SHORTENED EXPECTATION OF LIFE AND FOREIGN LAW

I

It has recently been said in this REVIEW that probably no other topic of law has caused as much discussion among lawyers in the past few years as that of shortened expectation of life. The problem raised in the case of *Rose* v. *Ford*, that "dreadful case" as it has been styled recently, are far from being settled. Without going into the merits of this case, the present article is designed to consider shortly the way in which some of the inherent problems have been dealt with on the Continent of Europe.

On the Continent of Europe, an accident having occurred, the injured party in order to obtain compensation for injuries suffered, has to prove that the owner of the motor-vehicle has committed an act of negligence in driving. In Germany, France and the Scandinavian countries, however, the law presumes, in the case of a motor accident that the person causing the accident is responsible. There is a rebuttable presumption of guilt against those who create a more or less severe risk.

This kind of reasoning is easily understood by Canadian and English lawyers. The differences lie in the legal treatment of the assessment of damages, and in this respect a gulf separates Canadian and English from foreign law.

II

As a matter of fact, all the elements of damage known in this country under the heading of "loss of expectation of life" are unknown as independent items for the assessment of damages on the Continent of Europe. The essential factor in any claim which a living person may make is, therefore, the anticipation that he will actually lose such and such earnings. Shortening of the normal expectation of the continuance of life is in itself not actionable unless one or more of the following elements are present—actual expenses, disability, surgeon, hospital, pain and suffering. Therefore damages must be assessed on the basis of the monetary value of life, which again must be assessed on the basis of the income which could have been expected from the continued existence and the actual ability and real opportunities to earn modified in some way by the security of its continuance. Therefore, in the case of personal injuries of children, Continental

lawyers think that it is not only in theory but also in practice unsound to give to their parents substantial damages for the loss of expectation of life or for the deprivation of the possibility of receiving support in later years. Such expectancies are in the eyes of Continental Courts too remote. The decisions are also very reluctant in giving way to claims based on loss of investment or expenses for education. Again the parents cannot claim compensation for the loss of services and support which the child might reasonably have been expected to render when growing up.

In England, the Courts have been working out a scale of awards under the "expectation of life" ruling. Up to the age of 8, £1,500; early 20's, £1,000; a man of 40, £500. On the Continent you can easily observe the contrary tendency. The younger the victim, the lower the sum awarded.

III

Besides the pecuniary compensation, Continental Courts accord an action for pain and suffering sustained in case of personal injuries. Very often, however, the decisions do not split up pecuniary and non-pecuniary damages but award a lump sum to the victim, without disclosing why and how they arrive at such and such amounts awarded. Again, you sometimes discern between the lines of the arguments that pity, security for the continuance of life, and humanitarian feelings are taken as the guiding principles rather than fixed schemes and figures settled by precedents. Judges and juries give full play to their imagination in determining the amount of compensation and rarely take note of the figures awarded in similar cases by other courts, all this with full realization of the roughness of the approximation and the crudity of method.

Some Continental legislation expressly provides that the private and economic situation of both parties in the families concerned must be considered: that is what French and German decisions call the "receptibilité personnelle", "die Empfanglichkeit"—that means the individual susceptibility to pain and suffering on the part of the person in question. In the same way, the Swiss Road Traffic Act and the Polish Code of Contracts expressly provide for the consideration of the gravity of the act of negligence which caused the accident. The French authorities admit that "ils diffèrent le dommage en pesant la faute."

IV

The cause of action is negligence, not damages. Though the cause of action survives in every Continental country after the death of the injured, this does not mean that all items of damage which the deceased had suffered accrue to his estate to the same extent. The items and the amount are by no means definitely fixed at the very moment of the accident or at the moment of bringing the action, nor even at the moment when judgment is given. Though from the very beginning the cause of action is definitely settled and the death of one of the parties to the action can no longer affect the liability, damages are only provisionally assessed by the judgment and new circumstances affecting the amount can cause the amount to be raised.

The measure of damages to the injured party is the pecuniary loss resulting from the accident. Only pecuniary losses survive. The right of action for loss of expectation of life, pain and suffering, follows the victim into his grave. The personal element inherent in such a claim is in the eyes of the Continental judges of such a nature as not to make it transferable by succession or assignment.

The position is different only when the injured party dies after judgment has been passed. Then the damages awarded for loss of expectation of life become *res judicata;* in the eyes of Continental Courts, the whole claim loses its personal character and accrues to the heir of the injured person. In practice it may therefore be of interest to the relatives of the injured person to expedite the bringing of an action where there is a danger of death supervening. Therefore an accident can perhaps become "fortunate" for an injured party who secures a substantial sum after losing his job in consequence of the accident. But the estate, the relatives and creditors cannot, as a rule, derive financial benefit from the death of another.

On the Continent, as in former times in this country, it may therefore be said that it is cheaper to kill a man than to wound him. But the reason is very different. In this country it was cheaper, because after his death the man could not bring an action which but for his death he would have been able to bring. On the Continent, the law has always enabled the executor to bring an action which the deceased would have been able to bring if he had survived. The death does not affect the cause of damages but only the quantum of damages.

V

All the preceding remarks concern the right of action of the injured which in the case of death may or may not pass to his heirs according to the laws of inheritance. There is a substantial distinction between damages awarded to the living because life is shortened and damages to a third person because of the death of some other person.

In Germany, Austria, Switzerland and Belgium this latter action can be maintained for the benefit of certain specified near relatives of the person whose death is involved. As in Lord Campbell's Act, in Latin countries which have the Code Napoleon, it is admitted that every person can enforce any pecuniary loss which can be based on a legal or *de facto* right which has been lost by the death. In the first instance, a person has a claim if he has been supported or assisted by the deceased at the time of the latter's death. Again an employer can recover for the loss of his employee's services caused by the employee's death. The State being deprived by the death of an official of the latter's services can claim damages for the loss of the pecuniary advantages it would have received from the continued existence of the deceased. The French decisions even go so far as to give compensation to the mistress of the deceased for the pecuniary loss she may sustain by the loss of her companion.

All these persons sue not as heirs to a right of the deceased but in their own right in respect of damage inflicted on them by the death of another. Such damages therefore can be awarded irrespective of the fact that the deceased did not suffer anything by death occurring immediately.

In this country as well as on the Continent it is quite a common thing for a person who is prejudiced by the death of the injured at the same time to benefit under the will or intestacy of the deceased. On the Continent, there is no duplication of damages as in this country. In his capacity of heir, the person in question does not benefit by the death as the damages for loss of expectation of life have, by the death been reduced to nothing. The damages for pain and suffering of the deceased die with the death. The actual expenses the deceased has incurred may be claimed by the estate and be added to the claim the successors have in their own right in the form of damages for pain and suffering, or for loss of a breadwinner. Where, however, the deceased, after the accident, has lived sufficiently long in order to bring an action on his own behalf, his estate benefits from the sum awarded irrespective of the fact

that the plaintiff dies afterwards. In this case, the relatives have, however, no right to be compensated twice by bringing a new action for loss of the breadwinner. The difference therefore is this :

In Canada and England the law retrospectively assesses the interest of a deceased person in his own life and then hands this on to whomsoever may take the deceased's estate.

On the Continent of Europe, the law assesses the interest of a living person in the deceased's life and then hands it to those persons who really have the interest in it.

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