

LOSS OF EXPECTATION OF LIFE

In *Flint v. Lovell*¹ the English Court of Appeal decided that in an action for damages for personal injuries, the damages awarded might, in appropriate cases, include a sum for the shortening of enjoyment of life or the lost prospect of an "enjoyable, vigorous and happy old age". In *Rose v. Ford*² the House of Lords not only approved the principle laid down in *Flint v. Lovell* but further held that, by virtue of section 1 of the Law Reform (Miscellaneous Provisions) Act 1934, the right to damages under this head survived the injured person, and could be enforced by his or her personal representatives. Then in *Major v. Bruer*³ the Court of Appeal of Ontario held that section 37 of the Ontario Trustee Act⁴ was indistinguishable from section 1 of the Imperial Law Reform Act of 1934.⁵

¹ [1935] 1 K.B. 354.

² [1937] A.C. 826.

³ [1938] O.R. 1.

⁴ R.S.O. 1937, c. 165.

⁵ Middleton J.A. was speaking generally in using the term "indistinguishable". The sections are differently worded and may in some cases produce different results.

The Ontario Act reads as follows: "Except in cases of libel and slander, the executor or administrator of any deceased person may maintain an action for all torts or injuries to the person or to the property of the deceased in the same manner and with the same rights and remedies as the deceased would, if living, have been entitled to do, and the damages when recovered shall form part of the personal estate of the deceased." Another sub-section gives a right, except in cases of libel and slander, against the personal representatives of a deceased person who has committed a wrong to person or property.

The English Act is, in this connection, more simple and direct. It provides:

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

Differing entirely from the Ontario Act, are the provisions which state that the above section does not apply to actions for defamation, seduction, enticing away a spouse, or adultery. Presumably, all of these save defamation, survive in Ontario. Further, the English Act limits damages in some cases. For example, it excludes exemplary damages, and limits recovery in the case of breach of promise to marry to damage to the estate. There are no such limitations in the Ontario Act. Further the English Act provides, (sec. 1 (2)(c)) that

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

No such provision appears in the Ontario Act, and funeral expenses are still not recoverable under either The Fatal Accidents Act or The Trustee Act.

[It will be interesting to see what an English court will do in a situation similar to that which arose in *McHugh v. G.T. Ry. Co.* (1901), 2 O.L.R. 600. X is killed by the defendants' negligence. X's only son has an action under the Fatal Accidents Act for damages resulting from such death. The son dies before the trial. Did the son have a "cause of

and therefore *Rose v. Ford* applied in Ontario, and personal representatives of an injured person whose life had been shortened by the injury could recover damages under the head of loss of expectation of life.

This new⁶ and extensive head of damages introduces complications which the courts will probably be called upon before long to resolve. The amount of damages usually awarded in cases of serious or fatal accidents caused by negligence, may be expected to be much increased. Motorists and others may require for their protection a higher coverage on their insurance policies than has been customary.⁷ The purpose of this article is to suggest by reference to the cases already decided under this head, some of the difficulties that remain to be solved before its scope is fully determined.

The courts have a difficult problem in determining upon what evidence and upon what principles enjoyment of life is to be weighed in money. It is obvious that a truly happy life cannot be compensated for by an award of money, however great, and again that any award of money might seem too much for the loss of life of a person on the point of suicide.⁸ The difficulties of the task do not, however, absolve the courts from having to attempt it.

action vested in him" at the time of death? It would seem so, although damages might be limited to the time of the son's death. An Ontario Court of Appeal held contrary in the *McHugh Case* stating, *inter alia* that the Fatal Accidents Act contemplated an action for the benefit of a living person, and that the language of The Trustee Act as to injuries "to the person or to the property of the deceased" was inapplicable to a claim under the Fatal Accidents Act. Is this a difference between the two Acts or is the Ontario case wrongly decided? — C. A. W.]

⁶Sir William Jowitt, *arguendo*, in *Rose v. Ford*, at pp. 830 - 31, stated that *Flint v. Lovell* introduced a new head of damages. Lord Wright, *ibid.*, at p. 848, said that as an element of damages loss of expectation of life was not new although, of course, the survival was new in England with the Act of 1934. *Sed quare*.

[It is amazing that since 1886 when Ontario enacted the present sec. 37 of The Trustee Act (49 Vict., c. 16, s. 23), there had been no such claim put forward under that Act for "shortened expectation of life", until the recent burst of litigation in England. Indeed in the *McHugh Case*, *supra* note 5, MacLennan J.A. stated (p. 610) that "it is not conceivable that the Legislature intended that, in the case of wrongs followed by death, the wrongdoer should be subjected to two different actions by the same executor or administrator, and for the same wrong". He was referring, of course, to an action under the Fatal Accidents Act (Lord Campbell's Act) and the survival section of the Trustee Act. In *Major v. Bruer*, *supra*, in 1937, such a thing is contemplated with equanimity and is fast becoming a commonplace. Who can deny that English legislation still has a real and potent effect on the Dominions? — C. A. W.]

⁷*E.g.*, in *Roach v. Yates*, [1938] 1 K.B. 256, in a case involving expectation of life, the Court of Appeal awarded a seriously injured plaintiff £6,542. Very few in Ontario carry insurance of \$30,000 for injuries to one person.

⁸See the comments of Dr. W. T. S. Stallybrass, editor of *SALMOND*, *TORTS*, 9th ed., p. 363.

It has been said that no branch of law is so uncertain or so confused as that relating to damages⁹ and that one reason for this has been the habit of leaving hard questions to a jury.¹⁰ Courts again suggest that a jury is the appropriate tribunal to solve the riddle of the value of human life.¹¹ But judges will still have to determine what evidence is or is not admissible to show the quality of the life which the injured person has lost; they will still have to give assistance to juries, and in most cases, perhaps, make their own assessment.

The basis of this claim for damages in *Flint v. Lovell* was that the plaintiff had lost the prospect of an "enjoyable, vigorous and healthy old age". This language was approved by the House of Lords in *Rose v. Ford*. The question of vigour and health is one with which medical evidence is adequate to deal. But how is the tribunal to determine the extent of the prospect of enjoyment inherent in the life of the injured person before the injury? In all of the cases decided so far the victim of the injury seems to have been "happy" and enjoying life. How far could the defence go in showing that in fact an injured person had not been happy, but miserable or deprived?

If the widest possible evidence as to the prospect of happiness or enjoyment for an injured person were permitted, trials would be not only embarrassing, but interminable. Should the tribunal, for instance, inquire into the home life of the injured person, the nagging tendencies of his wife, the wild or irresponsible behaviour of his children as elements likely to make his life less happy and enjoyable, and so worthy of a smaller sum in damages than in the case of a man unencumbered by such troubles? Should evidence of the injured person's gloomy outlook on life after the latest stock market crash, political defeat or new international complication, be admitted? On the other side of the picture, should evidence be admitted to show that a hopeless invalid had in fact risen superior to adversity and was as happy as a more healthy person? Lord Roche suggests in *Rose v. Ford* that the case of rich misers living in squalor, or poor men sunk in misery, might require special consideration. The task of proving a rich man to be a miser, or to be living in squalor, might be interesting. Which is the happier, the millionaire or the man on relief? In one case¹² Slessor L.J. speculates as to whether damages under this head

⁹ The *Susquehanna*, [1925] P. 196 at p. 210, Atkin L.J.

¹⁰ Goodhart, *Two Cases on Damages* (1937), 2 Univ. of Tor. L.J. 1.

¹¹ *Rose v. Ford*, *supra*, per Lord Roche at p. 862, and per Lord Wright at pp. 849 - 50.

¹² *Roach v. Yates*, [1938] 1 K.B. 256, 271.

would have been affected if the plaintiff had been (which he was not) of an "atrabilious temperament or a follower of Professor Schopenhauer or of suicidal tendencies". The legal mind shrinks from the imagination of judge, counsel and jury discussing the philosophy and philosophers favoured by the victim of an automobile accident. Can one imagine an argument directed to a court of appeal to the effect that the learned trial judge in directing the jury on the head of damages, had grossly misapprehended and misrepresented to the jury the evidence as to the philosophy of Karl Marx, Nietzsche, Dewey or whatever school of thought affected by the deceased?

The consideration of these possibilities makes it apparent that the courts will have to do, with this head of damages, what they have done with other questions regarding the quantum of damages, that is, abstract from the various circumstances of the injured person certain ones as relevant, not on the grounds of pure logic, but simply for practical reasons.¹³ They will impose what is largely an objective rather than a subjective test,¹⁴ and hold that what is to be considered are the prospects of happiness of the "ordinary man" in the circumstances abstracted as relevant by the courts, and not the individual particular happiness of the injured person.

What circumstances should be admitted as relevant? Evidence of age and physical health are relevant to prove the probable duration of the period of life lost by the injured person. They will also clearly be admissible to modify the tribunal's estimate of the quality of life of which the injured person has been deprived.¹⁵ What of evidence as to the financial circumstances of the injured person as an element contributing to his happiness? In *Rose v. Ford*, although it was unnecessary for the House of Lords to decide upon the quantum of the damages awarded under this head,¹⁶ several of the Law Lords refer to the subject.

Lord Roche said¹⁷ that the damages were "obviously and rightly" arrived at without regard to the question of the amount

¹³ See Goodhart, *op. cit.*, note 10.

¹⁴ Apparently a failure to appreciate life, and indeed a possible desire to get it over quickly, induced by the act of the defendant is not to be considered. See *Roach v. Yates*, *supra*.

¹⁵ Distinction between physical and mental conditions, or the results caused by mental as distinguished from physical ill-health, will probably be made although the line of demarcation between the two cannot be exactly drawn.

¹⁶ Lord Atkin was particularly careful to point out that any observations on this matter were *obiter dicta*. The Court of Appeal had fixed the amount of damages under this head at £1000, and in the House of Lords neither party complained of the quantum.

¹⁷ [1937] A.C. at p. 861.

of future earnings and "solely on the basis of what life was going to be worth to a healthy young woman earning her own living with dependent parents and with some prospects of marriage". "This method," he says, "seems to me correct. It eliminates, and rightly so, the question of rich and poor, and pays regard to the normal and the average. A rich miser living in squalor and a very poor man deeply sunk in misery might require special treatment, but ordinarily a person may be assumed to have or be able to earn enough to live his or her life and to enjoy it. Earnings or income are otherwise, and to an extent beyond this irrelevant." This passage bears out the suggestion that the test of the quantum of damages is to be the probable enjoyment of the ordinary man in the circumstances abstracted as relevant. Lord Roche apparently thinks financial circumstances, except in special cases, irrelevant. One can only wonder whether a jury might so believe.

Lord Atkin and Lord Wright¹⁸ suggest that there may be an area of duplication in the damages awarded under this head and damages awarded under the Fatal Accidents Act on the ground, apparently, that the enjoyment of life includes, as one of its component parts, the pleasure of providing for others and making provision for them. This is no doubt true, but only someone with financial resources can afford this source of enjoyment. And if the enjoyment of spending money on others is to be included, why not the enjoyment of spending a little money on oneself?

Again the Court of Appeal in *Roach v. Yates*,¹⁹ in allowing damages to a plaintiff whose life had been shortened by injuries sustained through the negligence of the defendant, included as two separate heads of damages (a) loss of the enjoyment of life, and (b) loss of wages not only for the period during which it was anticipated, the plaintiff would in fact live in a disabled condition, but also loss of wages for the whole normal life during which he might have been expected to live and earn, subject to ordinary contingencies, had it not been for the accident.²⁰ The Court of Appeal, however, suggested that these two heads overlapped at some point, and should not both be allowed for the full amount at which they would be estimated separately. Here again the Court seemed to have thought that income and enjoyment of life were connected.

¹⁸ [1937] A.C. at pp. 835, 852, 853. See this problem discussed *infra*.
¹⁹ [1938] 1 K.B. 256, 271.

²⁰ The question of survival of this head of damages after death in England and Ontario is mentioned below.

As a matter of fact, in most cases in which the injured person has died, actions will be brought under the Fatal Accidents Act and the Trustee Act at the same time, and evidence of the financial position of the injured person will be before the jury and in cases in which the injured person is still alive evidence of loss of wages will be given. It is suggested that in these circumstances a tribunal should not entirely disregard a person's income or financial circumstances in assessing the extent of a man's enjoyment of life, but should not give too much weight to it, realizing that ordinarily happiness does not correspond at all closely with income.²¹

What of family circumstances? It is to be noted that Lord Roche refers to the injured person in *Rose v. Ford* as being "with some prospects of marriage". These prospects were presumably prospects of a general nature. It is submitted that as a matter of convenience evidence might be given of the general domestic circumstances of an injured person; for instance, evidence as to whether the injured person was married or not, leaving it to a jury to determine whether or not marriage generally improves a man's or woman's prospects for enjoyment of life, but not to debate how the particular marriage of the injured person had turned out.

Lord Wright also considers this question of the method of assessment to be applied to this head of damages. He relies upon a jury to be fair and moderate in view of all the uncertainties and contingencies of human life. He then says, "Special cases may occur such as that of an infant²² or an imbecile or an incurable invalid or a person involved in hopeless difficulties."²³ This passage suggests that variations between human beings of a more ordinary and less unusual nature than those enumerated by Lord Wright should not be considered in this connection.

What is a "hopeless difficulty"? Presumably a man sentenced to life imprisonment or a long gaol term might be said to be facing a difficulty palpably hopeless to the ordinary man so as to justify the admission of evidence of his predicament.

To sum up, it may be suggested that the courts will and should, upon practical considerations, accept evidence on this

²¹ Aldous Huxley in *Ends and Means* refers to the opinion of a Bankruptcy Registrar in London that enjoyment of life increases with income up to about £5000 per annum, and then decreases. Huxley himself suggests that to lead the highest type of life in the present day, an income of not much more or less than £600 per annum is proper.

²² For the case of a child eight years of age see *Turbyfield v. Great Western Railway Co.*, (1937), 54 T.L.R. 221.

²³ [1937] A.C. at p. 850.

head of the injured person's age, physical health, mental condition in palpable and extreme cases, general income level, mode of life, occupation and family circumstances, and of all extreme cases or "hopeless difficulties". They will reject, on the other hand, evidence in detail as to an injured person's state of mind, philosophy, daily grumblings, family quarrels, particular worries or stock exchange losses, political disappointments, and so on. These circumstances might, before some ideal tribunal administering perfect justice, be properly admitted. Practical considerations of expedience require their exclusion.

At the best, the warnings uttered by Roche L.J. (as he then was) in *Flint v. Lovell*, have already been justified by the event. This head of damages, he thought, would introduce inquiries and speculations inappropriate to a court of law. The results of the reported cases show not only that the trial judges experience great difficulties on this head, but that from different tribunals widely differing estimates of the value of human life may be expected to flow. This chaos may be in part resolved in cases tried without a jury, by a tendency of the courts, already apparent, to arrive at a tariff for the value of the enjoyment of human life at different ages and in different circumstances, by considering amounts awarded in decided cases. In *Rose v. Ford*, £1000, awarded to the estate of the young lady of 23 for shortened expectation of life was allowed without objection or explanation by the House of Lords, and apparently no discussion was had as to the appropriateness of the amount. Since then this figure has been taken as a norm. For example, in the *Turbyfield Case* the trial judge, figuring that the deceased child was fifteen years younger than the girl in *Rose v. Ford*, merely added half as much again to the amount such child's estate should recover and awarded £1500. In the Ontario cases, so far, the amount seems to be a fixed one of \$1000, this being the amount awarded to the estate of a man aged 70 and to the estate of a woman aged 57.²⁴

In *Flint v. Lovell*²⁵ the plaintiff who was injured was a retired man of 69 interested in sport and of a happy disposition who expected at the date of trial to live one year instead of the seven or eight years he might have lived if the injury had not been received. The trial judge gave him £4000 for damages under this head, and for pain and suffering expected to last about a year. The Court of Appeal refused to disturb this

²⁴ See *Major v. Bruer* [1938] O.R. 1, and *Newell v. Gemmell* [1938] O.W.N. 1.

²⁵ [1935] 1 K.B. 354.

verdict.²⁶ In *Rose v. Ford*, in the case of a healthy young woman of 23 "with some prospects of marriage" and "a job", the Court of Appeal thought £1000 adequate under this head, and no one quarrelled with the figure suggested. A further sum was awarded to the girl's father under the Fatal Accidents Act.

In *Roach v. Yates*²⁷ the plaintiff was the injured man still alive at the date of that trial. He had been a bricklayer at the time of the accident, aged 32, married, earning about \$900.00 a year and living a vigorous, happy and healthy life. He was so severely injured by the accident that he required the nursing attention of a wife and sister. The Court of Appeal increased the trial judge's award of damages from £2750 (£542 special damages) to £6542. This figure included loss of expectation of life, loss of wages, pain and suffering, and an allowance for nursing services. The damages were not itemized under the different heads.²⁸

In the *Turbyfield Case* a girl of 8 was fatally injured. Her father sued as administrator of her estate, and was awarded £1500 for his daughter's loss of expectation of life. The learned judge (Greaves-Lord J.) used the figure of £1000 allowed in *Rose v. Ford* as a starting point and added to it a sum for the joys of childhood and adolescence which he apparently considered "a good thing". He did not think so highly, apparently, of the joys of even a healthy babyhood, as he suggested that if the child had been a small baby the amount awarded would have been smaller, in the light of the terrors of early childhood.

The learned judge deprecated sentiment, but created a precedent dangerous in this type of case, when he incorporated in his judgment the following verse :

A little work, a little play
To keep us going,
And so good-day.
A little warmth, a little light
Of love's bestowing,
And so good-night.

²⁶ The House of Lords in *Rose v. Ford* were careful to refrain from approving the quantum allowed in this case, although adopting the principle.

²⁷ [1938] 1 K.B. 256.

²⁸ It was suggested that £2000 might be a proper figure for loss of wages; approximately £2400 for nursing services and the balance of £1600 would presumably be attributable to pain and suffering and loss of expectation of life. As the court explained, the latter head duplicated to some extent the allowance for loss of wages, and was therefore somewhat reduced from what it might have been standing alone. See per Slesser L.J. pp. 269, 271.

A little fun to match the sorrow
Of each day's growing,
And so good-morning.²⁹

The learned judge may have been able to resist this sort of stuff. One wonders how juries would be affected by it, particularly if they guessed that the defendants were wealthy or insured.

In *Dransfield v. British Insulated Cables*,³⁰ Hawke J. gave to the widow of a working man £2340 under the Fatal Accidents Act, and £500 under this head. Hawke J. made the observation that some people think or say they think that they are better off in heaven than they would be in this life. "There are," he says, "all sorts of considerations that must be borne in mind." But surely one of the considerations that must be at all costs rejected is the view taken by the injured person or the tribunal assessing damages of the comparative pleasures of this world and the next.

In *Major v. Bruer*,³¹ the first reported Ontario case on this subject matter, the injured person (deceased at the trial) was 70 years of age, living in humble and dependent circumstances, but healthy and vigorous, and expected to live 10 years or so. A jury awarded \$1000 with which amount the Court of Appeal refused to interfere. Middleton J.A. remarked that the amount was extremely modest. In *Morgan v. Scoulding*³² Lewis J. gave £1000 for loss of expectation of life for a young man of 23, and £300 to his parents under the Fatal Accidents Act.³³

There are other questions of difficulty and importance arising out of the emergence of this new head of damages. In *Roach v. Yates*³⁴ the English Court of Appeal stated that in estimating damages a tribunal should, where life has been shortened by an accident, take into account, under a head for loss of wages, the period during which but for the accident the

²⁹ This poem does not appear in the report of the case in [1937] 4 All E.R. 614, but is reproduced in the report in 54 T.L.R. at p. 223.

³⁰ [1937] 4 All E.R. 382.

³¹ [1938] O.R. 1.

³² [1938] 1 All E.R. 28. It is interesting to note that this is the precise figure awarded in *Rose v. Ford* to a young lady of the same age. The court believed, apparently, in equality of the sexes so far as the prospects of enjoyment of life are concerned.

³³ This case is important in that, until overruled or reversed, it is authority that the interval of a split second between a man's injury and his death is a sufficient time to vest the right of action in the deceased so as to enable it to survive. The fact that death is instantaneous does not prevent the survival of claims for damages under the head here discussed. It is respectfully submitted that this decision is correct, and applicable to section 37 of the Trustee Act, *a fortiori*.

³⁴ *Supra*.

injured person would have lived and continued to earn. This head of damages is separate from the head of loss of expectation of the enjoyment of life, though to some extent duplicating it. No mention is made in the Court of Appeal of the lessening of the expenses of an injured person caused by the shortening of his life as a counterbalancing consideration, but this would be one of the elements to be considered. In *Roach v. Yates* the plaintiff was alive. Would a claim under the head of damages, called loss of wages, for the extended period after actual death of the injured person, survive the death (a claim for earnings lost through disability before actual death would clearly survive) under (a) the English Law Reform Act, 1934, s. 1, and (b) section 37 of the Trustee Act. The English Act contains a subsection (not in the Ontario section) expressly stating that damages awarded under section 1 of the Act should be calculated without reference to any loss or gain to the estate consequent on the death. The enacting sections are also worded differently.³⁵

Lord Atkin, in *Rose v. Ford*, contemplated that, apart from the effect of this subsection, damages for personal injuries would include, (a) actual money loss from the shortened expectation of life based upon earning capacity, and (b) an item of "personal" damage for loss of enjoyment of life. The decision in *Rose v. Ford* is that item (b) survives. What of item (a)? This money loss based upon loss of earnings, might be divided into two elements; first, money that would be, in the normal course, saved and upon death would augment the estate, and second, money that would be spent during the lifetime of the injured person. Lord Atkin puts the following question: "Can the damages include a calculation of loss of income which the deceased would have received during the normal expectation of life, but would not have saved so as to increase his estate?" He does not attempt to answer the question. The question suggests that Lord Atkin possibly contemplated that the lost earnings that would have been saved would be excluded from calculation by the terms of subsection (c) as a loss or gain to the estate consequent upon death. It is submitted that this conclusion is doubtful, and that the subsection might be given a narrower interpretation so as to exclude only those accretions of the estate dependent solely upon death, and not payable to anyone before death, *e.g.*, insurance moneys. However that may be, there seems to be no reason why, under the Ontario legislation, this element of damages should not survive, as it

³⁵ *Supra*, note 5.

could, if *Roach v. Yates* is correct, be recovered by the injured person in his lifetime.

What of the other element in the money loss caused by the shortening of life, namely loss of earnings that would have been expended by the injured person during the period of life that would have been extended but for the injury? There are two suggested reasons why this item might not be allowed. The first is that the shortened life saves the injured person this expense, as well as depriving him of the means of paying it. The second is that there is, on the grounds mentioned earlier in this article, a risk of duplication with the head of loss of enjoyment of life, the latter including the expenditure of money for oneself and for dependents.

The conclusion suggested is that under the English legislation, after death this separate head might disappear by virtue of subsection (c),³⁶ and by virtue of the duplication with damages awarded under the head of loss of expectation of life. Under the Ontario section it might survive at least to the extent of money that would have been saved and not expended during a normal expectation of life.

The English section excludes³⁷ from consideration the effect of insurance moneys falling due upon the death and augmenting the estate. What is the effect of the absence of such a subsection from the Ontario Trustee Act? Should insurance money falling in at the death be considered so as to reduce damages under these heads? The implication in the various judgments in *Rose v. Ford* seems to be that subsection (c) of the English Act is superfluous, except in so far as it enables funeral expenses to be recovered by the estate. Considerations of what happens after death are, in this view, irrelevant, the cause of action, i.e., the injury plus the damage, being crystallized, as it were, at the moment of death, and including all the precise items of damages exactly as the deceased could have recovered them, if living.

By the terms of the Ontario Act the cause of action does not survive (as by the English Act) but the executors or administrators are given a right of action with the same rights and remedies as the deceased. Does this difference in language affect the result? It is submitted that it does not.

Another problem apparently still unsolved is the relation between damages for shortened expectation of life which survive,

³⁶ *Supra*, note 5.

³⁷ By subsec. c., sec. 1.

and damages payable under the Fatal Accidents Act. Lord Atkin and Lord Wright, in *Rose v. Ford*, both assume that the damages to be awarded under these two Acts cover the same field to some extent. The reason for this is apparently that the enjoyment of life consists partially at least in the support of dependants, and the making of gifts. This last item is accounted for by an award under the Fatal Accidents Act. While both Lord Atkin and Lord Wright suggested that there might be duplication in awarding damages under both the Fatal Accidents Act and the Law Reform Act, they diverge as to the means by which duplication could be avoided. Lord Atkin suggested that if those benefiting under the Fatal Accidents Act also benefited under the will or intestacy of the person who had been deprived of his expectation of life, the damages under the former Act would be diminished by the amount which they would obtain under such will or intestacy. On the other hand, Lord Wright took the view that "as one of the fruits of continuing life is generally provision for dependants", therefore if this provision was made good under the Fatal Accidents Act there should be corresponding reduction of damages for shortened expectation of life. Lord Wright's view, if followed, would secure the dependants the full amount to which they were entitled, unaffected by creditors' claims. In the English cases following *Rose v. Ford*, however, Lord Atkin's view seems to have been adopted. See *Dransfield v. V. I. Cables Ltd.*,³⁸ and *Feay v. Barnwell*.³⁹ In the latter case a husband was awarded £625 under the Fatal Accidents Act for the death of his wife. As administrator of his wife's estate he was held entitled to £600 for shortened expectation of life. As the husband would take all the wife's estate, the court felt that the £600 should be deducted from the amount awarded under the Fatal Accidents Act, but, as there would be certain administration expenses payable by the estate, which were fixed at £25, he deducted from the Fatal Accident claim only £575. In the Ontario cases there has been as yet no suggestion of duplication.⁴⁰

To conclude, the courts and legislature, by introducing this new head of damages, have opened up a wide avenue of speculation and litigation. By a somewhat strange and illogical method they have succeeded in robbing of its sting the rule that a wrong causing the death of another does not confer a right of action upon a person suffering loss thereby. The Fatal

³⁸ [1937] 4 All E.R. 382.

³⁹ [1938] 1 All E.R. 31.

⁴⁰ See, for example, *Newell v. Gemmell*, [1938] O.W.N. 1.

Accidents Acts carved out a restricted exception to this common law rule. The Law Reform Act in England, and the Trustee Act in Ontario, together with the discovery by the courts of a right in an injured person still living to recover damages for the hastening of his own death, have made it probable that in fact the dependents (or creditors) of a deceased person suffering a loss from his death will usually ⁴¹ receive some compensation for his death.

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⁴¹ One says "usually" for, of course, the provision of a man's will may deprive some deserving dependants of any benefits under a will and confer them on a stranger, (subject to Dependents Relief Act, etc.). This suggests the necessity of everyone drawing a will. A man or woman may have no money to leave and think it unnecessary to draw a will. But we may all, of whatever station of life, be victims of a negligent automobile driver, and our personal representatives may have money to distribute which they have obtained as damages under this Act, of which we could have had no knowledge at all.