Bank* (1913), 10 D.L.R. 562, at p. 568. See also *Donnelly* v. *McManus Petroleum Ltd*, [1950] 1 D L.R. 303.

[316] *Davies* v *Powell etc*, *supra*, footnote 89, *per* Lord Wright at p. 617.

[317] *Deutch* v *Martin*, [1943] S.C R. 306, *per* Davis J at p. 369; *Archibald* v *Nesting*, [1953] 2 S.C.R. 423, *per* Cartwright J at p 427. See also *Pratt* v *Beaman*, [1930] S C.R 284, at p. 287

[318] For example, by taking into account some irrelevant factor or leaving out of account some relevant one. See *Haynes* v *Kennedy*, [1941] S C R 384 Instances are the taking of an unduly high or low number of years purchase in the calculation of damages under the Fatal Accidents Act (*Heatley* v *Steel Company of Wales Ld*, *supra*, footnote 188) or where a trial judge states that the basis of his assessment is by "guess" (*Williams* v *Stephenson* (1903), 33 S.C.R 323)

[319] *Nance* v. *B C Electric Rly. Co. Ltd*, *supra*, footnote 184, *per* Viscount Simon; applied in *Gaid* v. *Slobodian (No 2)*, (1951) 4 W.W R (N S.) 91, *Bird* v *Cocking & Sons*, *supra*, footnote 4, *Pollard* v. *Chipperfield*, (1952-53) 7 W W R. (N S.) 596, *Honan* v. *McLean*, *supra*, footnote 119, *Proctor* v. *Dyck*, *supra*, footnote 6, *Travis* v. *Whalen* (1953), 31 M P.R. 162. See generally *Owen* v. *Sykes*, *supra*, footnote 24, *Ponyicki* v. *Sawayama*, *supra*, footnote 154, at p. 207, *Greenfield* v. *L. & N.E. Ry. Co.*, [1944] 2 All E R. 438, at p. 440.

[320] Corresponding judicial expressions are: "a wholly erroneous estimate of damage" (*Davies* v. *Powell etc*, *supra*, footnote 89, at p. 617), "damages so excessive as to be unreasonable" (*Greenfield* v. *L. & N.E. Ry. Co*, *supra*, footnote 319), "gross and palpable excess or inadequacy" (*Ross* v. *Dunstall* (1921), 62 S C.R. 393), "damages extravagant, excessive or wholly disproportionate to the injuries suffered or to the nature and the extent of the resultant disability" (*McCarthy* v *Coldair*, [1951] 2 T.L.R. 1226). Denning L.J. in the last case felt an award that aroused the exclamation, "Good gracious me—as high as that", should be reduced

[321] For a general statement of the principles see Davies J. in *Warren* v. *Gray Goose Stage Ltd.*, [1938] S C R. 52, at p. 57.

to be in law indefensible,[322] an unsatisfactory trial by reason of misdirection,[323] the wrongful admission or rejection of evidence or the taking into account of matters that could not legally affect the verdict,[324] or omitting to take into account matters relevant to the issue.[325]

CONCLUSION

An examination of the law on the assessment of damages for personal injuries and death in the common-law provinces of Canada would be incomplete without some analysis of its adequacy under present conditions. That it should be adequate assumes increasing importance because, as was mentioned at the outset of this essay, actions based on personal injuries and death continue to multiply.

In an area as homogeneous as the common-law provinces it is not proper that a resident of one province should have rights different from those of a resident of another. A fundamental requirement for the adequacy of this branch of the law is that the damages awarded, in similar circumstances, should be as uniform as possible in the nine provincial jurisdictions. Uniformity embraces two distinct aspects, namely, consistency in legal principles and in the application of the principles.

The maxim that not only must justice be done but also be seen

[322] "Damages cannot be treated as excessive merely because they are large" (*Mechanical and General Inventions Co. Ld.* v *Austin, supra,* footnote 314, at p. 377), nor is it necessary that they be regarded as unconscionable to justify interference (*Cosgrove* v. *C N R.*, [1923] 4 D.L.R. 818. The classic test was stated by Lord Esher M.R. in *Praed* v *Graham* (1889), 24 Q.B.D. 53, at p. 55, namely, that the court will interfere where "the damages are so excessive that no twelve men could reasonably have given them" This test has been applied in *Smith* v. *Schilling*, [1928] 1 K B. 429, *Mechanical etc.* v. *Austin, supra,* footnote 314, *Loudon* v *Ryder, supra,* footnote 28. Other descriptions of excessive liberality are: "the assessment was unreasonably large and such as must have been occasioned by a misunderstanding of the basis upon which the amount ought to be determined", *Littley* v. *Brooks, supra,* footnote 151, at p. 472, "the amount awarded is so large that a jury appreciating the evidence could not reasonably have awarded that sum", *C P. Express Co* v. *Levy,* [1945] S.C.R. 456, at p 457; "no jury properly instructed and acting judicially could reasonably have reached it", *Landreville* v. *Brown,* [1941] S C R. 473, at p. 480, "excessive and so out of measure with what might be deemed reasonable as to justify interference", *Fick* v. *B.C Electric Rly. Co., supra,* footnote 7, at p. 736

[323] See, for example, *Gauley* v *H.E P.C*, *supra,* footnote 204; *Karavois* v. *Gallinicos,* [1917] W.N 323. It is improper to tell a jury to ask themselves: "If I were plaintiff how much ought I to be paid if the company did me an injury", *Hesse* v. *Saint John Rly. Co* (1899-1900), 30 S.C.R. 218.

[324] See generally, *C.P.R.* v. *Jackson, supra,* footnote 314; *Cosgrove* v. *C.N.R., supra,* footnote 322; *Elston* v. *Southern Ry. Co., supra,* footnote 71, at p. 77; *Peterson* v *McIntosh,* [1934] 1 D.L.R. 289, at p. 291.

[325] See, generally, *Phillips* v. *L. & S. W Rly. Co., supra,* footnote 16, *per* James L.J. at p 85

to be done has particular significance in the application of the principles. Irrespective of the soundness of the law, litigants obviously will not be satisfied unless awards are reasonably consistent. As has been seen, although damage assessments are the result of the application of legal concepts, the final calculation, whether the award be for personal injuries or death, involves estimation and even conjecture. The resulting inconsistencies can only be kept to a minimum by vigilant assessors.

The question naturally arises whether more uniform awards would be achieved if the mode of assessing damages by judge or jury were changed. Recently this question was examined in England by the Evershed Committee on Supreme Court Practice and Procedure[326] and a negative answer given. Of the several reforms proposed, the one most strenuously pressed was the reference of all assessments to a tribunal, comprising a lawyer and a doctor, which would confine itself solely to the question of quantum. Its advocates contended that, since such tribunals would consult together and be the only assessors of damages, greater uniformity in awards would be achieved. The committee's opinion was that, even disregarding the additional expense involved in establishing such bodies throughout the country, and the probable increased costs to litigants, the proposal was unacceptable because no greater uniformity would be produced than presently exists. Also rejected was the suggestion that questions of damages should be decided by a bench of three judges.[327] The committee considered that the best method of achieving greater uniformity would be consultation among judges.

Although absolute consistency in awards is unattainable, not only because of the human frailties of assessors but also because of the contingencies peculiar to each case, progress towards uniformity will be made if the assessing tribunal is not a jury,[328] but a judge, who consults his brother judges and is guided by awards made in other cases.

The uniformity of the legal principles applied in the various Canadian jurisdictions must also be considered. In personal injury claims[329] the overriding concept in the assessment of damages,

[326] Final Report of the Committee on Supreme Court Practice and Procedure, 1953, pp 121-2.

[327] See *supra*, footnote 9.

[328] As damage assessment becomes increasingly involved and reliance is placed on decided cases, a jury's inexperience, it is submitted, will lead to inconsistent awards. Although individual judges will differ, their experience will be a stabilizing factor.

[329] See *supra*, pp. 715-731

which has been adopted in all provinces, stems from the common law of England. It calls for awarding such compensation as is reasonable.[330] Where special damages are concerned, reasonable compensation means the total loss suffered, but in the case of general damages the rule does not assist positively, because no matter how much sympathy a particular injury engenders it cannot be truly compensated by money. In fact, however, money is the only yardstick by which injuries can be compensated; since it would be impractical to base compensation on the amount the injured person would have accepted to undergo the injury,[331] "reasonableness" appears the most satisfactory test, even though the resulting damages are described as "notional or theoretical compensation".[332] The courts, in arriving at adequate awards, "must be guided by conventional standards as shown by current levels of awards; and the criterion of current levels, in the long run, is whether they are accepted by general opinion as fair and full compensation".[333]

Generally speaking, the rules discussed for the assessment of special damages are equitable. There are, however, two points where improvement could be effected. First, statutes limiting the damages recoverable, as for example the Canada Shipping Act and the Carriage by Air Act, should be amended so that the maximum compensation bears some reasonable relation to present economic conditions and possible injuries as well as consequent expenses.[334] Secondly, compensation for lost accumulated sick-leave and wages or profits before the trial should take the form of general and not special damages, because, apart from the accident in question, the claimant might have been incapacitated by any one of many contingencies.[335]

There is considerable divergence in the remedies provided by the various provincial statutes in the event of death and a progressive step would be the enactment of a uniform statute.

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[330] See *supra*, p. 716.

[331] The difficulty inherent in this approach is evident from the following statement in (1953), 8 Industrial L. Rev. 106, at p. 108: "Many people might cheerfully consent to the amputation of one limb in return for a fortune, but no one would undergo terrible physical and mental hurt for money especially if he could not afterwards enjoy the spending of it. Regrettably enough, money is the only means by which the injured may be compensated however unsatisfactory it may be."

[332] *Rushton* v. *National Coal Board, supra*, footnote 23, *per* Romer L.J.

[333] (1953), 103 L J. 227

[334] See *supra*, footnote 26. The inadequate maximum limits provided by the named statutes are, respectively, 125,000 francs and $72.97 for each ton of ship's tonnage

[335] See *supra*, pp. 721-722.

Fatal-accident legislation generally has met with approval, but there has been criticism that its design is too narrow and relief should not be confined to near relatives and their pecuniary loss, actual or reasonably probable. The limitation to close relatives would appear to be a compromise and, although not theoretically just, seems practically sound, for otherwise it would be difficult to know where to draw the line.[336] The relatives included, however, should be all those who normally might suffer pecuniary loss from the death.[337] Confining compensation to pecuniary loss has excluded damages for loss of consortium. The wisdom of the exclusion has been disputed, but it is submitted that it was sound because it would be impractical to introduce the speculation inherent in valuing the sentimental loss of a relative.[338] On the other hand, awards based on pecuniary loss must not be calculated narrowly and every allowance must be made for probable benefits, particularly in the case of young children, where the courts have tended to be too strict.[339] There seems no reason why both insurance moneys and future premiums[340] should be included in the calculation or why pensions should not be treated similarly.[341] Recovery of funeral expenses should be limited to a reasonable, not a specified amount and should not depend on the claimant establishing pecuniary loss; the deceased's medical and hospital expenses paid for by the claimant should be dealt with in the same way.[342]

The principle of survival legislation, that rights of action survive for the benefit of a deceased's estate, is sound and should be adopted in all provinces.[343] It is impossible, however, to justify particular damage claims, which the legislation in some instances permits. The main anomalies concern exemplary damages, the deceased's pain and suffering, loss of expectation of life and bodily or mental harm suffered. The real objection to compensation for

[336] A case can probably be made for the lack of an employer's remedy when his servant is killed, but when the "family circle" is left, where is recovery to stop? For example, should it extend to a church that loses regular subscriptions when a wealthy member is killed, or to the Crown when deprived of income taxes?

[337] See *supra*, footnote 138: all the relatives there referred to should be allowed to sue

[338] See (1938), 16 Can. Bar Rev. 193. at pp. 198-9.

[339] See *supra*, p. 745. In (1938), 16 Can. Bar Rev. 193, at p 199. it is suggested that recovery might be based on loss of investment or on something like replacement value.

[340] See *supra*, pp. 741-742

[341] See *supra*, p. 741 After all, the principle underlying insurance and pensions is the same, namely, agreement now whereby in the future moneys will be paid to the contributor in return for moneys presently paid.

[342] See *supra*, p 733.

[343] Presently it is lacking in Nfld , N.S , P.E.I. and, to a limited extent, in Sask.

these is that, being of a personal nature, they should not be permitted to swell the estate for the benefit of living persons, whether relatives or creditors of the deceased.[344] When the Law Revision Committee, pursuant to whose recommendations the original survival legislation was enacted in England,[345] considered possible heads of damage, it did not intend to recommend that actions for pain and suffering and shortened expectation of life should still lie.[346] In view of the inherent difficulties in assessment and the fundamental objection referred to, survival legislation should exclude recovery for exemplary damages and the curtailment of the deceased's expectation of life, his pain and suffering and bodily or mental harm, and be confined to those damages suffered by his estate and not personal to him,[347] excluding in the calculation, however, any consideration of loss or gain to the estate because of the death.[348] The contention that this would lead to injustice, because it would then be cheaper to kill than to injure, is unsound: the true test should be compensation for damage suffered by the claimant. It is against the whole conception of the common law to compensate a person who has not suffered.

In concluding it may be said that the confusion existing in the law on the assessment of damages both for personal injuries and death lies not in principles, which are capable of clear exposition, but in the uncertainty of result obtained from their application. Room for unreasonable variation in damage awards will continue to exist, however, until the present elements of uncertainty disappear. They will disappear only when judicial experience is such that all possible contingencies have been dealt with. Until then the rôle of the courts should be viewed with sympathy.

[344] Stone, The Province and Function of Law (1946) pp. 196-7: "But the actuality is that expectation of life while the deceased lives represents an actual human interest of the deceased. After his death, *his* interest ceases. Any interest which his dependents have in his death is quite distinct in fact if not in logic and is already provided for, more or less, by the Fatal Accidents Act" In addition, claims for pain and suffering and loss of expectation of life involve "inquiries and speculations inappropriate to and difficult for a court of law". The claim for loss of expectation of life has been a particular source of embarrassment to the courts and, although the principles enunciated in *Benham* v. *Gambling* have done much to confine it within reasonable limits, its nebulous character continues to make unhappy those who must deal with it.

[345] Law Reform (Miscellaneous Provisions) Act, 1934.

[346] See (1938), 2 Mod L Rev. 14

[347] This is the situation in New Zealand. Recovery is excluded for exemplary damages in England, N.B. and Man., for loss of expectation of life in N.B., Ont., Sask. and B.C., for pain and suffering and facial disfigurement in B.C. If damages for pain and suffering are recoverable, why should exemplary damages not be? Caprice not logic so determines: see (1941), 5 Mod. L. Rev. 81, at pp 98-101.

[348] As is provided in Manitoba and England. See *supra*, p. 747.