THE ABOLITION OF CLAIMS FOR SHORTENED EXPECTATION OF LIFE BY A DECEASED'S ESTATE

Probably no other single topic in the law has caused so much discussion among lawyers in the past year as "shortened expectation of life". The novel claim for damages under such a head first saw the light of day in an action by a living person for damages to compensate him for the loss of part of his life.[1] When the English Parliament in 1934 passed the Law Reform (Miscellaneous Provisions) Act, 1934, providing that

> 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.

it was only logical that if a living person had a claim for "shortened expectation" such "vested" cause of action should "survive" under the section and be enforceable by his personal representatives. And so the House of Lords held in *Rose* v. *Ford*.[2]

Ontario had on the statute books for over fifty years legislation [3] which, while differing in many respects from the English Act, undoubtedly was designed to achieve the same result of allowing the personal representative of a person injured by tortious conduct to continue the action for the benefit of the estate. For over fifty years no one had thought that a personal representative could collect damages for the estate of a deceased person based solely on the fact that such person's life had been shortened or that he had been killed by the defendant's tortious conduct. Immediately after the new English legislation and the decision of the House of Lords in *Rose* v. *Ford* we find all this gone.[4] A personal representative is entitled on behalf of the estate to collect damages for the death .[5] Presumably, therefore, this has been, in theory, the law of Ontario for over fifty years —only no one knew it until in England legislation similar to ours was passed.

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[1] *Flint* v. *Lovell*, [1935] 1 K.B. 354. Although Lord Wright in *Rose* v. *Ford*, [1937] A.C. 826 at p. 848, said that loss of expectation of life was not a new head of damages in an action by a living person, this seems open to doubt.

[2] [1937] A.C. 826.

[3] See now The Trustee Act, R.S.O. 1937, c. 165, sec. 37.

[4] *Major* v. *Bruer*, [1938] O.R. 1.

[5] Theoretically the damages are not for the death. Death merely shows that the deceased's life *was* shortened. Practically the action is for the death.

At the time of writing, a Bill is before the Ontario Legislature seeking to abolish the effect of *Rose* v. *Ford* and to bring the law back to what it had always been understood to be in this Province until recent developments in England. The Bill merely provides that in an action by a personal representative no damages for death or shortened expectation of life shall be recoverable for the benefit of the estate.

Since the Bill was introduced a few weeks ago, several lawyers have bitterly attacked it in the public press and elsewhere. In all the opposition to the Bill the sinister hand of the insurance companies is seen at the back of this "retrograde" step. We are told that "civil penalties" for the death-toll on the highways must be raised and not lowered : that to revert to a stage when we can say "it is cheaper to kill than to injure" is "vicious" in principle.

Had such statements come from non-lawyer politicians one would, perhaps, not register surprise. In the case of lawyers one is only surprised at the extent to which phrases rather than realities still control the thoughts of many parts of the profession.

The present writer is not in the slightest concerned with the undoubted alarm of the insurance companies,—save as it may be reflected in imposing higher rates on innocent motorists. Even then, this factor is relatively unimportant if there be some desirable social result to be attained. On the other hand, Ontario having had fundamentally the same statute which furnished the basis for the decision in *Rose* v. *Ford* for so long without any outcry from persons now vocal in support of the change introduced by that decision, it would seem that some reasoned examination of the whole subject is called for.

It is strange that the opposition to the Bill now before the Legislature seems to regard our law as satisfactory if only we retain the change introduced by *Rose* v. *Ford*. But then, apparently the same persons regarded the law as satisfactory before *Rose* v. *Ford*. At least we heard nothing to the contrary. It is extremely doubtful, even in England, whether there is approval of the changes made by the new legislation or the decision in *Rose* v. *Ford*. Even were we to continue the doctrine of *Rose* v. *Ford* in this Province our law, in matters of the survival of tort actions, would be different from that in England. What is needed, is neither a blind approval nor a blind disapproval of everything done in England. What we might well do, however, is retain our law as it has existed for so many years until a proper examination of the pros and cons

of the whole situation could be made. It is the writer's opinion not only that a claim for shortened expectation of life or death should be excluded as an item in an action by a personal representative of a deceased, but that many other actions in tort and all claims for pain and suffering should be excluded as well. At the same time, it is possible that claims in addition to those now allowed to dependents under the Fatal Accidents Act should be provided for, and that other pecuniary losses to the estate should be compensable by the defendant. What is needed is not invective, nor appeals to prejudice, but a willingness to examine the situation freed from academic platitudes and in the light of a sound, workable policy of law.

Two events coincided to produce the existing state of the law: (1) the work of the Law Revision Committee resulting in the English survival statute, and (2) the decision of *Flint* v. *Lowell* approving a claim for shortened expectation of life by a living person. Granting the latter — and (although to the writer it seems of doubtful utility as a claim distinct from pain and suffering) there is no intention of questioning that here — the House of Lords decision in *Rose* v. *Ford* seems inevitable. Whether it be desirable, therefore, depends on how far the so-called "reform" of the law by the statute can be supported on any utilitarian view. While the writer is interested in reform of the law, he does not believe that reform consists either in making the law "logical" or consistent with theories which serve no practical purpose. He is inclined to believe that many efforts to "reform" the so-called "evils" of a given situation, are concerned more with eliminating phrases with an ominous sound than with an attempt to find a solution of problems based on what is expedient and desirable from the standpoint of the *entire* body politic.

That it doubtless sounds ridiculous to say "it is cheaper to kill than to injure", proves nothing. It is not even accurate.[5A] We might just as well be told that there is one law for the rich and one for the poor because to smash up a new expensive car is more costly to the defendant than injury to an old worthless motor car. In fact, a writer recently went this far in an appeal to the public against the Bill in question, by saying that the claim for shortened expectation of life now leveled up the difference between killing a poor man and a rich man. Why not equalize ages as well? Or why not have a standard sum for

[5A] A person slightly injured by homicidal negligence will receive very small damages. If he were killed, the pecuniary loss to his dependents might well be extremely heavy.

breach of contract? Before the English Law Reform Act was passed, many writers spoke of the anomaly of the common law that "the infliction of death is not, as such, a tort".[6] Such writers, before *Rose* v. *Ford*, urged that the Law Reform Act 1934 did not go far enough. It did not make death a tort.[7] It is submitted, with respect, that statements of this kind ignore the fundamental problem.

All law exists for some purpose. The criminal law is primarily concerned with punishing persons for committing anti-social acts, presumably with a view to deterring others. The function of the law of torts is to adjust the incidence of loss caused in the many activities of modern life and to compensate a person for losses sustained due to another's conduct. At one stage of our legal development, torts and crimes were no doubt undifferentiated. At the present day there is no need to confuse their respective functions. Although we still have instances in the law of torts where the early criminal aspect of tort law remains, *e.g.*, assault unaccompanied by battery, the two should be kept distinct. Although we often speak of a person who must compensate for harm done as a "wrongdoer" or as "guilty" of something or other, *e.g.*, negligence, this does not necessarily imply any moral fault-finding. Today liability may be imposed on a person who has done no wrong, been guilty of no fault, simply because it is good policy to shift the loss from the injured person to the person doing the injury.[8] That being so, it seems beside the point to speak of imposing a "penalty" for causing death. That is the purpose of the criminal law. The most "guilty" or reprehensible driver may be lucky enough to cause no damage. He *should* be punished and severely. Another, who momentarily lapses from reasonable standards of care may kill another. That he should pay is undoubted. Perhaps the time is coming when he will pay on mere proof of the harm without proof of negligence at all.[9] But he should

[6] See this language used by Winfield, *Recent Legislation on the English Law of Tort* (1936), 14 Can. Bar Rev. 639 at p. 644.

[7] See Winfield, *op. cit.*

[8] There are dozens of such cases. The law of vicarious liability imposing on an employer liability for the acts of a servant is the most common, although we constantly becloud the issue with fictions. So liability has been extended in many cases to employers of independent contractors. Exercise of care is no excuse under the rule of *Rylands* v. *Fletcher*, nor in the cases involving the keeping of dangerous animals. Workmen's Compensation is another large department of the law removed from "fault-finding" and based on other considerations of policy.

[9] Distinctions between the "strict liability" of *Rylands* v. *Fletcher* and negligence are becoming more and more blurred particularly with the increase of presumptions of negligence either statutory or of the common law.

only pay or compensate for losses which the law thinks it good policy should not be left to lie where they fall. With the increasing risks of modern life the law must select an ever-widening number of claims for protection. To protect as many claims as possible without unduly limiting the activities of others has always been the central problem of legal administration. This calls at the least for some justification of the claims advanced.

What is the claim which *Rose* v. *Ford* and the Law Reform Act considered as worthy of compensation in money? Here arises the question which many writers ignore. Who is asserting the right, or the claim? It seems clear that it is not the deceased man. The dead can have no claims against the living save in the most artificial sense.[10] In what sense is it good policy to throw a loss on a living person for the benefit of a dead person? It is believed that few would admit such policy. It is only by saying that the money paid will go to some living person that we can make any sense at all. If that be so, is not the problem that of protecting the claims or rights of one person in the continued existence of another? True, a living person may, perhaps, be entitled to damages for the shortening of his life. Something is taken from him. What, however, is taken from a living person by the death of another? Two things in any event. (1) Possibility of receiving support, or pecuniary advantage of several kinds. (2) Possibility of future pleasant relations with the deceased of a non-pecuniary nature. The problem seems to be, should these claims of the living be protected against conduct jeopardizing them.

By artificial reasoning, not relevant here, the common law recognized such rights only to a limited extent. Thus, for example, even when the maxim *actio personalis moritur cum persona* flourished in all its vigour, claims in contract by the personal representatives of a deceased were allowed, as were also claims for any property of the deceased which the defendant had appropriated and added to his own.[11] With these everyone agrees. But why? Is it not because living persons, beneficiaries of the deceased's estate, would have obtained the benefit of this property, whether tangible or in the form of promise, had it not been for the defendant's act? Was this not an

[10] The "right" of free testation is today breaking down in favour of the "rights" of the living. See McMurray, *Liberty of Testation* (1919), 14 Ill. L. Rev. 96, and compare various Dependents' Relief Acts, and the policy behind Succession Duty Acts, and other policies of the common law aimed to secure the free alienation of property.

[11] *Phillips* v. *Homfray*, 24 Ch. D 439.

indirect method of recognizing claims of the living? Perhaps the common law was sounder than we knew.

Clearly, however, there were a number of persons who suffered pecuniary loss by the death of another who were barred of recovery by the *actio personalis* doctrine.[12] To meet this, Lord Campbell's Act (Fatal Accidents Act) was passed in 1846 to give recognition to the claims of the living, within a limited circle, for the pecuniary advantages they would have received from the continued existence of the deceased. It is true that this did not cover the claims of everyone. For example, Winfield laments that an employer still cannot recover for the loss of his employee's services by death.[13] There is a difficulty here, but it seems one of degree. Where stop? A church may lose regular subscriptions by an early death of a wealthy member. The State may be deprived of income taxes. The law has compromised here on near relatives, and while not theoretically just, the result seems practically sound.

Under the Fatal Accidents Act there is no protection for loss of consortium. Should this be remedied? It is here that one meets with a real argument in favour of continuing "shortened expectation of life" claims. Such a claim it is said takes care of this gap. The difficulties, however, are twofold: (1) How can an estimate in money ever be made of such an intangible interest? (2) Who is entitled to this protection? At present the law assesses the deceased's interest in his own life, and then hands this on to whomsoever may take the deceased's estate. Such persons might conceivably be creditors or some charitable institution. Such a result would still leave the close relatives with no claim for loss of consortium. If it be said this result would be rare, there is still the objection that the law is not valuing the claim of living persons at all, and that to estimate the value a man put on his own life after his death is to enter a sphere of speculation quite foreign to law. If the injured man still lives the courts may feel bound to weigh this in a dollars and cents scale — the remedy given by English law for everything. If he be dead, should the time of the courts be taken up with such speculations; should meritorious cases be impeded in settlement

[12] It is interesting to observe that this doctrine was probably mixed up with the notion that the defendant had only "wronged" the deceased —that is, the evil nature of the act was purged by death. It is this "wrong" notion that advocates for enlarging the scope of survival actions use today in a diametrically opposed manner. So long as the Act is viewed as a "wrong" it is only the State that is interested. To the extent that the act has caused loss to another there should be compensation.

[13] WINFIELD, TEXT-BOOK OF THE LAW OF TORT, p. 215.

by the extravagant claims possible under such a head? It is submitted that the law in rejecting claims for loss of consortium in death cases was sound and that to bring in all the uncertainty and speculation inherent in valuing the sentimental loss of a near relative when there is nothing to justify it save some vague punitive theory of torts is unsound as a matter of practical politics.

It may well be, however, that in the claims of relatives under the Fatal Accidents Act the rules of proof of pecuniary loss are too strict. Particularly may this be so in the case of young children. In these cases recovery based on loss of investment or on something akin to replacement value should be considered. Amendments along this line seem sound. It is, however, unsound to say such cases are taken care of by a claim for shortened expectation of life. In such cases there is and can be no standard of evaluation : the loss is theoretically not the loss of bereaved parents, but of the child himself. This is not only theoretically unsound but practically unsound as well. By all means let us reform the law, but should we not direct our efforts to the thing to be reformed?

This leads to the broader question : to what extent are the so-called reforms of sec. 37 of the Ontario Trustee Act and the English Law Reform Act, sound in principle? To the extent that these provide for compensation for a pecuniary loss to an estate, making up in amount what the estate would have possessed had it not been for the interference by the defendant, there seems only one answer. On the other hand, why should total strangers or creditors, be able to claim money as an item for suffering of a personal nature, no matter how severe, sustained by a person dead at the time of the action? What policy of law is involved here?

The interesting fact is that both Ontario and England have, in their legislation, realized that there was no justification for imposing liability in some cases of tort. Thus, for example, in Ontario libel and slander are excepted from the survival statute. In England not only is defamation excluded, but also, seduction, inducing one spouse to leave or remain apart from the other, and damages for adultery.[14] The English Act also

[14] Why, when it is the tortfeasor who has died, these exceptions should apply is a complete mystery to the present writer. If a claim in any of these suits is entitled to protection it seems impossible to see any reason for excluding an action by a living person for vindication of his claim. In Ontario a living person can not sue the estate of a slanderer or libellor. Why?

excludes "exemplary" damages. What is the reason for these exceptions? In the Report of the Law Revision Committee, it was recommended that there should be no change in the law as to "actions which are regarded as purely personal".[15] Is not a claim for "shortened expectation of life" purely personal? Who, other than the deceased, has an interest in his enjoyment of life? Is this not the acme of a personal claim? The persons who are opposed to the exclusion of this type of claim should also urge that a claim for libel and slander should survive. Indeed, to the present writer, it would seem much more logical to allow the latter than the former were it not for the fact that the only remedy English law gives to clear a man's name is an action for damages, and clearly damages for the deceased's good name should not go to living persons who may have no interest in that name at all. While the writer certainly believes all the actions in the English Act should be barred in the Ontario Act, even then the English Act is curiously inconsistent in allowing the survival of actions for assault, battery and damages for pain and suffering. What interest can a living person have in obtaining money for such sufferings of a deceased?

Both the English and Ontario Acts, by recognizing some exceptions, plainly indicate that they are not protecting the deceased's interests, otherwise *all* actions of every kind should survive. Once a limitation of personal claims is introduced it is submitted that it is only cases of pecuniary loss to the living that should survive. If this be so, why not bar claims for shortened expectation of life, as well as all claims for personal suffering or other injuries to the deceased's personality?

On the other hand, the English Act of 1934 gives a right to the personal representative to claim funeral expenses. Under existing Ontario law this is impossible. Such a claim seems eminently proper and should be added to sec. 37 of the Ontario Trustee Act. The living should not be exposed to this burden at a time other than when it would occur in the normal course of things. No one has yet suggested adding this to our Ontario legislation. Why?

In *Rose* v. *Ford* itself, it would seem that the claim under the statute for "shortened expectation of life" was really a claim by the living, for both Lord Atkin and Lord Wright indicated that if the persons to benefit under the estate of the deceased were the same as were entitled to claim under the Fatal Accidents Act, there would have to be deductions made to

[15] See 77 Law Journal at p. 247.

prevent giving damages twice over.[16] Later cases have followed their dicta.[17] The only conclusion from this is that there may be persons outside the scope of the Fatal Accidents Act entitled to be compensated for the death. Who are they? How shall their claims be estimated? As the law stands, anyone who would take on the deceased's death is a person entitled to compensation. It seems strange on this view than an employer may be excluded as well as all the numerous objects assisted financially by the deceased. Further, they may claim some artificial sum, calculated on no predictable basis. Without going so far as to say "expectation of life" claims lead to ambulance-chasing, they must of necessity hinder and delay the settlement of other pressing and meritorious claims under the Fatal Accidents Act.

It is strange that with all the talk in favour of retaining "expectation of life" as a claim in a death action, and with appeals to the press for the support of the public whose "rights" are in danger, there has been no mention of raising the amount of compensation payable to a workman killed in the course of his employment. Are these not situations individually just as serious as the highway accidents we are told of? It would seem that if the estate of a person killed on a highway is to be increased because of a shortening of an expectation of life, there should be an increase in compensation to the dependents of a working man. If the English doctrine of *Rose* v. *Ford* was a needed "reform" in the computation of damages in legal actions, surely we need the same "reform" in all cases of death, whether regulated by courts or administrative tribunals. No one has yet suggested this. We can only speculate as to the reasons.

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[16] [1937] A.C. at pp. 835, 852–3.

[17] *Dransfield* v. *B. I. Cables Ltd.*, [1937] 4 All E.R. 382; *Feay* v. *Barnwell*, [1938] 1 All E.R. 31.