Ponyicki v. Sawayama

**Paul Ponyicki (Plaintiff), Appellant; and
Takashi T. Sawayama and Conzo Sawayama (Defendants),
Respondents.**

[1943] S.C.R. 197

Supreme Court of Canada

1943: February 2, 3 / 1943: April 2.

Present: Rinfret, Davis, Kerwin, Hudson and Taschereau JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Walter F. Schroeder K.C., for the appellant.
C.L. McAlpine K.C. and John L. Farris, for the respondents.

Solicitors for the appellant: A.H. Fleishman.
Solicitors for the respondents: Farris, McAlpine, Stultz, Bull and Farris.

The judgment of Rinfret, Hudson and Taschereau JJ., was delivered by

HUDSON J.:-- The plaintiff's wife and infant daughter, while on a public street, were struck by an automobile and so severely injured that the wife died within a few hours and the infant daughter within a few days thereafter.

Originally, there were two actions, each alleging that the accident arose through the negligence of the defendant Takasi Sawayama, for which both he and his father were responsible.

In the first of such actions, the plaintiff claims as administrator of his wife's estate (a) general damages for loss of income to the plaintiff as a result of the death of his wife and for loss of consortium; and (b) general damages for loss of expectation of life of his wife; and (c) special damages.

The second action was brought by the plaintiff as administrator of the estate of his infant daughter and claimed general damages for pain and suffering of the daughter and damages for loss of expectation of life, and also special damages.

By order these two actions were consolidated.

The defendants admitted liability and the matter was heard before Mr. Justice Sydney Smith for assessment of damages. That learned judge gave judgment as follows:

In these consolidated actions I award damages as follows:--

(a) Under the Administration Act;

(1)	For loss of wife's expectation of life.....	$1,000 00
(2)	For loss of child's expectation of life.....	750 00

(b) Under the Families' Compensation Act;

For loss of wife's services.....	125 00

The above amounts are without abatement.

Judgment accordingly.

An appeal and cross-appeal to the Court of Appeal were dismissed.

In respect of the items awarded by Mr. Justice Smith, no question is raised with reference to the amount allowed for the wife's expectation of life, nor for the child's expectation of life, but the plaintiff contends that the amount allowed for the loss of his wife's services is grossly inadequate.

Although the amount allowed for loss of expectation of life is not questioned, yet it cannot be ignored when considering the award which is made to the plaintiff in respect of the loss of his wife's services. This point was recently considered by the House of Lords in the case of Davies v. Powell Duffryn Associated Collieries, Limited [[1942] 1 All. E.R. 657; [1942] A.C. 601.]. In that case the appellants, each of them suing as administratrix of her deceased husband, brought actions against the respondents for breach of statutory duty and negligence. Each claimed damages (1) under the Fatal Accidents Acts, 1846 to 1908, on behalf of the deceased's dependents, and (2) under the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of the deceased's shortened expectation of life. The appellants contended that no allowance should be made in assessing damages under the Fatal Accidents Acts in respect of any damages awarded under the 1934 Act. It was held that in assessing damages under the Fatal Accidents Act, 1846, damages awarded under the Law Reform (Miscellaneous Provisions) Act 1934, must be taken into account in the case of dependents who will benefit under the latter Act.

There are minor differences between the English legislation and that of British Columbia, but none which would appear to be material on this point.

All of the learned judges in the Court of Appeal have agreed that the present case is governed by the Davies v. Powell Duffryn Associated Collieries, Limited case [[1942] 1 All E.R. 657; [1942] A.C. 601.] and that, therefore, in considering what should be allowed the plaintiff in respect of his wife's services, the amount allowed him for loss of his wife's expectation of life must be taken into account.

In the present case the total amount awarded under either heading goes to the plaintiff himself, so that he gets in respect of the two headings an aggregate of $1,125.00.

Counsel for the plaintiff raised another question worded in this way,

> ... that the learned judge erred in assessing damages under the Families' Compensation Act for the death of the said Anna Ponyicki, deceased, in that he failed to allow damages for the death of the said Anna Ponyicki, deceased, to the estate of the infant Betty Anna Ponyicki, deceased, to which damages the said infant, or her estate, is entitled under the provisions of the said Families Compensation Act.

Even if the appellant were able to overcome the initial objection that this point was not raised in the pleadings nor at the trial, I am of the opinion that on the facts here it is not well founded.

In Williamson v. John I. Thornycroft and Co. Ltd. [[1940] 2 K.B. 658.], it was held by the Court of Appeal that while the damages had to be assessed as at the date of the husband's death, the Court was entitled to inform its mind of subsequent events throwing light upon the realities of the case, such as the fact that one defendant had only had a short tenure of life before her dependence was brought to an end, and that, therefore, in this case only a comparatively small sum ought to have been allowed to the widow under Lord Campbell's Act.

If we look at the realities, we must consider that the plaintiff recovers $1,125.00 in respect of his wife's death and $750.00 in respect of his child's death, both these events taking place within a few days. It is strongly argued that even on this basis the amount awarded to the plaintiff in respect of his wife's death is grossly inadequate and, in the court below, Mr. Justice O'Halloran gave a dissenting judgment on this point. He would have allowed an aggregate $7,500.00.

The principles of law applicable to compensation in cases of this kind do not seem to be open to any amount of doubt. Damages are awarded for the loss of a reasonable expectancy of pecuniary benefit. See Grand Trunk Railway Company of Canada v. Jennings [[1888] 13 App. Cas. 800.], Royal Trust Company v. Canadian Pacific Railway Co. [[1922] 38 T.L.R. 89, 67 D.L.R. 518.]. The appellant claimed damages for the loss of his wife's services as housekeeper. The evidence discloses merely that the wife acted as housekeeper and took care of her infant child, who was killed in the same accident as the wife. After his wife's death the appellant employed a housekeeper for one month at a cost of $25.00. No other evidence of loss was given. Services rendered gratuitously may constitute a pecuniary loss under the Families Compensation Act, but such services must be worth more than the cost of maintaining the wife with food, clothing, etc.

The burden is on the appellant and although the amount allowed seems small, the difficulty we are met with here is that the evidence is so meagre and inconclusive that it is difficult to say that the trial judge and the majority in the court below are clearly wrong, and, for that reason, I would dismiss the appeal with costs.

DAVIS J.:-- I agree that this appeal should be dismissed with costs.

The only question in the appeal is the amount of damages which should be allowed for the husband's loss of his wife by death. The right conferred by statute to recover is restricted, to use the words of Lord Watson in Grand Trunk Railway Company v. Jennings [(1888) 13 App. Cas. 800, at 803.], "to the actual pecuniary loss sustained."

Giving effect to what the learned trial judge obviously intended by the use of the words "without abatement" in his judgment, the amount fixed by him was $1,125. The evidence of the probability of any pecuniary loss was so scanty that I do not see how the learned trial judge would have been justified in awarding any larger sum. His judgment was affirmed by the Court of Appeal and there is no ground upon which we should interfere.

KERWIN J.:-- Paul Ponyicki was the husband of Anna and the father of their child, Betty Anna. These two were run down by a motor vehicle owned by one of the respondents and operated by the other, as a result of which the wife died almost immediately and the daughter four days later. Ponyicki was appointed administrator of his wife's estate and he was also appointed administrator of his daughter's estate. Two actions were brought against the respondents but an order was made consolidating them and directing that the issues be tried together at the same time. The respondents admitted liability so that the only question remaining to be tried was that of damages. In the first action, damages were claimed by Ponyicki as administrator of his wife's estate for loss of expectation of her life, under the Administration Act, R.S.B.C. 1936, chapter 5, and also damages for his benefit personally as husband, and for the benefit of Betty Anna as daughter (represented by her administrator), under the provisions of the Families' Compensation Act, R.S.B.C. 1936, chapter 93. In the second action, the appellant sued as administrator of the daughter's estate for damages for loss of expectation of her life.

The trial took place before Mr. Justice Sidney Smith without the intervention of a jury. It appears that at the time of the accident the wife was twenty-seven years and eleven months old, the daughter was aged one year and three months, and the husband forty-two years. The family lived together in a two-story house, owned by the husband, in a factory section of the city of Vancouver. The husband was a carpenter and mill-wright. The wife was strong and in good health and did all the housework, including looking after six roomers who paid, in all, twenty-six dollars per month. After the wife's death another woman looked after the house for the husband, washed his clothes, etc., for one month, in return for which he did some plumbing work. After that, he rented the lower part of the house, furnished, for twenty-five dollars per month and he lived upstairs. No roomers have been kept since the wife's death. The above narrative relates the only evidence on the question of damages, except that of the husband and of his sister-in-law who testified that it had been arranged that he would build an addition to the house to contain a hair-dressing shop on one side and a lunch counter on the other, the former to be managed by the sister-in-law and the latter by the wife.

On this evidence the trial judge directed:--

In these consolidated actions I award damages as follows:--

(a) Under the Administration Act:--

(1) For loss of wife's expectation of life..... $1,000.00

(2) For loss of child's expectation of life..... 750.00

(b) Under the Families' Compensation Act:--

For loss of wife's services..... 125.00

The above amounts are without abatement. Judgment accordingly.

Only one formal judgment was taken out in the consolidated actions and by it Paul Ponyicki as administrator of his daughter's estate was awarded $750.00, and as administrator of his wife's estate $1,125.00. In view of the daughter's death, all of the $1,125 would go to Paul Ponyicki, irrespective of what part thereof would have been allowed under the Families' Compensation Act. No doubt for that reason it was considered unnecessary to state in the formal judgment that he was the sole party entitled to damages under that Act.

As plaintiff in the first action, Paul Ponyicki in his capacity as administrator of his wife's estate appealed from the judgment in the consolidated actions on the ground, according to the notice of appeal, that the damages of $1,125 were insufficient. The present respondents cross-appealed on the ground that nothing should have been awarded for loss of the wife's services. The Court of Appeal, with Mr. Justice O'Halloran dissenting, dismissed the appeal and cross-appeal, subject to a variation by which the total amount was increased to $1,165 to cover a small item that had been overlooked. Upon leave granted by the Court of Appeal, the plaintiff in the first action as administrator of his wife's estate now appeals to this Court.

At bar, counsel for the appellant, quite properly I think, abandoned the claim advanced in his factum that because the daughter survived her mother four days some amount should have been awarded the former's estate under the Families' Compensation Act. He admitted that damages could not be awarded the husband because of grief and suffering at his wife's death but argued that the sum awarded by the trial judge bore no relation to the loss in money suffered by the husband by the deprivation of his wife's services. The sum was either $125 or $1,125, depending upon the construction to be placed upon the trial judge's direction. Counsel also contended that if the trial judge had really decided to allow $1,125 under the Families' Compensation Act and had then deducted the $1,000 allowed under the Administration Act, there was no justification for so doing under the provisions of the relevant statutes.

It is advisable, therefore, to refer to the provisions of the two statutes under which the two rights of action were advanced. The Families' Compensation Act, R.S.B.C. 1936, chapter 93, is for all relevant purposes the same as the Imperial Fatal Accidents Acts, giving a right of action for damages, where wrongful act, negligence or default causes death, for the benefit of the wife, husband, parent and child of the deceased. Subsections 2 and 6 of section 71 of the Administration Act, R.S.B.C. 1936, chapter 5, deal with the other right of action and read as follows:--

> (2) The executor or administrator of any deceased person may bring and maintain an action for all torts or injuries to the person or property of the deceased in the same manner and with the same rights and remedies as the deceased would, if living, be entitled to, except that recovery in the action shall not extend to damages in respect of physical disfigurement or pain or suffering caused to the deceased or to damages in respect of expectancy of earnings subsequent to the death of the deceased which might have been sustained if the de-

> ceased had not died; and the damages recovered in the action shall form part of the personal estate of the deceased.
>
> (6) This section shall be subject to the provisions of section 12 of the Workmen's Compensation Act, and nothing in this section shall prejudice or effect any right of action under the provisions of section 81 of that Act or the provisions of the Families' Compensation Act.

In Davies v. Powell Duffryn Associated Collieries Ltd. [[1942] A.C. 601; [1942] 1 All. E.R. 657.], the House of Lords decided that subsection 5 of section 1 of The Law Reform (Miscellaneous Provisions) Act, 1934, does not alter the measure of damages recoverable for the benefit of the named persons under the Fatal Accidents Acts and that damages awarded under The Law Reform Act of 1934 must be taken into account in fixing the amount that would otherwise be given under the former. The speeches of all the peers indicate that all that is meant by subsection 5 of section 1 of The Law Reform Act is that the right of action under each enactment shall co-exist. The wording of subsection 6 of section 71 of the British Columbia Act, "nothing in this section shall prejudice or affect any right of action", is even more emphatic than the corresponding Imperial statute and the decision of the House of Lords applies. On this point there appears to be no disagreement among any of the judges who have so far considered this case.

At the date of the trial judgment, the decision of the House of Lords was probably not known to the trial judge or to counsel but all were familiar with the earlier decision in Rose v. Ford [[1937] A.C. 826.]. In view of the speeches of some of the peers in that case, the expression used by the trial judge "The above amounts are without abatement" would be idle unless it is construed as meaning that he had fixed the damages of the husband, under the Families Compensation Act, at $1,125, and deducted from it the amount allowed under the Administration Act. In this he did exactly what the House of Lords, in the later case, decided was proper. Construing the direction for judgment in that way, there is nothing to indicate that the trial judge did not take into consideration all relevant matters. The decision of this Court in St. Lawrence and Ottawa Railway Company v. Lett [(1885) 11 Can. S.C.R. 422.], relied upon by the appellant, contains nothing in conflict with this conclusion. The amount of damages was not there in question, the whole argument being confined to the question whether any amount could be given a husband for the death of his wife in the absence of proof that the husband had lost so many dollars and cents.

The principle to the applied was stated by the Judicial Committee in Grand Trunk Railway Company of Canada v. Jennings [(1888) 13 App. Cas. 800.], and re-affirmed in Royal Trust Company v. Canadian Pacific Railway Company [(1922) 67 D.L.R. 518.], where Lord Parmoor observes:--

> When a claim for compensation to families of persons killed through negligence is made, the right to recover is restricted to the amount of actual pecuniary benefit which the family might reasonably have expected to enjoy had the deceased not been killed. It is not competent for a court or a jury to make in addition a compassionate allowance. The principle, as stated by Lord Watson in Grand Trunk Railway Co. v. Jennings [(1888) 13 App. Cas. 800, at 804.], is applicable in cases where the loss, in respect of which compensation is claimed, is based on the cessation of an income derived from professional skill:--

> "It then becomes necessary to consider what, but for the accident which terminated his existence, would have been his reasonable prospects of life, work and remuneration; and also how far these, if realised, would have conduced to the benefit of the individual claiming compensation."
>
> 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.

Finally, in the House of Lords, Lord Wright in the Davies case [[1942] 1 All. E.R. 657; [1942] A.C. 601.] puts it thus:--

> The damages are to be based on the reasonable expectation of pecuniary benefit or benefit reducible to money value.

Applying this principle to the evidence in this case, no damages for the loss of his wife's society could be allowed the husband under the Families' Compensation Act but there is nothing to prevent an allowance for the reasonable expectation of pecuniary loss suffered by him in the death of a healthy, industrious and careful woman who had performed all the household duties in and about the residence of the spouses. While the evidence is meagre, it justifies a conclusion that Anna Ponyicki could be so described, and by her death the husband sustained "a substantial injury and one for which it was the intention of the legislature to indemnify the husband" (per Sir William Ritchie, C.J., in the Lett case, at 443) [(1885) 11 Can. S.C.R. 422.]. The evidence does not justify an allowance of damages in connection with the proposal for the hair-dressing shop and lunch counter as there is nothing to warrant a finding that there were any reasonable prospects of the earning of profits by the services of the wife which would have conduced to the benefit of the husband. Under these circumstances, I am unable to say that the trial judge "has acted on a wrong principle of law or has misapprehended the facts or has for these or other reasons made a wholly erroneous estimate of the damage suffered" [[1942] A.C. 601, at 617.], and I would not, therefore, interfere with the assessment of damages.

The appellant finally contended that in any event, on the assumption that $1,125 was fixed as the damages under the Families' Compensation Act, there should be an abatement of only one-half of the $1,000 awarded under the Administration Act, because the husband would be entitled to that proportion and the child, represented by her father as administrator, to the balance. However, the child having died, the trial judge undoubtedly treated the matter in a realistic manner, knowing that the full amount allowed under the Administration Act would go to the husband. The gain in money to the husband under that Act accrued to him by reason of the death of his wife although one-half came from another source, and the total should therefore be deducted from the award under the Families' Compensation Act. In the Davies case [[1942] A.C. 601; [1942] 1 All E.R. 657.], Mrs. Williams, one of the appellants, took all the damages awarded her because her husband's estate was under 1,000 pound sterling in value. Her right thereto arose under a different statute but nevertheless the 250 pound sterling fixed as her damages under the Law Reform Act accrued to her by reason of her husband's death.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

1943

CANADA LAW REPORTS

Supreme Court of Canada

REPORTERS

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90231—1

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS

The Right Hon. Sir Lyman Poore Duff, G.C.M.G., C.J.C.
The " Thibaudeau Rinfret J.
" " Oswald Smith Crocket J.
" " Henry Hague Davis J.
" " Patrick Kerwin J.
" " Albert Blellock Hudson J.
" " Robert Taschereau J.
" " Ivan Cleveland Rand J.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:
The Hon. Louis St-Laurent, K.C.

90231—1½

1943

THE NORTH EMPIRE FIRE INSUR. CO. v. VERMETTE.

Rinfret J.

Ce principe ne nous paraît pas compatible avec les exigences du code civil et les conditions de la police elle-même, dont l'article 240 des statuts refondus exige l'insertion avec tant de rigueur.

Le prête-nom est essentiellement un mandataire. Son intérêt ne peut être que celui du mandataire; il ne saurait jamais devenir celui du mandant propriétaire.

Admettant que son titre lui conférerait un "intérêt dans la chose assurée appréciable en argent", en vertu de l'article 2571 C. C., la nature de cet intérêt devait être spécifiée.

Mais bien plus; la condition même de la police, acceptée par Desrosiers, est que la compagnie n'est pas responsable des pertes

d'une propriété possédée par toute autre personne que l'assuré, à moins que l'intérêt de l'assuré ne soit mentionné dans ou sur la police.

Il ne s'agit plus, par conséquent, de se demander si l'article 2571 du code civil doit être considéré comme une disposition d'ordre public à laquelle il ne peut être permis de déroger. En l'espèce, l'obligation de mentionner dans la police l'intérêt de l'assuré était une condition du contrat lui-même entre l'appelante et l'intimé; et cette condition spécifiait que "à moins que l'intérêt de l'assuré ne soit mentionné dans ou sur la police", la compagnie n'était pas responsable de la perte de la propriété.

Nous ne voyons pas comment l'intimé pouvait réussir dans sa réclamation contre l'appelante à l'encontre d'une stipulation expresse de son contrat.

Il convient d'ajouter que, s'il était besoin de décider la cause indépendamment de la clause spécifique du contrat et de la loi telle qu'elle est contenue dans le code civil et dans les statuts refondus, nous pourrions difficilement souscrire au principe que le prête-nom pouvait assurer comme propriétaire les biens couverts par la police en question.

Dans la cause de *Gilbert* v. *Lefaivre* (1), l'honorable juge Mignault, rendant le jugement unanime de cette Cour, s'exprime comme suit:

Il y a, surtout en matière de mandat, des différences notables entre le Code Civil de la province de Québec et le Code Napoléon. Ainsi nos articles 1716 et 1727, pour ne parler que de ceux-là, n'existent pas dans le code français. En France, les tiers qui traitent avec un prête-nom, ou avec un mandataire qui parle en son propre nom, n'ont pas d'action directe contre le mandant (Planiol, 8e éd. t. 2, n° 2271; Dalloz, Répertoire pratique, vo. Mandat, n° 301). Il en est autrement sous notre

(1) [1938] S.C.R. 333, at 338, 339

code (art. 1716 C. C.) qui s'inspire de la doctrine de Pothier (Mandat, n° 88). La situation apparente, en France, semble avoir une importance, THE NORTH EMPIRE FIRE INSUR. CO. v. VERMETTE. en regard de la situation réelle, qu'elle n'a peut-être pas dans notre droit où nous n'avons pas la règle, si importante en matière mobilière, possession vaut titre (art. 2279 C. N. et art. 2268 Code civil, Québec). Sur tout cela je crois devoir faire des réserves, car la question peut se présenter d'une façon concrète, mais pour le moment je n'ai pas à trancher le débat. Rinfret J.

Ainsi que nous l'avons dit, si Desrosiers doit être considéré comme le prête-nom de Taschereau: alors il n'en était que le mandataire; la police, en fait, appartenait à Taschereau; et, si ce dernier avait été partie contractante avec l'appelante, c'est ce dernier qui aurait eu le droit d'en réclamer le produit.

La connaissance qu'ont pu avoir Bouchard et Corriveau ne change rien à la situation. Elle ne saurait permettre aux tribunaux d'amender ou de modifier le contrat d'assurance, ou de le traiter comme s'il eût été rédigé différemment. (Art. 2570 C. C.).

On nous a cité l'arrêt *Re Alliance Assurance Company Limited* v. *McLean* (1), mais il est juste de faire remarquer que cette décision a été portée en appel devant cette Cour, où elle a été infirmée le 21 juin 1921.

Pour ces motifs, l'appel doit être maintenu et le jugement de première instance doit être rétabli avec dépens tant en cette Cour que dans la Cour du Banc du Roi en appel.

Appeal allowed with costs.

Solicitor for the appellant: *Audette & McEntyre.*

Solicitor for the respondent: *Christophe Taschereau.*

1943

*Feb. 2, 3.
*Apr. 2.

PAUL PONYICKI (PLAINTIFF) ..... APPELLANT;

AND

TAKASHI T. SAWAYAMA AND CONZO SAWAYAMA (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Negligence—Motor vehicle—Fatal accident—Deaths of wife and infant child—Damages—Measure of—Pecuniary loss—Loss of expectation of life—Loss of wife's services—Claims under the Administrations Act, R.S.B.C., 1936, c. 5, and the Families' Compensation Act, R.S.B.C., 1936, c. 93.

*PRESENT:—Rinfret, Davis, Kerwin, Hudson and Taschereau.

(1) [1921] 27 R. L. N.S. 8.

1943

PONYICKI v. SAWAYAMA.

The appellant's wife and infant daughter, while on a public street, were struck by an automobile operated by one of the respondents and owned by his father, the other respondent, and they were so severely injured that the wife died within a few hours and the daughter within a few days thereafter. The appellant brought two actions, one as administrator of his wife's estate for damages for loss of expectation of her life under the *Administration Act* and also for damages for his benefit personally as husband and for the benefit of her daughter (represented by him as her administrator) under the *Families' Compensation Act*; and, in the second action, the appellant sued as administrator of his daughter's estate for damages for loss of expectation of her life. The two actions were consolidated; and the respondents admitted liability. The trial judge awarded damages, first, under the *Administration Act*, for loss of wife's expectation of life, $1,000, and for loss of child's expectation of life, $750, and, secondly, under the *Families' Compensation Act*, for loss of wife's services, $125; and the trial judge added that "the above amounts are without abatement". The appellant, as administrator of his wife's estate, appealed to the Court of Appeal on the ground that the damages of $1,125 were insufficient; and the respondents cross-appealed on the ground that nothing should have been awarded for loss of the wife's services. Both the appeal and the cross-appeal were dismissed.

Held, affirming the judgment of the Court of Appeal ([1942] 3 W.W.R. 719), that the appeal to this Court should be dismissed with costs. The principle of law applicable to a claim for compensation in cases as the present one has been clearly stated by the Judicial Committee in *Grand Trunk Railway Co. of Canada* v. *Jennings* (13 App. Cas. 800), where it was held that the right to recover damages is restricted to the actual pecuniary loss sustained. Under the circumstances of this case and applying such principle to the evidence, which is meagre and inconclusive, it cannot be held that the trial judge and the majority of the appellate court were clearly wrong, and this Court ought not to interfere with the assessment of damages.

Per Rinfret, Hudson and Taschereau JJ.—The point raised by the appellant, that the trial judge failed to allow to the estate of the infant, for the death of the mother, damages to which the infant was entitled under the *Families' Compensation Act*, is not well founded. The Court is entitled to inform its mind of subsequent events throwing light upon the realities of the case: *Williamson* v. *John I. Thornycroft and Co.* ([1940] 2 K.B. 658). Although the amount allowed for loss of expectation of life is not questioned, it cannot be ignored when considering the award which should be made to the appellant in respect of the loss of his wife's services: *Davies* v. *Powell Duffryn Associated Collieries Limited* ([1942] A.C. 601). The total amount awarded under either headings went to the appellant himself, so that he received in respect of the two headings an aggregate of $1,125 in respect of the wife's death, and he recovered a further sum of $750 in respect of his child's death, both these events having taken place within a few days. Therefore, when the realities of this case are taken into account, the amount of damages awarded should not be disturbed.

Per Kerwin J.—The expression used by the trial judge "The above amounts are without abatement" would be idle, unless it is construed as meaning that he had fixed the damages of the husband, under the *Families' Compensation Act*, at $1,125, and deducted from it the amount allowed under the *Administration Act*. And, in this, the trial judge did exactly what the House of Lords, in *Davis* v. *Powell Duffryn Associated Collieries Limited* ([1942] A.C. 601), decided was proper. Construing the direction for judgment in that way, there is nothing to indicate that the trial judge did not take into consideration all relevant matters. On the assumption that $1,125 was fixed as the damages under the *Families' Compensation Act*, there should not be an abatement of one-half of the $1,000 awarded under the *Administration Act* because the husband would be entitled to that proportion and the child, represented by her father as administrator, to the balance. The trial judge, the child having died, undoubtedly treated the matter in a realistic manner, knowing that the full amount allowed under the *Administration Act* would go to the husband. The gain in money to the husband under that Act accrued to him by reason of the death of his wife although one-half came from another source, and the total should therefore be deducted from the award under the *Families' Compensation Act*.

1943

PONYICKI v. SAWAYAMA.

APPEAL, by leave of appeal granted by the Court below, from the judgment of the Court of Appeal for British Columbia (1), affirming the judgment of the trial judge, Sidney Smith J., and maintaining the appellant's action.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgments now reported.

Walter F. Schroeder K.C. for the appellant.

C. L. McAlpine K.C. and *John L. Farris* for the respondents.

The judgment of Rinfret, Hudson and Taschereau JJ., was delivered by

HUDSON J.—The plaintiff's wife and infant daughter, while on a public street, were struck by an automobile and so severely injured that the wife died within a few hours and the infant daughter within a few days thereafter.

Originally, there were two actions, each alleging that the accident arose through the negligence of the defendant Takasi Sawayama, for which both he and his father were responsible.

In the first of such actions, the plaintiff claims as administrator of his wife's estate (*a*) general damages for loss of income to the plaintiff as a result of the death of his wife and for loss of consortium; and (*b*) general damages for loss of expectation of life of his wife; and (*c*) special damages.

(1) [1942] 3 W.W.R. 719; [1943] 1 D.L.R. 165.

1943
PONYICKI
v.
SAWAYAMA.
Hudson J.

The second action was brought by the plaintiff as administrator of the estate of his infant daughter and claimed general damages for pain and suffering of the daughter and damages for loss of expectation of life, and also special damages.

By order these two actions were consolidated.

The defendants admitted liability and the matter was heard before Mr. Justice Sydney Smith for assessment of damages. That learned judge gave judgment as follows:

In these consolidated actions I award damages as follows:—

(a) Under the *Administration Act*;
(1) For loss of wife's expectation of life.....$1,000 00
(2) For loss of child's expectation of life..... 750 00
(b) Under the *Families' Compensation Act*;
For loss of wife's services..... 125 00
The above amounts are without abatement.

Judgment accordingly.

An appeal and cross-appeal to the Court of Appeal were dismissed.

In respect of the items awarded by Mr. Justice Smith, no question is raised with reference to the amount allowed for the wife's expectation of life, nor for the child's expectation of life, but the plaintiff contends that the amount allowed for the loss of his wife's services is grossly inadequate.

Although the amount allowed for loss of expectation of life is not questioned, yet it cannot be ignored when considering the award which is made to the plaintiff in respect of the loss of his wife's services. This point was recently considered by the House of Lords in the case of *Davies* v. *Powell Duffryn Associated Collieries, Limited* (1). In that case the appellants, each of them suing as administratrix of her deceased husband, brought actions against the respondents for breach of statutory duty and negligence. Each claimed damages (1) under the *Fatal Accidents Acts*, 1846 to 1908, on behalf of the deceased's dependents, and (2) under the *Law Reform (Miscellaneous Provisions) Act*, 1934, in respect of the deceased's shortened expectation of life. The appellants contended that no allowance should be made in assessing damages under the *Fatal Accidents Acts* in respect of any damages awarded under the 1934 Act. It was held that in assessing damages

(1) [1942] 1 All. E. R. 657; [1942] A.C. 601.

under the *Fatal Accidents Act*, 1846, damages awarded under the *Law Reform (Miscellaneous Provisions) Act* 1934, must be taken into account in the case of dependents who will benefit under the latter Act.

There are minor differences between the English legislation and that of British Columbia, but none which would appear to be material on this point.

All of the learned judges in the Court of Appeal have agreed that the present case is governed by the *Davies* v. *Powell Duffryn Associated Collieries, Limited* case (1) and that, therefore, in considering what should be allowed the plaintiff in respect of his wife's services, the amount allowed him for loss of his wife's expectation of life must be taken into account.

In the present case the total amount awarded under either heading goes to the plaintiff himself, so that he gets in respect of the two headings an aggregate of $1,125.00.

Counsel for the plaintiff raised another question worded in this way,

* * * that the learned judge erred in assessing damages under the *Families' Compensation Act* for the death of the said Anna Ponyicki, deceased, in that he failed to allow damages for the death of the said Anna Ponyicki, deceased, to the estate of the infant Betty Anna Ponyicki, deceased, to which damages the said infant, or her estate, is entitled under the provisions of the said *Families Compensation Act*.

Even if the appellant were able to overcome the initial objection that this point was not raised in the pleadings nor at the trial, I am of the opinion that on the facts here it is not well founded.

In *Williamson* v. *John I. Thornycroft and Co. Ltd.* (2), it was held by the Court of Appeal that while the damages had to be assessed as at the date of the husband's death, the Court was entitled to inform its mind of subsequent events throwing light upon the realities of the case, such as the fact that one defendant had only had a short tenure of life before her dependence was brought to an end, and that, therefore, in this case only a comparatively small sum ought to have been allowed to the widow under Lord Campbell's Act.

If we look at the realities, we must consider that the plaintiff recovers $1,125.00 in respect of his wife's death and $750.00 in respect of his child's death, both these events

(1) [1942] 1 All. E. R. 657; [1942] A.C. 601. (2) [1940] 2 K.B. 658.

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taking place within a few days. It is strongly argued that even on this basis the amount awarded to the plaintiff in respect of his wife's death is grossly inadequate and, in the court below, Mr. Justice O'Halloran gave a dissenting judgment on this point. He would have allowed an aggregate of $7,500.00.

The principles of law applicable to compensation in cases of this kind do not seem to be open to any amount of doubt. Damages are awarded for the loss of a reasonable expectancy of pecuniary benefit. See *Grand Trunk Railway Company of Canada* v. *Jennings* (1), *Royal Trust Company* v. *Canadian Pacific Railway Co.* (2). The appellant claimed damages for the loss of his wife's services as housekeeper. The evidence discloses merely that the wife acted as housekeeper and took care of her infant child, who was killed in the same accident as the wife. After his wife's death the appellant employed a housekeeper for one month at a cost of $25.00. No other evidence of loss was given. Services rendered gratuitously may constitute a pecuniary loss under the *Families Compensation Act*, but such services must be worth more than the cost of maintaining the wife with food, clothing, etc.

The burden is on the appellant and although the amount allowed seems small, the difficulty we are met with here is that the evidence is so meagre and inconclusive that it is difficult to say that the trial judge and the majority in the court below are clearly wrong, and, for that reason, I would dismiss the appeal with costs.

DAVIS J.—I agree that this appeal should be dismissed with costs.

The only question in the appeal is the amount of damages which should be allowed for the husband's loss of his wife by death. The right conferred by statute to recover is restricted, to use the words of Lord Watson in *Grand Trunk Railway Company* v. *Jennings* (3), "to the actual pecuniary loss sustained."

Giving effect to what the learned trial judge obviously intended by the use of the words "without abatement" in his judgment, the amount fixed by him was $1,125. The

(1) [1888] 13 App. Cas. 800.
(2) [1922] 38 T.L.R. 89 67 D.L.R. 518.
(3) (1888) 13 App. Cas. 800, at 803.

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evidence of the probability of any pecuniary loss was so scanty that I do not see how the learned trial judge would have been justified in awarding any larger sum. His judgment was affirmed by the Court of Appeal and there is no ground upon which we should interfere.

KERWIN J.—Paul Ponyicki was the husband of Anna and the father of their child, Betty Anna. These two were run down by a motor vehicle owned by one of the respondents and operated by the other, as a result of which the wife died almost immediately and the daughter four days later. Ponyicki was appointed administrator of his wife's estate and he was also appointed administrator of his daughter's estate. Two actions were brought against the respondents but an order was made consolidating them and directing that the issues be tried together at the same time. The respondents admitted liability so that the only question remaining to be tried was that of damages. In the first action, damages were claimed by Ponyicki as administrator of his wife's estate for loss of expectation of her life, under the *Administration Act*, R.S.B.C. 1936, chapter 5, and also damages for his benefit personally as husband, and for the benefit of Betty Anna as daughter (represented by her administrator), under the provisions of the *Families' Compensation Act*, R.S.B.C. 1936, chapter 93. In the second action, the appellant sued as administrator of the daughter's estate for damages for loss of expectation of her life.

The trial took place before Mr. Justice Sidney Smith without the intervention of a jury. It appears that at the time of the accident the wife was twenty-seven years and eleven months old, the daughter was aged one year and three months, and the husband forty-two years. The family lived together in a two-story house, owned by the husband, in a factory section of the city of Vancouver. The husband was a carpenter and mill-wright. The wife was strong and in good health and did all the housework, including looking after six roomers who paid, in all, twenty-six dollars per month. After the wife's death another woman looked after the house for the husband, washed his clothes, etc., for one month, in return for which he did some plumbing work. After that, he rented the lower part of the house, furnished, for twenty-five dollars per month

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and he lived upstairs. No roomers have been kept since the wife's death. The above narrative relates the only evidence on the question of damages, except that of the husband and of his sister-in-law who testified that it had been arranged that he would build an addition to the house to contain a hair-dressing shop on one side and a lunch counter on the other, the former to be managed by the sister-in-law and the latter by the wife.

On this evidence the trial judge directed:—

> In these consolidated actions I award damages as follows:—
> (a) Under the *Administration Act*:—
> (1) For loss of wife's expectation of life.....$1,000.00
> (2) For loss of child's expectation of life..... 750.00
> (b) Under the *Families' Compensation Act*:—
> For loss of wife's services..... 125.00
> The above amounts are without abatement. Judgment accordingly.

Only one formal judgment was taken out in the consolidated actions and by it Paul Ponyicki as administrator of his daughter's estate was awarded $750.00, and as administrator of his wife's estate $1,125.00. In view of the daughter's death, all of the $1,125 would go to Paul Ponyicki, irrespective of what part thereof would have been allowed under the *Families' Compensation Act*. No doubt for that reason it was considered unnecessary to state in the formal judgment that he was the sole party entitled to damages under that Act.

As plaintiff in the first action, Paul Ponyicki in his capacity as administrator of his wife's estate appealed from the judgment in the consolidated actions on the ground, according to the notice of appeal, that the damages of $1,125 were insufficient. The present respondents cross-appealed on the ground that nothing should have been awarded for loss of the wife's services. The Court of Appeal, with Mr. Justice O'Halloran dissenting, dismissed the appeal and cross-appeal, subject to a variation by which the total amount was increased to $1,165 to cover a small item that had been overlooked. Upon leave granted by the Court of Appeal, the plaintiff in the first action as administrator of his wife's estate now appeals to this Court.

At bar, counsel for the appellant, quite properly I think, abandoned the claim advanced in his factum that because the daughter survived her mother four days some amount should have been awarded the former's estate under the

Families' Compensation Act. He admitted that damages could not be awarded the husband because of grief and suffering at his wife's death but argued that the sum awarded by the trial judge bore no relation to the loss in money suffered by the husband by the deprivation of his wife's services. The sum was either $125 or $1,125, depending upon the construction to be placed upon the trial judge's direction. Counsel also contended that if the trial judge had really decided to allow $1,125 under the *Families' Compensation Act* and had then deducted the $1,000 allowed under the *Administration Act*, there was no justification for so doing under the provisions of the relevant statutes.

It is advisable, therefore, to refer to the provisions of the two statutes under which the two rights of action were advanced. The *Families' Compensation Act*, R.S.B.C. 1936, chapter 93, is for all relevant purposes the same as the *Imperial Fatal Accidents Acts*, giving a right of action for damages, where wrongful act, negligence or default causes death, for the benefit of the wife, husband, parent and child of the deceased. Subsections 2 and 6 of section 71 of the *Administration Act*, R.S.B.C. 1936, chapter 5, deal with the other right of action and read as follows:—

> (2) The executor or administrator of any deceased person may bring and maintain an action for all torts or injuries to the person or property of the deceased in the same manner and with the same rights and remedies as the deceased would, if living, be entitled to, except that recovery in the action shall not extend to damages in respect of physical disfigurement or pain or suffering caused to the deceased or to damages in respect of expectancy of earnings subsequent to the death of the deceased which might have been sustained if the deceased had not died; and the damages recovered in the action shall form part of the personal estate of the deceased.
>
> (6) This section shall be subject to the provisions of section 12 of the *Workmen's Compensation Act*, and nothing in this section shall prejudice or affect any right of action under the provisions of section 81 of that Act or the provisions of the *Families' Compensation Act*.

In *Davies* v. *Powell Duffryn Associated Collieries Ltd.* (1), the House of Lords decided that subsection 5 of section 1 of *The Law Reform* (*Miscellaneous Provisions*) *Act*, 1934, does not alter the measure of damages recoverable for the benefit of the named persons under the *Fatal Accidents Acts* and that damages awarded under *The Law Reform Act* of 1934 must be taken into account in fixing

(1) [1942] A.C. 601; [1942] 1 All. E. R. 657.

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the amount that would otherwise be given under the former. The speeches of all the peers indicate that all that is meant by subsection 5 of section 1 of *The Law Reform Act* is that the right of action under each enactment shall co-exist. The wording of subsection 6 of section 71 of the British Columbia Act, "nothing in this section shall prejudice or affect any right of action", is even more emphatic than the corresponding Imperial statute and the decision of the House of Lords applies. On this point there appears to be no disagreement among any of the judges who have so far considered this case.

At the date of the trial judgment, the decision of the House of Lords was probably not known to the trial judge or to counsel but all were familiar with the earlier decision in *Rose* v. *Ford* (1). In view of the speeches of some of the peers in that case, the expression used by the trial judge "The above amounts are without abatement" would be idle unless it is construed as meaning that he had fixed the damages of the husband, under the *Families Compensation Act*, at $1,125, and deducted from it the amount allowed under the *Administration Act*. In this he did exactly what the House of Lords, in the later case, decided was proper. Construing the direction for judgment in that way, there is nothing to indicate that the trial judge did not take into consideration all relevant matters. The decision of this Court in *St. Lawrence and Ottawa Railway Company* v. *Lett* (2), relied upon by the appellant, contains nothing in conflict with this conclusion. The amount of damages was not there in question, the whole argument being confined to the question whether any amount could be given a husband for the death of his wife in the absence of proof that the husband had lost so many dollars and cents.

The principle to the applied was stated by the Judicial Committee in *Grand Trunk Railway Company of Canada* v. *Jennings* (3), and re-affirmed in *Royal Trust Company* v. *Canadian Pacific Railway Company* (4), where Lord Parmoor observes:—

> When a claim for compensation to families of persons killed through negligence is made, the right to recover is restricted to the amount of actual pecuniary benefit which the family might reasonably have expected to enjoy had the deceased not been killed. It is not competent for a court or a jury to make in addition a compassionate allowance. The

(1) [1937] A.C. 826.
(2) (1885) 11 Can. S.C.R. 422.
(3) (1888) 13 App. Cas. 800.
(4) (1922) 67 D.L.R. 518.

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principle, as stated by Lord Watson in *Grand Trunk Railway Co.* v. *Jennings* (1), is applicable in cases where the loss, in respect of which compensation is claimed, is based on the cessation of an income derived from professional skill:—

> "It then becomes necessary to consider what, but for the accident which terminated his existence, would have been his reasonable prospects of life, work and remuneration; and also how far these, if realised, would have conduced to the benefit of the individual claiming compensation."

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.

Finally, in the House of Lords, Lord Wright in the *Davies* case (2) puts it thus:—

> The damages are to be based on the reasonable expectation of pecuniary benefit or benefit reducible to money value.

Applying this principle to the evidence in this case, no damages for the loss of his wife's society could be allowed the husband under the *Families' Compensation Act* but there is nothing to prevent an allowance for the reasonable expectation of pecuniary loss suffered by him in the death of a healthy, industrious and careful woman who had performed all the household duties in and about the residence of the spouses. While the evidence is meagre, it justifies a conclusion that Anna Ponyicki could be so described, and by her death the husband sustained "a substantial injury and one for which it was the intention of the legislature to indemnify the husband" (per Sir William Ritchie, C.J., in the *Lett* case, at 433) (3). The evidence does not justify an allowance of damages in connection with the proposal for the hair-dressing shop and lunch counter as there is nothing to warrant a finding that there were any reasonable prospects of the earning of profits by the services of the wife which would have conduced to the benefit of the hubsand. Under these circumstances, I am unable to say that the trial judge "has acted on a wrong principle of law or has misapprehended the facts or has for these or other reasons made a wholly erroneous estimate of the damage suffered" (4), and I would not, therefore, interfere with the assessment of damages.

(1) (1888) 13 App. Cas. 800, at 804.
(2) [1942] 1 All. E.R. 657; [1942] A.C. 601.
(3) (1885) 11 Can. S.C.R. 422.
(4) [1942] A.C. 601, at 617.

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The appellant finally contended that in any event, on the assumption that $1,125 was fixed as the damages under the *Families' Compensation Act*, there should be an abatement of only one-half of the $1,000 awarded under the *Administration Act* because the husband would be entitled to that proportion and the child, represented by her father as administrator, to the balance. However, the child having died, the trial judge undoubtedly treated the matter in a realistic manner, knowing that the full amount allowed under the *Administration Act* would go to the husband. The gain in money to the husband under that Act accrued to him by reason of the death of his wife although one-half came from another source, and the total should therefore be deducted from the award under the *Families' Compensation Act*. In the *Davies* case (1), Mrs. Williams, one of the appellants, took all the damages awarded her because her husband's estate was under £1,000 in value. Her right thereto arose under a different statute but nevertheless the £250 fixed as her damages under the *Law Reform Act* accrued to her by reason of her husband's death.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *A. H. Fleishman.*

Solicitor for the respondents: *Farris, McAlpine, Stultz, Bull and Farris.*

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*April 2.

IN THE MATTER OF A REFERENCE AS TO THE POWERS OF THE CORPORATION OF THE CITY OF OTTAWA AND THE CORPORATION OF THE VILLAGE OF ROCKCLIFFE PARK TO LEVY RATES ON FOREIGN LEGATIONS AND HIGH COMMISSIONERS' RESIDENCES.

International law—Constitutional law—Assessment and taxation—Crown—Powers of municipalities in Ontario to levy rates on foreign legations and High Commissioners' residences.

*PRESENT:—Duff C.J. and Rinfret, Kerwin, Hudson and Taschereau JJ.

(1) [1942] A.C. 601; [1942] 1 All E.R. 657.

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REFERENCE AS TO POWERS TO LEVY RATES ON FOREIGN LEGATIONS AND HIGH COMMISSIONERS' RESIDENCES.

The following questions were referred to this Court:

Is it within the powers of the Council of the Corporation of the City of Ottawa to levy rates on

(1) properties in Ottawa owned and occupied as Legations by the Governments of the French State, the United States of America and Brazil, respectively, or

(2) on property in Ottawa owned and occupied by His Majesty in right of the United Kingdom as the Office and Residence of the High Commissioner for the United Kingdom, or

(3) on property in Ottawa owned and occupied by His Majesty in right of Australia as the Residence of the High Commissioner for the Commonwealth of Australia, and

(4) is it within the powers of the Council of the Corporation of the Village of Rockcliffe Park to levy rates on property owned and occupied by the Government of the United States of America as the Legation of the United States in Rockcliffe Park?

The said municipalities are in the province of Ontario.

On said questions, opinions were given as follows:

Per curiam: Questions 2 and 3 should be answered in the negative, as the properties come within the exemption of Crown property in the Ontario *Assessment Act*.

As to questions 1 and 4:

Per the Chief Justice and Rinfret and Taschereau JJ. (the majority of the Court): These questions should be answered in the negative.

Per the Chief Justice: There are applicable certain general principles of international law (as applied in normal times and circumstances), accepted and adopted by the law of England (which, except as modified by statute, is the law of Ontario) as part of the law of nations. The general principle which governs the juridical position of the foreign minister is that he owes no allegiance to the state to which he is sent and that he is not subject to its laws. The inviolability of his residence, used as a legation, is one of the diplomatic immunities recognized by English law and acknowledged in all civilized nations as annexed to the ambassadorial character. The legation, for all the ordinary affairs of life, is equally, with the ambassador himself, not subjected to the authority of the territorial sovereignty. Taxes and rates imposed by statute in general terms in respect of the occupation or the ownership of real property are not recoverable from diplomatic agents in respect of real property occupied or owned by them or their states and occupied and used for diplomatic purposes. Such a statute creates no liability to pay; and it cannot, consistently with principle, create any effective charge upon the property: the property is not subject to process, or to visitation by government officers; and the foundation of this privilege is that the foreign state and its ambassador are immune from *coactio* (in the sense of Lord Campbell's judgment in *Magdalena Steam Navigation Co.* v. *Martin*, 2 E. & E. 94) direct or indirect. The contention that property of a foreign sovereignty in use for diplomatic purposes may, without infringement of the principles of international law, be subjected to such a tax as a charge upon the land, cannot be accepted. So long as the property is devoted to such use, the territorial sovereignty admittedly cannot enforce a charge;