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;

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:--

	1	•		•
For	IOSS	ot.	wite'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:--

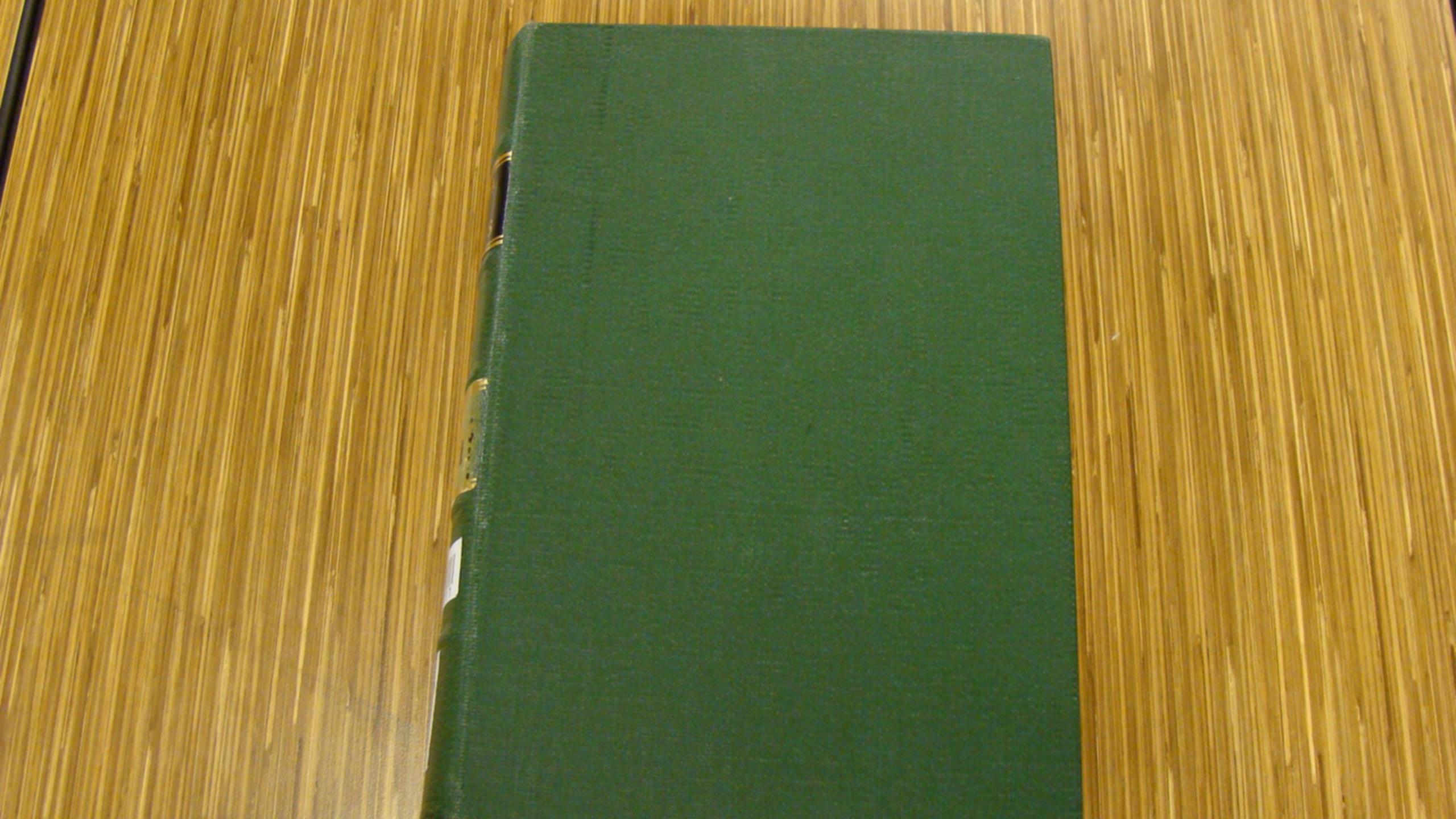
The damages are to be based on the reasonable expectation of pecuniary benefit or benefit reducible to money value.

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

ARMAND GRENIER K.C. S. EDWARD BOLTON K.C.

1750

PUBLISHED PURSUANT TO THE STATUTE BY

PAUL LEDUC K.C., Registrar of the Court



OTTAWA
EDMOND CLOUTIER
PRINTER TO THE KING'S MOST EXCELLENT MAJESTY
1943

JUDGES

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.

SUPREME COURT OF CANADA Ce principe ne nous paraît pas compatible avec les exigen. The North ces du code civil et les conditions de la police elle-même, EMPRE dont l'article 240 des statuts refondus exige l'insertion. The North ces du code de la financia de la police elle-même, Empire Fire dont l'article 240 des statuts refondus exige l'insertion avec tant de rigueur.

Ant de rigueur.

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

Admettant que son titre lui conférerait un "intérêt dans la chose assurée appréciable en argent", en vertu de l'arti. la chose assurce appearent 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

d'une propriété possédée par toute autre personne que l'assuré, à d'une propriete possette per 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 prêtenom, 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

(art. 1716 C. C.) qui s'inspire de la doctrine de Pothier (Mandat, La situation apparente, en France, semble avoir une importance, qu'elle n'a peut se (St. 1716 C. C.) qui s'inspire de la doctrine de Pothier (Mandat, THE NORTH La situation apparente, en France, semble avoir une importance droit EMPIRE FIRE de la situation réelle, qu'elle n'a peut-être pas dans notre droit EMPIRE FIRE de la situation rielle, si importante en matière pas dans notre droit EMPIRE FIRE de la situation rielle, si importante en matière pas dans notre droit EMPIRE FIRE de la situation rielle, si importante en matière pas dans notre droit EMPIRE FIRE de la situation rielle, si importante en matière pas dans notre droit EMPIRE FIRE de la situation rielle, si importante en matière pas dans notre droit EMPIRE FIRE de la situation rielle, si importante en matière pas dans notre droit EMPIRE FIRE de la situation rielle, si importante en matière pas dans notre droit EMPIRE de la situation rielle, si importante en matière pas dans notre droit EMPIRE de la situation rielle, si importante en matière pas dans notre droit EMPIRE de la situation rielle, si importante en matière pas dans notre droit en matière pas dans notre de la destroit de la destroit en matière pas dans notre de la destroit de la d code (art. 1710 to apparente, en France, semble avoir une importance, THE NORTH EMPIRE FIRE)

as regard de la situation réelle, qu'elle n'a peut-être pas dans notre droit INSUR. Co.,

se regard de la situation réelle, qu'elle n'a peut-être en matière mobilière,

se regard de la situation réelle, si importante en constitue (art. 2279 C. N. et art. 2268 Code civil Outdoord). s' SS). Is situation at regle, qu'elle n'a peut-être pas dans notre droit EMPIRE FIRE.

"SS). Is la situation règle, si importante en matière mobilière, INSUR.

"S regird de la situation règle, si importante en Code civil, Québec).

"SS). VERMETE.

"SOUS raut titre (ar. 2279 C. N. et art. 2268 Code civil, peut se al nous nave titre (art. 2279 C. N. et art. 2268 Code civil, Québec). Vermerz v.

Vermerz Ainsi que nous l'avons dit, si Desrosiers doit être consi-Ainsi que nous l'avons dit, si Desrosiers doit être considéré comme le prête-nom de Taschereau: alors il n'en était déré comme le prête-nom de fait, appartenait à Taschereau. déré comme le prete-nom de l'aschereau: alors il n'en était que le mandataire; la police, en fait, appartenait à Taschereau: et, si ce dernier avait été partie contractante que le mandataire; la ponce, en lait, appartenait à Tasche-reau; et, si ce dernier avait été partie contractante avec reau; et, si ce dernier qui aurait eu le droit d'en resu; et, si ce dernier avait ete 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

La connaissance qu'ont Elle ne saurait permettue. La connaissance qu'ont pu avoir Bouchard et Corriveau.

Re change rien à la situation. Elle ne saurait permettre aux

Baunaux d'amender ou de modifier le contrat. d'accure ne change rien a la situation. Elle ne saurait permettre aux tribunaux d'amender ou de modifier le contrat d'assurance, de le traiter comme s'il eût été rédigé différence. tribunaux d'amender ou de moumer 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
McLean (1), mais il est juste de faire On nous a circ (1), mais il est juste de faire remarquer

Limited v. McLean (1), mais il est juste de faire remarquer Limited v. McLeur (1), mais il car juste de l'aire remarquer que cette décision a été portée en appel devant cette Cour, où elle a etc maintenu et le jugement Pour ces motifs, l'appel doit être maintenu et le jugement où elle a été infirmée le 21 juin 1921. de première instance doit être rétabli avec dépens tant en de première instance de la Cour du Banc du Roi en appel. Solicitor for the appellant: Audette & McEntyre. Solicitor for the respondent: Christophe Taschereau. PAUL PONYICKI (PLAINTIFF)..... APPELLANT;

1943

*Feb. 2, 3.

*Apr. 2.

TAKASHI T. SAWAYAMA AND CONZO RESPONDENTS. SAWAYAMA (DEFENDANTS) ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH

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, RSB.C., 1936, c. 5, and the Families' Compensation Act, RSB.C., *PRESENT:-Rinfret, Davis, Kerwin, Hudson and Taschereau.

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

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

199

1943 PONYICKI SAWAYAMA.

SUPREME COURT OF CANADA The appellant's wife and infant daughter, while on a public street, were truck by an automobile operated by one of the respondents appellant's wife and iniant daugnter, while on a public street, were struck by an automobile operated by one of the respondent, were to make the public street, were the public street, and the public street, were the public street, were the public street, and the public street, were the public street, and the public street, were the public street, and the public street, struck by an automobile operated by the respondents are owned by his father, the other respondent, and they were so reverely that the wife died within a few hours and the dans. owned by his father, the other responses, and they were so reversely injured that the wife died within a few hours and the daughter two actions and the daughter injured that the wife died within a few hours and the daughter within a few days thereafter. The appellant brought two actions, within a few days thereaster.

one as administrator of his wife's estate for damages for loss of loss of one as administrator of his benefit personally as husband and for the his benefit personally as husband and hi expectation of her me under the state of the benefit personally as husband and for the benefit damages for the benefit personally as her administrator) under the benefit damages for his beneat parameters and for the benefit of her daughter (represented by him as her administrator) under the benefit of her daughter (represented by him as her administrator) under the of her daughter (represented by Families' Compensation Act; and, in the second action, the appellant of his daughter's estate for damages for his Families' Compensation Act, and, action, the appellant sued as administrator of his daughter's estate for damages for loss of the life. The two actions were consolidated: sued as administrator or his transport transport transport to the expectation of her life. The two actions were consolidated; and the expectation of her life. The trial judge awarded the respondents admitted liability. The trial judge awarded amages, the Administration Act, for loss of wife's expectation respondents admitted hadming.

first, under the Administration Act, for loss of wife's expectation of life, \$750. of life, \$1,000, and for loss of child's expectation of life, \$750, and, of life, \$1,000, and for loss of compensation Act, for loss of wife's secondly, under the Families' Compensation Act, for loss of wife's secondly, under the ramines services, \$125; and the trial judge added that "the above amounts of his abstement". The appellant, as administrator of his 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

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 trial Families' Compensation Act, at \$1,125, and deducted from it the smount allowed under the Administration Act. And, in this, the trial amount did exactly what the House of Lords, in Davis v. Powell Duffred Amount did exactly what the House of Lords, in Davis v. Powell Duffryn U.

Associated Collieries Limited (1942) A.C. 601), decided was proper.

Sawarama. Associated Collieries Limited (1942) A.C. 601), decided was proper.

Construing the direction for judgment in that way, there is nothing that the trial judge did not take into consideration and the indicate that the trial judge did not take into consideration. Constraing the direction for judgment in that way, there is nothing to indicate that the trial judge did not take into consideration all to indicate. On the assumption that \$1,125 was fixed as to indicate that the trial Judge did not take into consideration all the relevant matters. On the assumption that \$1,125 was fixed as the televant under the Families' Compensation Act, there should not be a summer to the families of the consideration all the relevant matters. relevant matters. On the assumption that \$1,125 was fixed as the damages under the Families' Compensation Act, there should not be also as a latement of one-half of the \$1,000 awarded under the Administration of the \$1,000 awarded under the \$1, 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 proposition. an abatement of one-half of the \$1,000 awarded under the Administration Act because the husband would be entitled to that proportion that the child, represented by her father as administrator to tration Act because the husband would be entitled to that proportion and the child, represented by her father as administrator, to the trial judge, the child having died, undoubtedly treated and the child, represented by her father as administrator, to the balance. The trial judge, the child having died, undoubtedly treated the manner, knowing that the full amount balance. The trial ludge, the child having died, undoubtedly treated the matter in a realistic manner, knowing that the full husband to the husband. the matter in a reansite manner, knowing that the full amount allowed under the Administration Act would go to the husband. allowed under the Auministration Act would go to the husband.

The gain in money to the husband under that Act accrued to him the gain of the death of his wife although one-half carry. The gain in money to the nusoand under that Act accrued to him by reason of the death of his wife although one-half came from the source, and the total should therefore be deducted from the by reason of the death of his wife although one-half came from another source, and the total should therefore be deducted from the mand under the Families' Compensation Act. another source, and another source the Families' Compensation Act.

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

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

Walter F. Schroeder K.C. for the appellant. C. L. McAlpine K.C. and John L. Farris for the respond-

The judgment of Rinfret, Hudson and Taschereau JJ.,

HUDSON J.—The plaintiff's wife and infant daughter, was delivered by 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

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 Ponyicki administrator of the estate of his infant daughter as claimed general damages for pain and suffering of the Ponyicki administrator of the sawayama, claimed general damages for pain and suffering of the daughter and damages for loss of expectation of life claimed general damages for loss of expectation of life, and

By order these two actions were consolidated.

By order these two little liability and the matter was The defendants admitted liability and the matter was The defendance and state of the defendance was before Mr. Justice Sydney Smith for assessment of the defendance of the state of the sta heard before That learned judge gave judgment as follows: In these consolidated actions I award damages as follows:-

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

(b) Under the Families' Compensation Act; 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

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,

the Fatal Accidents Act, 1846, damages awarded Ponyicki.

White the Law Reform (Miscellaneous Provisions) Act Ponyicki.

White the Law Reform into account in the case of dependents of the latter Act with the latter Act with the latter Act. scriptor fatal Accidents Act, 1846, damages awarded (Miscellaneous Provisions) Act under the Law Reform (Miscentaneous Provisions) Act Ponyleki v. Sawayama.

Sawayama.

1934, must be taken into account in the case of dependents

1934, will benefit under the latter Act.

There are minor differences between the English legisla-and that of British Columbia, but none which There are minor differences between the English legislation and that of British Columbia, but none which would appear to be material on this point. 1934, must be taken into account in the who will benefit under the latter Act.

appear to be material of the Court of Appeal have
All of the learned judges in the Court by the Danies agreed that the present case is governed by the Davies v. appear to be material on this point. agreed that the present case is governed by the Davies v.

**Powell Duffryn Associated Collieries, Limited case (1) and therefore, in considering what should be allowed. Powell Duffryn Associated Comeries, Limited case (1) and that, therefore, in considering what should be allowed the that, therefore, of his wife's services, the amount of the considering what should be allowed the that, the considering what should be allowed the that, the considering what should be allowed the that, the considering what should be allowed the considering the considering what should be allowed the considering the considering what should be allowed the considering the considering the considering what should be allowed the considering the consideri that, therefore, in considering what should be allowed the amount plaintiff in respect of his wife's services, the amount plaintiff in for loss of his wife's expectation of life. plaintiff in respect of his wife's services, the amount allowed him for loss of his wife's expectation of life must

In the present case the total amount awarded under In the present to the plaintiff himself, so that he gets either heading goes to the plaintiff himself, so that he gets an aggregate of \$1 195.00 either heading some headings an aggregate of \$1,125.00.
in respect of the two headings another questions and the plaintiff raised another questions.

in respect of the plaintiff raised another question worded

in this way?

* * that the learned judge erred in assessing damages under the Families'

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

Even if the appellant were able to overcome the initial ebjection 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

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

If we look at the realities, we must consider that the Campbell's Act. 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.

SUPREME COURT OF CANADA taking place within a few days. It is strongly argued that PONTICKI 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

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

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

eridence of the probability of any pecuniary loss was so the residence of I do not see how the learned trial judge would ridence of the probability of the learned trial judge would Ponyicki.

Anty that I do not see how the learned trial judge His judge. eridence to I do not see how the learned trial judge would Ponyicks.

Same been justified in awarding any larger sum. there is no save been justified by the Court of Appeal and there is no save was affirmed by the should interfere scanty of justified in awarding any larger sum. His judg- Sawayan Davis J.

Davis J.

Scanty of Justified in awarding any larger sum. there is no Davis J.

Davis J.

KERWIN J.—Paul Ponyicki was the husband of Anna
KERWIN J.—Paul Ponyicki was Anna. These two was KERWIN J.—Paul Ponyicki was the husband of Anna

These two were

and the father of their child, Betty Anna. These respond

on down by a motor vehicle owned by one of the respondence of the father of their emid, Betty Anna. These two were run down by a motor vehicle owned by one of the which the other, as a result of which the other of the other run down by a motor venicle owned by one of the respond-the other, as a result of which the other, as a daughter four days died almost immediately and the daughter four days ests and operated by the other, as a result of which the wife died almost immediately and the daughter four days, wife died almost was appointed administrator of his wife. The died almost immediately and the daughter four days are died almost immediately and the daughter four days also appointed administrator of his wife's also appointed administrator. later. Ponyieki was appointed administrator of his wife's and he was also appointed administrator of his wife's estate. Two actions were brought against the state and he was also appointed administrator of his wife's estate and he was also appointed administrator of his daughter's estate. Two actions were brought against the daughter's but an order was made consolidation. dsughter's estate. Two actions were brought against the made consolidating them respondents but an order was made consolidating that the issues be tried together at the respondents but an order was made consolidating them and directing that the issues be tried together at the same.

The respondents admitted liability so that The respondents admitted liability so that the only time. The respondents admitted nation so that the only question remaining to be tried was that of damages. In question remaining to be tried was that of damages. In the first action, damages were claimed by Ponyicki as larger action, damages were for loss of exponential action. the first action, damages were claimed by Ponyicki as significant and significant strator of his wife's estate for loss of expectation of life under the Administration Act. R S R C administrator of this water scatter for loss of expectation of the life, under the Administration Act, R.S.B.C. 1936, her life, and also damages for his benefit personal. her life, under the Administration Act, R.S.B.C. 1936, chapter 5, and also damages for his benefit personally as chapter 5, and also damages for his benefit personally as husband, and for the benefit of Betty Anna as daughter husband, by her administrator), under the husband, and to her administrator), under the provisions (represented by her administrator), under the provisions (represented by her administrator). (represented by Compensation Act, R.S.B.C. 1936, chapter of the Families' Compensation Act, R.S.B.C. 1936, chapter of the Families of the Jacobs action, the appellant sued as administrate the daughter's estate for damage. on the daughter's estate for damages for loss of the daughter's estate for damages for loss of the daughter's estate for damages.

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, twentysix 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

^{(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.

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

On this evidence the trial judge directed:-

In these consolidated actions I award damages as follows:-

(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

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 crossappealed 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 read not be awarded the husband because of grief and Bawayama.

Suffering at his wife's death but argued that the loss in suffering by the trial judge bore no relation to the loss in suffering at his wife's death but argued that the sum sawaram swarded by the trial judge bore no relation to the loss in Kerwin J.

awarded by the trial Judge bore no relation to the loss in money suffered by the husband by the deprivation \$1105.

The sum was either \$125 or \$1.05. money suffered by the husband by the deprivation of his services. The sum was either placed upon the construction to be placed. wife's services. The sum was either \$125 or \$1,125, depending upon the construction to be placed upon the construction. Counsel also contended that if 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 \$1.195 updates. trial judge's direction. Counsel also contended that if the strial judge had really decided to allow \$1,125 under the smilies' Compensation Act and had then declared the samples of the strial judge compensation and had then declared the samples of the samples o trial judge had reany decided to allow \$1,125 under the families' Compensation Act and had then deducted the stopp allowed under the Administration Act thousand the stopp allowed under the Administration and the stopp allowed under the stopp allowed Families' Compensation Act and had then deducted the \$1,000 allowed under the Administration Act, there was no doing under the provisions. \$1,000 allowed under the Nammastration 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 It is advisable, therefore, to refer to the provisions of the two statutes under which the two rights of action to the two statutes under which the two rights of action. the two statutes under winch the two rights of action were advanced. The Families' Compensation Act, R.S.B.C. 1936, advanced. The ramites Compensation Act, R.S.B.C. 1936, chapter 93, is for all relevant purposes the same as the same for all relevant purposes the same as the same for all relevant purposes. chapter 93, 18 101 an Televant purposes the same as the Imperial Fatal Accidents Acts, giving a right of action for where wrongful act. negligence on default. damages, where wrongful act, negligence or default causes, the benefit of the wife husband powers. damages, where wrongrur act, negligence or default causes death, for the benefit of the wife, husband, parent and child subsections 2 and 6 of specific subsec death, for the benefit of the wife, nusband, parent and child of the deceased. Subsections 2 and 6 of section 71 of the of the deceased. Educations 2 and o or section 71 of the Administration Act, R.S.B.C. 1936, chapter 5, deal with the

other right of action and read as follows:

Other ***B**

(2) The executor or administrator of any deceased person may bring intain an action for all torts or injuries to the person or administrator of any deceased person or may bring the second of the person of the per (2) The executor or administrator or any deceased person may bring and maintain an action for all torts or injuries to the person or property, the deceased in the same manner and with the same 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 the deceased would, if living be entitled to 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 in the action shall not extend to damages in respect to the same rights. remedies as the deceased would, it living, be entitled to, except that recovery in the action shall not extend to damages in respect of physical to the deceased or pain or suffering caused to the deceased or the deceased o recovery in the action small not extend to damages in respect of physical disfigurement or pain or suffering caused to the deceased or to damages. disfigurement or pain or sumering 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 bank and the deceased bank and the deceased which might have been sustained if the deceased bank and the deceased bank and the deceased which might have been sustained if the deceased bank and the deceased or to damages. in respect or expectancy or carmings subsequent to the death of the deceased which might have been sustained if the deceased had not died; deceased which impression been advanted if the deceased had not died; and the damages recovered in the action shall form part of the personal

(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 Workmen's Compensation 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.

SUPREME COURT OF CANADA

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

Ponyicki The specches of the s is that the right of action under each enactment shall is that the right of action 6 of section 71 of the co-exist. The wording of subsection 6 of section 71 of the British Columbia Act, "nothing in this section 71 of the British Columbia Act, "nothing in this section shall pre-British Columbia Act, judice or affect any right of action", is even more emphatic and the day. 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

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

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.

S.C.R.I Stated by Lord Watson in Grand Trunk Railway Co. v. which in cases where the loss, in respect of which principle, as stated by Lord Watson in Grand Trunk Railway Co. v.

Ponyicks:

Ponyicks: Sawayam Sawayam of the professional skill:

It then becomes necessary to consider what, but for the aecident Kerwin J.

It then becomes necessary would have been his reasonable prospects It then becomes necessary to consider what, but for the accident his existence, would have been his reasonable prospects and terminated his existence, would have been his reasonable prospects. terminated his existence, would have been his reasonable prospects work and remuneration; and also how far these, if realised, would be work and the benefit of the individual claiming compensation. of life, work and remuneration; and also how far these, if realised, won bare conduced to the benefit of the individual claiming compensation. The difficulty arises not in the statement of the principle, but in its The difficulty arises not in the statement of the principle, but in its plication to a case in which the extent of the actual pecuniary loss is to a matter of estimate, founded on probabilities, of which no accurate 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 to the property is possible.

Finally, in the House of Lords, Lord Wright in the Davies

The damages are to be based on the reasonable expectation of case (2) puts it thus:

The damages are to be based on the reasona.

Pecuniary benefit or benefit reducible to money value. Applying this principle to the evidence in this case, no Applying this principle to the evidence in this case, no damages for the loss of his wife's society could be allowed bushand under the Families' Compensation damages for the loss of the wife's society could be allowed the husband under the Families' Compensation Act but the husband and compensation Act but there is nothing to prevent an allowance for the reasonable there is nothing to prevent as allowance for the reasonable. there is nothing to prevent an anowance for the reasonable expectation of pecuniary loss suffered by him in the death of leathy industrious and careful woman who had expectation of pooling and careful woman who had performed a healthy, industrious and careful woman who had performed ahealtny, industriction and about the residence of the all the household duties in and about the residence of the While the evidence is meagre it. all the nousehold the evidence is meagre, it justifies a spouses. That Anna Ponvicki could be so described. spouses. The Anna Ponyicki could be so described, and 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 and one for which the husband" (per Sir William Ritchie, C.J., in The original of the legislature to the Lett case, at 433) (3). The evidence does not justify an the Lett case, 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

(3) (1885) 11 Can. S.C.R. 422. (4) [1942] A.C. 601, at 617.

(2) [1942] 1 All. E.R. 657; [1942] A.C. 601,

The appellant finally contended that in any event, on Ponyicki the assumption that \$1,125 was fixed as the damages under the Families' Compensation Act, there should be an all the assumption that 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 to the child be child be child be. as administrator, to the balance. However, the child having as administrator, to died, the trial judge undoubtedly treated the matter in a 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

1942 -*June 9. 10, 11. 1943 *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.

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

SUPREME COURT OF CANADA

The following questions were referred to this Court:

Lit within the powers of the Council of the Corporation of the City of References.

As to Powers

Lit Within the powers on the Council of the Corporation of the City of References. The following questions were referred to this Court: I it will to levy rates on and occupied as Legations by the GovRATES ON RATES ON

(1) properties in Ottawa owned and occupied as States of America and Foreign

(2) properties of the French State, the United States of America Brazil, respectively, or

Brazil, respectively, or

Commission of the Property in Ottawa owned and occupied by His Majesty in right Commission of the United Kingdom as the Office and Residence of the High Com-RESIDENCES.

os property in Ottawa owned and occupied by His Malesty in right Communication of the United Kingdom as the Office and Residence of the High Com-

missioner 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 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 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 is it within the powers of the Council of the Corporation of the Village of Rockcliffe Park to levy rates on property owned and occur. Village of Rockeliffe Park to levy rates on property owned and occurpied by the Government of the United States of America as the
Location of the United States in Rockeliffe Park?

pied by the Government of the United States of Legation of the United States in Rockcliffe Park?

The said municipalities are in the province of Ontario. Per curiam: Questions 2 and 3 should be answered in the negative, as the properties come within the exemption of Crown properties. per curion: Questions 2 and 3 should be answered in the negative, as the properties come within the exemption of Crown property in the Optario Assessment Act.

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

Per the Chief Justice: There are applicable certain general principles of international law (as applied in normal times and size of international law (as applied in normal times and circumstances), of international law (as applied in normal times and circumstances), accepted and adopted by the law of England (which, except as 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 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 of the foreign minimet is that he is not subject to its laws. The inviolawhich he is sent and the sent and 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;

^{*}PRESENT:-Duff C.J. and Rinfret, Kerwin, Hudson and Taschereau JJ.