

CANADA / JUDGMENT

Keizer v. Hanna and Buch

[1978] 2 SCR 342

COURT

Supreme Court of Canada

DECIDED

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Keizer v. Hanna and Buch

Collection

Supreme Court Judgments

Date

1978-01-19

Report

[1978] 2 SCR 342

Judges

Laskin, Bora; Martland, Ronald; Judson, Wilfred; Ritchie, Roland Almon; Spence, Wishart Flett; Pigeon, Louis-Philippe; Dickson, Robert George Brian; Beetz, Jean; de Grandpré, Louis-Philippe

On appeal from

Ontario

Subjects

Motor vehicles

Torts

Decision Content

Supreme Court of Canada

Keizer v. Hanna and Buch, [1978] 2 S.C.R. 342

Date: 1978-01-19

Marilyn E. Keizer (Plaintiff) Appellant;

and

Herbert Lewis Hanna and John Buch (Defendants) Respondents.

1977: March 8; 1978: January 19.

Present: Laskin C.J. and Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Motor vehicles—Registered ownership retained by unpaid seller—Collision occurring as result of buyer's negligence—Vicarious liability of owner—The Highway Traffic Act, R.S.O. 1970, c. 202, s. 132.

Damages—Fatal accident—Action by widow—Quantum—Factors to be taken into consideration—Allowance for income tax—Contingency deduction.

The appellant MK brought an action on her own behalf and on behalf of her infant son against the defendants H and B pursuant to the provisions of The Fatal Accidents Act, R.S.O. 1970, c. 164, and The Trustee Act, R.S.O. 1970, c. 470, for damages arising out of the death of her late husband JK. The latter came to his death as a result of injuries sustained in a collision between an automobile driven by him and one driven by H and registered in the name of B. It was admitted that the collision occurred solely through the negligence of H.

The trial judge found the defendant B was vicariously liable for the negligence of the defendant H. The Court of Appeal held that the circumstances of the deal whereby H agreed to purchase the automobile in question, together with the certification by B that he was the owner and that the car was insured under his own policy, provided ample foundation for the finding by the trial judge that B was the owner for the purposes of s. 132 of The Highway Traffic Act, R.S.O. 1970, c. 202. This Court agreed with the conclusions of the Court of Appeal and determined that the issue required no further comment. The Court, therefore, at the close of the argument, dismissed the cross-appeal of B.

The trial judge fixed the amount of damages at \$121,600 and provided that the appellant should retain for herself out of that the sum of \$104,100 and pay into Court to the credit of her infant son the sum of \$17,500. In the Court of Appeal, it was pointed out that the appellant, in her statement of claim, had claimed damages under The Fatal Accidents Act in the sum of \$100,000 and that there had been no motion to amend that statement of claim. The parties in the Court of Appeal and in this Court were, therefore, agreed that the maximum amount which the plaintiff could recover under The Fatal Accidents Act was that sum of \$100,000 and further agreed that from any amount which should be awarded under the provisions of The Fatal Accidents Act there must be deducted the sum of \$6,500 which had been paid to the appellant under the no-fault provisions of the insurance policy carried by her late husband as to his automobile. Such a deduction, it was agreed, was the result of the amendments to the Ontario Insurance Act and had been determined in the *Gorrie v. Gill* judgment of the Court of Appeal delivered some months after the decision of

the trial judge in this case. The Court of Appeal, however, further reduced the total award under the provisions of The Fatal Accidents Act to \$65,000 which, with the reduction of \$6,500, made a net recovery of \$58,500 and the Court of Appeal directed that the appellant would retain for herself the sum of \$48,500 and pay into Court to the credit of her infant son the sum of \$10,000.

Held (Judson and de Grandpré JJ. dissenting): The appeal should be allowed.

Per Laskin C.J. and Martland, Ritchie, Dickson, Pigeon and Beetz JJ.: The trial judge projected average earnings of the deceased at \$15,000 for a working expectancy of 31 years. From this figure he deducted \$3,200 for income tax, \$1,800 for personal use, and \$3,000 for personal support leaving disposable income for dependants in the amount of \$7,000. The deduction for income tax with which the Court of Appeal agreed was proper. The Court of Appeal did not question the judge's findings that the deceased would expend \$1,800 for his personal use and \$3,000 for his personal support. Thus, as a result, \$7,000 would be available as disposable income for dependants.

The proper method of calculating the amount of a damage award under The Fatal Accidents Act is similar to that used in calculating the amount of an award for loss of future earnings, or for future care, in cases of serious personal injury. In each, the Court is faced with the task of determining the present value of a lump sum which, if invested, would provide payments of the appropriate size over a given number of years in the future, extinguishing the fund in the process. The object here is to award a sum which will replace present day payments of \$7,000 per year for a future period of 31 years, with some reduction for contingencies. The discount rate should be calculated on the basis of present rates on long-term investments with an allowance for the effects of future inflation. Evidence on these matters was not introduced at trial. However, the 6½ per cent chosen by the judge can be tested by the level of present day investment rates and a forecast by Dr. Deutch, of the Economic Council of Canada, of the rate of inflation over the long-term future, which together suggest an appropriate discount rate of approximately 7 per cent. This is only marginally different from the rate used by the trial judge. Ignoring, for the moment, the other factors to be taken into consideration, the sum required to produce \$7,000 per year for 31 years, payable monthly, discounted at 6½ per cent, is slightly less than \$95,000. The award should be reduced somewhat to account for contingencies although this amount will probably not be large. On the other hand, in order to yield the sum required net of taxes a greater sum would obviously be called for. The resulting amount would not reach the figure of \$120,000 which the trial judge chose. The sum of \$100,000, the amount claimed, can be justified, however, with reasonable allowance made for income tax impact and contingency deduction.

Accordingly, an order should be made that the appellant recover from the defendants the sum of \$93,500. Out of that sum there should be paid to the appellant the sum of \$78,500 and there should be paid into Court to the credit of the infant son the sum of \$15,000, to be paid out when he attains the age of 18 years. The appellant is also entitled to her award of \$1,600 under the provisions of The Trustee Act.

Per Spence J.: The Court of Appeal may not vary the decision of the trial judge unless it finds an error in principle in arriving at the amount of the general damages or, that failing, that the trial judge's assessment was so excessive that it could not be upheld. The trial judge did commit an error in principle in his examination of the question of contingencies but there was another important matter to be considered and calculated. If this Court was correct in the view it adopted in *The Queen v. Jennings*, [1966] S.C.R. 532, that the impact of income tax should not be taken into account in assessing an award for damages in a personal injuries case, then exactly the same course is proper in the case of an action under *The Fatal Accidents Act*: (*Gehrmann v. Lavoie*, [1976] 2 S.C.R. 561). If the majority decision in *Gehrmann* is applied, then the disposable income for the dependants would have been not \$7,000 but \$10,200, and the present value of that latter amount for 35 years (the joint life expectancy) at a rate of 6 per cent (the rate found closest to the 6½ per cent cited by the trial judge according to *Giauque and McClure Present Value Tables*) would have been \$147,881.64. Had that amount been utilized by the trial judge, then his finding of the amount to be assessed as general damages under *The Fatal Accidents Act* at \$120,000 would, in this case, have allowed sufficient deduction for any contingency. Since the award cannot exceed \$100,000, it is not so inordinately high as would require variation by the Appellate Court.

The appeal should be allowed and the award returned to that allowed by the trial judge but there should be deducted therefrom the excess over the amount of \$100,000 claimed and also the amount of \$6,500 already received under the no-fault provisions of JK's own policy to arrive at a global amount of \$93,500. Of that amount, \$15,000 should be paid into Court to the credit of the appellant's infant son to be paid out upon his attaining the age of 18 years. There should also be a correction of the technical error in the formal judgment of the Court of Appeal whereby the appellant was deprived of her award of \$1,600 under the provisions of *The Trustee Act*.

If, however, this Court is now of the opinion that the course followed in *Gehrmann* was in error, then that authority must be considered as overcome. Under such circumstances, the appeal should still be allowed and should be disposed of in the manner proposed by Dickson J. for the reasons enunciated by him.

Per Judson and de Grandpré JJ., dissenting: On the matter of actuarial calculation, there is no doubt that present inflationary trends have in principle to be taken into consideration when determining the proper rate of interest to be used when capitalizing the loss of support. However, that principle no longer applies when as in this instance plaintiff chooses to adduce evidence of calculations based on high interest rates, without any qualification, and enters into an agreement with the defence, the net result of which is to make that evidence the only one on the point. In these circumstances, the hands of the judges are tied and the case must be decided without recourse to other information or to prior judicial knowledge. Thus the Court of Appeal was right in its approach to the question of damages. There was no error in principle in its judgment with the possible exception of the issue of income tax.

Under *The Fatal Accidents Act*, what must be determined is the pecuniary benefit lost by the plaintiff because of the untimely death of the deceased. What the widow and the child have lost in this case is the support payments made by the deceased, support payments which could only

come out of funds left after deducting the cost of maintaining the husband, including the amount of tax payable on his income. This pecuniary loss could not be evaluated on any other basis than the take-home pay, that is the net pay after deductions on many items, including income tax. Also, it is obvious that basing an award under The Fatal Accidents Act on gross income would fail to take into consideration the realities of life in a modern state and would, in some cases, give to the dependants a fund greatly in excess of their financial loss. Income tax must therefore be taken into consideration and the Court of Appeal was right in accepting the trial judge's approach in this respect.

A point that has no bearing on the result in the present case but which could be major in other cases is: by what mechanics do the courts provide for the tax to be paid by the dependants on the income produced by the fund? There are two approaches, one outlined in *Spurr v. Naugler*, 50 D.L.R. (3d) 105, and another in *Taylor v. O'Connor*, [1970] 1 All E.R. 365. In *Spurr* the income tax was deducted "on that part of the gross income not available for the widow and the other dependents". This method only gives an exact result if care is taken not to pro-rate the income tax between the deceased and the dependants. Keeping in mind the progressive feature of the taxing statute, the greater bite of the tax should be on the deceased's share because the remainder coming to the dependants attracts a lower rate. In the present case the impact of the income tax on the dependants is minimal. In any event, the award of the Court of Appeal is generous enough.

[*Gehrmann v. Lavoie*, [1976] 2 S.C.R. 561, not followed; *The Queen v. Jennings*, [1966] S.C.R. 532, distinguished.]

APPEAL and CROSS-APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing in part an appeal from the judgment of Dunlop Co.Ct.J. in an action for damages under The Fatal Accidents Act, R.S.O. 1970, c. 164, and The Trustee Act, R.S.O. 1970, c. 470. Appeal allowed, Judson and de Grandpré JJ. dissenting; cross-appeal dismissed.

W.S. Wigle, Q.C., and D.G. Duke, for the plaintiff, appellant.

G. Morin, for the defendant, respondent, Herbert Lewis Hanna.

G.J. Cooligan, Q.C., and R. Montague, for the defendant, respondent, John Buch.

The judgment of Laskin C.J. and Martland, Ritchie, Pigeon, Dickson and Beetz JJ. was delivered by

DICKSON J.—I have had the advantage of reading the reasons for judgment prepared by Mr. Justice Spence and by Mr. Justice de Grandpré in this appeal. There are two issues: (i) the deductibility of income tax in arriving at an award of damages; (ii) quantum. Although as a member of Court, I shared in the decision in *Gehrmann v. Lavoie*[2], I have concluded, upon reading the reasons for judgment to which I have referred, and upon further reflection, that Mr. Justice de Grandpré is correct in law and that the impact of income tax should be taken into account in assessing a damage award under The Fatal Accidents Act, R.S.O. 1970, c. 164.

On point (ii), however, “quantum,” I have come to a conclusion other than that arrived at by my brother de Grandpré. I would allow the appeal, and like my brother Spence, award the amount of \$100,000 claimed in the statement of claim but deduct therefrom the amount of \$6,500 insurance benefits already received by the appellant under the accident and death benefits provision found in schedule E of the deceased’s insurance policy. In the result, the award of general damages would amount to \$93,500.

The accident in which Mr. Keizer was killed occurred on July 16, 1973. At that date he was 33 years of age with a life expectancy of 38.55 years. He was a tool-room foreman for the Town of Renfrew, capable, conscientious, industrious and in good health. He had been married for nine years to the appellant who, at the date of his death was 27 years of age with a life expectancy of 49.60 years. Mr. and Mrs. Keizer had one child, an infant of six months.

The trial judge projected average earnings of \$15,000 for a working expectancy of 31 years. From this figure he deducted \$3,200 for income tax, \$1,800 for personal use, and \$3,000 for personal support leaving disposable income for dependants in the amount of \$7,000. The judge made a deduction for income tax with which the Court of Appeal agreed and which, in my view, was proper. The Court of Appeal did not question the judge’s finding that the deceased would expend \$1,800 for his personal use and \$3,000 for his personal support. Thus, as a result, \$7,000 would be available as disposable income for dependants. The evidence was that he contributed his pay cheque weekly to his family reserving only nominal sums and odd-job earnings for his own use. Having concluded that \$7,000 per year would have been available to the appellant and her child each year, the judge said:

Actuarial tables filed as Exhibit #1 herein at 9% and 10% compound interest show the present value of \$1.00 to age 65 for the male as \$9.9375 and \$9.1381 respectively. I believe a more realistic interest rate would be the approximate amount of 6½% which would materially inflate these figures for example at 4% the factor is 18.66461. One must consider Income Tax as a reality of modern life and its depreciating impact along with the contingencies hereinbefore alluded to is reflected in my assessment. Under the provisions of the Fatal Accidents Act I award the Plaintiff the sum of \$120,000.00 of which sum I apportion \$17,500.00 for the infant Mitchel Stephen.

It is difficult, if not impossible, to know what use, if any, the trial judge made of actuarial tables to which he was referred. It would seem, however, that he proceeded on an exhausting fund basis, with a discount rate of approximately 6½ per cent. He made an allowance in respect of the income tax which the deceased would have had to pay on his earnings, had he lived, and he further reduced the award by a contingency allowance. He referred to the contingencies which might bear on assessment, as follows:

- (a) Possibility of remarriage;
- (b) Possibility of widow’s death before expiry of joint expectancy period;
- (c) Possibility of deceased’s dying under other circumstances prior to expiry of said joint expectancy period;

- (d) Possibility of deceased husband's retiring before expiry of joint expectancy period;
- (e) Acceleration of inheritance to widow—bearing in mind likelihood of increased inheritance in event death had not occurred;
- (f) Possibility the infant child may not be a burden to the father or require additional benefits for the full period of his calculated working life.

On the question of prospects of remarriage, the judge adopted the apt comments of Phillimore J. in *Buckley v. John Allen & Ford (Oxford) Ltd.*^[3] including the statement that judges should act on evidence rather than guesswork and, there being no evidence of any existing interest or attachment, concluded: "I therefore accord no material significance to this prospect by way of deduction." He does not say that he is according no weight to the contingency.

As to the possibility of the early demise of either husband or wife, the judge said:

All of the evidence indicates excellent health prospects and I rule that relatively little real significance can be attached to this contingency by way of reduction.

Again, it is not a question of refusing to consider a particular contingency. The judge considered the contingency, but decided it merited little significance. I do not think he can be faulted on this account.

With respect to the possibility of acceleration of the inheritance to the appellant, the judge had this to say: So far as the acceleration of her inheritance is concerned I am readily satisfied that same should have no reducing effect as in these circumstances I am assured it is more than offset by the substantial loss she has suffered in future realization from this source.

Finally, the possibility that the infant child might not be a burden during his father's working life. On this point, the judge said that he would give this fact material consideration in considering his award. These are his words:

Unquestionably there is the probability that the child Mitchel Stephen would not have been a burden to his father for anything like the 30 years or so of his working expectancy and I give this fact material consideration in considering this award.

The quantum of the award came before the Court of Appeal for Ontario. In that Court, reference was made by Mr. Justice Arnup, for the Court, to the six contingencies to which the trial judge referred. Mr. Justice Arnup observed that the trial judge might have added "possibility of incapacity to earn, occasioned by industrial or other accident, or by illness." He then continued:

Having listed these contingencies, the trial judge decided he should make no deduction for any of them. In so doing, he erred. A contingency, in the context of damages under The Fatal Accidents Act, is obviously an event that may or may not happen. A defendant is entitled to have contingencies taken into account by way of reduction from the result that would be reached if every contingency turned out favourably to the dependants, although due weight must be given in each case to the probability, or otherwise, of the contingent event actually happening.

I have been unable to find in the trial judgment any statement by the trial judge that he had decided he should not make any deduction for any of the contingencies. The evidence, as I read it, is to the contrary. It is true that the trial judge might have considered the possibility of the deceased husband becoming unable to earn, but I do not think it can be said that failure to express himself on this point amounts to reversible error. The award of \$120,000 exceeded the amount claimed of \$100,000 but that does not preclude an award of \$100,000.

In making a gross award of \$65,000 the Court of Appeal was content with the following cryptic statement:

In my view, the appropriate award of general damages in all of the circumstances of this case, as disclosed by the evidence, would have been \$65,000.

The judgment does not assist us, or the parties, by explaining why \$65,000 should be considered to be the appropriate award. From this amount the Court of Appeal deducted the \$6,500 to which I have referred and directed that \$10,000 be paid into Court for the infant. In the result, the widow would receive from the defendants for her support and maintenance for the next 50 years the sum of \$48,500. This, plus \$6,500 already received, totals \$55,000.

It is, of course, true that a trial judge must consider contingencies tending to reduce the ultimate award and give those contingencies more or less weight. It is equally true there are contingencies tending to increase the award to which a judge must give due weight. At the end of the day the only question of importance is whether, in all the circumstances, the final award is fair and adequate. Past experience should make one realize that if there is to be error in the amount of an award it is likely to be one of inadequacy.

In my opinion, in the circumstances of this case, an award of \$55,000 to the appellant can only be described as niggardly. The appellant is entitled to an award of such amount as will assure her the comforts and station in life which she would have enjoyed but for the untimely death of her husband. If one is speaking of contingencies, I think it is not unreasonable to give primary attention to the contingencies, and they are many, the occurrence of which would result in making the award, in the light of events, entirely inadequate. An assessment must be neither punitive nor influenced by sentimentality. It is largely an exercise of business judgment. The question is whether a stated amount of capital will provide, during the period in question, having regard to contingencies tending to increase or decrease the award, a monthly sum at least equal to that which might reasonably have been expected during the continued life of the deceased.

The proper method of calculating the amount of a damage award under The Fatal Accidents Act is similar to that used in calculating the amount of an award for loss of future earnings, or for future care, in cases of serious personal injury. In each, the Court is faced with the task of determining the present value of a lump sum which, if invested, would provide payments of the appropriate size over a given number of years in the future, extinguishing the fund in the process. This matter has been discussed in detail in the decisions of this Court in *Andrews v. Grand & Toy Alberta Ltd.*; *Thornton v. The Board of School Trustees of School District No. 57* (Prince George); and *Arnold v. Teno*, which are being delivered with the decision in the present

case.

The object here is to award a sum which will replace present day payments of \$7,000 per year for a future period of 31 years, with some reduction for contingencies. The trial judge used a discount rate of 6½ per cent without explaining this choice except to say that it was a “more realistic” rate than 9 or 10 per cent. As I have said in *Andrews and Thornton*, in my opinion the discount rate should be calculated on the basis of present rates of return on long-term investments with an allowance for the effects of future inflation. Evidence on these matters was not introduced at trial in the present case. However, the 6½ per cent chosen by the judge can be tested by the fact that present day investment rates reach about 10½ per cent, and Dr. Deutsch of the Economic Council of Canada forecasted an inflation rate of about 3½ per cent over the long-term future. These two figures suggest that an appropriate discount rate is approximately 7 per cent. This is only marginally different from the rate used by the trial judge. Ignoring, for the moment, the other factors to be taken into consideration, the sum required to produce \$7,000 per year for 31 years, payable monthly, discounted at 6½ per cent, is slightly less than \$95,000. The award should be reduced somewhat to account for contingencies although, as I have mentioned, this amount will probably not be large. On the other hand, in order to yield the sum required net of taxes a greater sum would obviously be called for. The resulting amount would not reach the figure of \$120,000 which the trial judge chose. The sum of \$100,000, the amount claimed, can be justified, however, with reasonable allowance made for income tax impact and contingency deduction.

I would allow the appeal, set aside the judgment of the Court of Appeal and direct that the appellant recover from the defendants the sum of \$93,500. Out of that sum there should be paid to Marilyn E. Keizer the sum of \$78,500 and there should be paid into Court to the credit of the infant, Mitchel Stephen Keizer, the sum of \$15,000, to be paid out to the said infant when he attains the age of 18 years, or upon further order of a judge of the County Court of the County of Renfrew. The appellant is also entitled to her award of \$1,600 under the provisions of The Trustee Act in respect of funeral expenses and the value of an automobile.

I would allow the appellant her costs at trial against both defendants and her costs in this Court and in the Court of Appeal against the defendant Buch.

SPENCE J.—This is an appeal from the judgment of the Court of Appeal for Ontario pronounced on October 1, 1975. By that judgment, the said Court of Appeal allowed in part an appeal by the defendant John Buch from the judgment pronounced by Dunlap Co.Ct.J. on January 27, 1975. The Court of Appeal for Ontario maintained the judgment against both the defendants Herbert Lewis Hanna and John Buch but reduced the amount thereof from \$121,600, of which the sum of \$104,100 was to be paid to the present appellant, to an amount which would have yielded the present appellant the sum of \$48,500.

The appellant Marilyn E. Keizer was granted leave to appeal by the order of this Court pronounced on December 15, 1975, and upon the appellant serving notice of appeal in accordance with such leave counsel for the respondent John Buch served notice of cross-appeal upon both the appellant and his co-defendant Herbert Lewis Hanna. The said notice of cross-appeal requested that the judgment of the Court of Appeal be varied as follows:

That the Court of Appeal be reversed in its decision with respect to the ownership issue.

No leave to take such cross-appeal was sought from this Court, the respondent John Buch evidently relying on the provisions of Rule 100 of the Supreme Court Rules despite the amendment of ss. 36 and 41 of the Supreme Court Act.

The appellant is the widow of the late John F. Keizer who, at the time of his death on July 16, 1973, was 34 years of age. The late John F. Keizer left surviving him his widow, the appellant, and an infant son born on January 5, 1973. His widow had been born on July 19, 1945.

The late John F. Keizer came to his death as a result of injuries sustained in a collision between an automobile driven by him and one driven by the respondent Herbert Lewis Hanna and registered in the name of the respondent John Buch. Counsel for the respondent Hanna admitted at trial that the collision occurred solely through the negligence of his client and throughout the proceedings there has been no further consideration of that question of negligence.

The plaintiff takes action under the provisions of The Fatal Accidents Act, R.S.O. 1970, c. 164, on behalf of herself and her infant son, and also under the provisions of The Trustee Act, R.S.O. 1970, c. 470, as to certain disbursements made and special damages suffered.

The Court at trial and the Court of Appeal for Ontario and also this Court have been concerned with only two matters: firstly, whether or not there is any liability on the respondent John Buch by virtue of the provisions of s. 132 of The Highway Traffic Act, R.S.O. 1970, c. 202, and, secondly, at what amount damages under The Fatal Accidents Act should be assessed. The first question involves the consideration of the circumstances and the application thereto of the law as determined in a series of cases, most of which are judgments of this Court.

The evidence revealed the following circumstances. On February 24, 1973, the respondent Hanna agreed to purchase a 1967, four-door Dodge motor vehicle from the respondent Buch who had been, since 1961, a dealer in automobiles. On that 24th of February 1973, the price to be paid for the said automobile was fixed at \$300 and the respondent Hanna paid to the respondent Buch the sum of \$100 by cheque. The receipt for that payment was produced at trial and it is simply a document which recited the name of Hanna and then in its body sets out the words "by cheque \$100" and at the foot thereof "Total \$100". Only four days later, on February 28, 1973, this vehicle was returned by the respondent Hanna to the respondent Buch because of motor failure and then the two agreed that there should be substituted for that vehicle a 1965 Plymouth Fury motor vehicle bearing Serial Number P-2B59187840. The original deal was confirmed in so far as the purchase price and the instalment already paid. The respondent Hanna did not give evidence at the trial but the respondent Buch testified that Hanna was to pay to him the balance of \$200

within a month or two “when his bush lot was cleared”. At that time, February 28, 1973, the Plymouth Fury vehicle bore 1972 registration plates which had been issued in the name of Helmer Wilkie. Wilkie upon selling the automobile to the respondent Buch had endorsed the registration certificate in blank.

The vehicle could not be driven after that date bearing such 1972 licence plates and it was, therefore, necessary to apply immediately for 1973 licence plates. Although the respondent Hanna was able to pay the \$100 on account of the purchase price to which I have referred and was able to pay the \$32 fee necessary for obtaining the new plates, he was unable to provide either an insurance policy applicable to that Plymouth Fury automobile or to pay the additional \$25 fee required at that time from uninsured drivers. Therefore, the respondent Buch completed the transfer form on the back of the 1972 registration which had been executed by Wilkie in blank to show the purchaser as himself, inserted the number of his own driver's licence in the appropriate blank, and signed the certificate which recited that the vehicle was covered by an insurance policy in the Shaw & Begg Insurance Company giving the number of the said policy and the expiry date thereof. This policy was a general policy applying to all automobiles owned by the said Buch which, of course, in the case of an automobile dealer, would be a considerable number.

The new licence plates having been obtained, the purchaser, the respondent Hanna, then left. Thereafter and until the date of the accident, the respondent Buch made some desultory but apparently not very serious attempts to obtain from Hanna either an insurance policy applicable to the Plymouth Fury automobile or the additional sum of \$25 required before a vehicle permit would be issued to an uninsured driver.

Upon the accident occurring, which resulted in the death of the late John F. Keizer, police officials notified the respondent Buch that a vehicle registered in his name had been involved in an accident and the respondent Buch immediately notified the insurance company of the accident. That insurance company was the company the policy of which had been noted by Buch in the certificate which he had signed on applying for the transfer of the registration of the said vehicle from Wilkie to himself.

After outlining this evidence and discussing a very considerable number of decisions of this Court and other Courts, the learned trial judge concluded:

I deem therefore that the vendor has retained such title in the motor vehicle sufficient to establish vicarious liability to him pursuant to the reasoning of Jessup J. in the Gerhold case.

Therein, the learned trial judge referred to *Honan v. Gerhold et al.*[4] As I have said, the respondent Buch appealed to the Court of Appeal for Ontario in part on the issue of his liability and Arnup J.A., in giving reasons for the Court of Appeal on this issue, concluded:

I do not think that the decision of this case requires us to attempt to set out in precise terms the ratio of the various cases to which I have referred, the circumstances of which vary substantially from case to case. In this case the conclusion is irresistible that Buch intended that the car should

remain in his name at least until Hanna had either produced evidence that the car was insured under Hanna's policy or produced \$25 so that the transfer could take place with no evidence of insurance produced to the issuer of permits. Indeed, it is not an unreasonable inference from the evidence that Buch was not prepared to transfer the car into Hanna's name until he got the balance of \$200 owing on the purchase price. These facts' coupled with the certification by Buch that he was the owner and that the car was insured under his own policy, provided ample foundation for the findings by the trial Judge that Buch was the owner for the purposes of The Highway Traffic Act. Accordingly, I would dismiss the appeal against that finding.

This Court was in complete agreement with the conclusions of Arnup J.A. and determined that the issue required no further comment. The Court, therefore, at the close of the argument, dismissed the cross-appeal of the respondent Buch with costs in favour of both the appellant Keizer and his co-respondent Hanna.

I turn now to the question of the quantum of damages which should be allowed to the appellant in her action under the provisions of The Fatal Accidents Act.

As I have said, the learned County Court judge at trial fixed that amount at \$121,600 and provided that the appellant should retain for herself out of that the sum of \$104,100 and pay into Court to the credit of her infant son the sum of \$17,500. In the Court of Appeal, it was pointed out that the appellant, in her statement of claim, had claimed damages under The Fatal Accidents Act in the sum of \$100,000 and that there had been no motion to amend that statement of claim. The parties in the Court of Appeal and in this Court were, therefore, agreed that the maximum amount which the plaintiff could recover under The Fatal Accidents Act was that sum of \$100,000 and further agreed that from any amount which should be awarded under the provisions of The Fatal Accidents Act there must be deducted the sum of \$6,500 which had been paid to the appellant under the no-fault provisions of the insurance policy carried by her late husband as to his automobile. Such a deduction, counsel agreed, was the result of the amendments to the Ontario Insurance Act and had been determined in the *Gorrie v. Gill* judgment of the Court of Appeal delivered on April 17, 1975, i.e., some months after the decision of the learned County Court judge in this case. The Court of Appeal, however, further reduced the total award under the provisions of The Fatal Accidents Act to \$65,000 which, with the deduction of \$6,500 to which I have just referred, made a net recovery of \$58,500 and the Court of Appeal directed that the appellant would retain for herself the sum of \$48,500 and pay into Court to the credit of her infant son the sum of \$10,000.

This Court, has, on several occasions, outlined the function of the Court of Appeal in considering a quantum of damages allowed by a trial court judge and of this Court in considering any variation thereof by the Court of Appeal. I cite *McCannel v. McLean*[5], at p. 343; *Gorman v. Hertz Drive Yourself Stations of Ontario Ltd.*[6], per Cartwright J., as he then was, at p. 14; *Gehrmann v. Lavoie*[7].

For the purpose of the present appeal, the function of the Court of Appeal may be cited very shortly. That Court may not vary the decision of the trial court judge unless it finds an error in principle in arriving at the amount of the general damages or, that failing, that the trial judge's assessment was so excessive that it could not be upheld. In this appeal, Arnup J.A. found that the learned trial judge, after having listed some contingencies which bore upon the assessment of damages but had omitted a most important one, had decided that he should make no deduction for any of them and in so doing found the learned trial judge had erred. The learned justice on appeal said:

A Defendant is entitled to have contingencies taken into account by way of reduction from the result that would be reached if every contingency turned out favourably to the dependants, although due weight must be given in each case to the probability, or otherwise, of the contingent event actually happening.

The contingencies which the learned county court judge had listed and which Arnup J.A. repeated were as follows:

- (a) Possibility of remarriage;
- (b) Possibility of widow's death before expiry of joint expectancy period;
- (c) Possibility of deceased's dying under other circumstances prior to expiry of said joint expectancy period;
- (d) Possibility of deceased husband's retiring before expiry of joint expectancy period;
- (e) Acceleration of inheritance to widow—bearing in mind likelihood of increased inheritance in event death had not occurred;
- (f) Possibility the infant child may not be a burden to the father or require additional benefits for the full period of his calculated working life.

Arnup J.A. added:

He might have added "Possibility of incapacity to earn, occasioned by industrial or other accident, or by illness".

An examination of the reasons for judgment given by the learned county court judge shows that he did deal with these contingencies as follows:

- (a) Possibility of remarriage:

After quoting from Phillimore J. in *Buckley v. John Allen & Ford (Oxford) Ltd.*[8], at p. 542, the learned trial judge concluded:

I therefore accord no material significance to this prospect by way of deduction.

In my view, the learned trial judge could have used not only the excellent statement quoted from Phillimore J. but decisions in the Courts in Canada, and particularly in the Court of Appeal for Ontario, and have arrived at a similar conclusion.

- (b) Possibility of widow's death before expiry of joint expectancy period:
- (c) Possibility of deceased's dying under other circumstances prior to expiry of said joint expectancy period:

These contingencies, although cited in both the judgment of the learned trial judge and that of Arnup J.A., are not, in my opinion, valid considerations as those possibilities have already been dealt with in establishing the joint life expectancy. The learned trial judge, however, did state:

There remain the possibilities of the demise of either husband or wife during the next 31 years to age 65, which age I deem to be a reasonable limit on the deceased's working expectancy. All of the evidence indicates excellent health prospects and I rule that relatively little real significance can be attached to this contingency by way of reduction.

He, therefore, did deal with these so-called contingencies.

- (e) Acceleration of inheritance to widow—bearing in mind likelihood of increased inheritance in event death had not occurred:

The learned trial judge did refer to this contingency as follows:

So far as the acceleration of her inheritance is concerned I am readily satisfied that same should have no reducing effect as in these circumstances. I am assured it is more than offset by the substantial loss she has suffered in future realization from this source.

- (f) Possibility the infant child may not be a burden to the father or require additional benefits for the full period of his calculated working life:

The learned trial judge in considering such contingencies stated:

Unquestionably there is the probability that the child Mitchel Stephen would not have been a burden to his father for anything like the 30 years or so of his working expectancy and I give this fact material consideration in considering his award. (d) Possibility of deceased husband's retiring before expiry of joint expectancy period:

In my view, this contingency should be considered with that mentioned by Arnup J.A., i.e., the possibility of incapacity to earn occasioned by industrial or other accident or by illness, and there should be added to that contingency the possibility that the husband, had he lived, might have ceased to provide support for his wife and child for a variety of other reasons—some emotional, some mental, some due to later developed changes in character. In short, the future of anyone is filled with unforeseen events and the possibility of their occurring must be considered as a contingency in awarding general damages under The Fatal Accidents Act. I am, therefore, in respectful agreement with Arnup J.A. that this last and important contingency was not mentioned in words by the learned trial judge and that the failure to consider it, if such failure

did result from the failure to mention it, would be an error in principle. It is, therefore, necessary to determine whether there was, in the result reached by the learned trial judge, an error which would exhibit the failure to consider that contingency.

The learned trial judge found that the deceased man would have had an average income until he reached the age of 65 years of \$15,000 per year. To reach this result, the learned trial judge noted that if the deceased man had continued in the employment at which he was working at the time of his death until the year 1975, and he had been employed by the same company for some years, he would have been earning a salary of \$13,500 annually and that, in addition, he was carrying on a part-time employment operating from his home to which the learned trial judge assigned an ability to earn an average of \$1,500 per annum. In view of the fact that the deceased man had established in his new home a tool and workshop and that the succession duty returns showed that he had sales and sporting equipment to the value of \$1,000, it would seem that that estimate of \$1,500 would not be excessive. It is to be noted that the appellant and her late husband, from their joint earnings between the year 1968 and the date of his death, had bought a lot and built thereon a bungalow 30ft. x 80ft. in area which had a value for succession duty purposes of \$45,000 and was clear of debt. Indeed, in my view, this estimate of the earning capacity of the deceased man had he continued to live his normal life was accepted by Arnup J.A. when he said:

There was little evidence of the amount the deceased actually spent on his family in his lifetime. In those circumstances a trial judge simply has to do the best he can with what he has. I am not prepared to question his finding that the deceased would expend \$1,800.00 for his "personal use" and \$3,000.00 for his "personal support", and would have \$7,000.00 available as "disposable income for dependants". (The trial Judge had deducted \$3,200.00 as an average annual figure for income tax of the deceased, and despite the judgment in *Spurr v. Naugler*, 50 D.L.R. (3d) 105 (Cowan, C.J.T.D., N.S.) I find no error in principle in his doing so.

As Arnup J.A. points out, this left a disposable income for the dependants of \$7,000 per year. The learned trial judge capitalized that amount at \$120,000. There had been quoted to him tables made up by an actuary and filed on consent which gave the present value of a life income of \$1 per annum commencing to a male 34 years and assuming an interest rate of either 9 or 10 per cent. The learned trial judge was of the opinion that "...a more realistic interest rate would be in the approximate amount of 6½ per cent..." and then simply concluded:

Under the provisions of the Fatal Accidents Act I award the Plaintiff the sum of \$120,000.00 of which sum I apportion \$17,500.00 for the infant Mitchel Stephen.

In my opinion, the calculation should not be made on the basis of such figures as those cited to the learned trial judge but once the joint life expectancy had been settled at about 35 years, the calculation should be made of the present value of an annual payment of \$7,000 for each year in the next 35 years. The present value under such calculation at a rate of 6 per cent, which is the rate I have found closest to the 6½ per cent cited by the learned trial judge according to *Giauque* and *McClure Present Value Tables* would have been \$101,487.40. This result, as compared with the figure of \$120,000 chosen by the learned trial judge, would seem to exhibit an error in

principle but there is another important matter to be considered and calculated.

The learned trial judge deducted from the projected average income of the deceased which, as I have said, he fixed at \$15,000, the sum of \$3,200 for income tax, remarking:

One must consider income tax as a reality of modern life and its depreciating impact along with the contingencies hereinbefore alluded to is reflected in my assessment.

Arnup J.A., giving judgment for the Court of Appeal, said, and I have quoted him but repeat: (The trial judge had deducted \$3,200 as an average annual figure for income tax of the deceased, and despite the judgment in *Spurr v. Naugler*, 50 D.L.R. (3d) 105 (Cowan, C.J.T.D., N.S.) I find no error in principle in his doing so).

The judgment of the Court of Appeal for Ontario was rendered on October 1, 1975. Six days later, on October 7, 1975, this Court pronounced judgment in *Gehrmann v. Lavoie*[9]. That judgment deals with the question of fixation of general damages in an action under the Family Compensation Act of British Columbia, the counterpart of The Fatal Accidents Act in Ontario. There I said for four of the five members of the Court:

This Court, in *The Queen in right of Ontario v. Jennings* (1966), 57 D.L.R. (2d) 644, [1966] S.C.R. 532, dealt with the question of deduction for income tax in the case of a plaintiff who had been so injured in an automobile collision that his earning capacity ceased although he had a life expectancy of five years after the date of the trial. I am of the opinion that the principle there enunciated applies as well in an action under the provisions of a fatal accidents statute such as the Families Compensation Act. Under that statute, an award should be that amount which those who claim under the statute would have been entitled to receive had the deceased continued to live his normal life. If the deceased's earning capacity were destroyed as, of course, it is upon his death, then that amount is greatly reduced. In the case of *Jennings*, the victim's earning capacity was similarly reduced to the point of elimination. Judson J., there speaking for the Court, rejected the propriety of any deduction because of income tax which might be payable upon the earnings of the victim had his life continued in a normal fashion, saying [at p. 655 D.L.R., pp. 544-5 S.C.R.]:

I would, however, put my rejection upon broader grounds. I agree with the dissenting opinion of Lord Keith in the *Gourley* case [[1956] A.C. 185] and the minority views expressed in the 7th Report of the Law Reform Committee on the effect of tax liability on damages, published in August of 1958.

Therefore, to have considered the deduction for income tax in calculating the annual income of the late Mr. *Gehrmann* was an error. As to payments under the Canada Pension Plan, this Court in *Canadian Pacific Ltd. v. Gill et al.* (1973), 37 D.L.R. (3d) 229, [1973] S.C.R. 654, [1973] 4 W.W.R. 593, affirmed the Court of Appeal for British Columbia that in assessing damages there should not be taken into account any sum or sums payable on the death of the deceased under the Canada Pension Plan. Therefore, to have referred to such a deduction in arriving at the annual income of the deceased was also an error in principle.

de Grandpré J., in this Court, refrained from concurring with the reasons so expressed reserving his consideration of the matter until it came up in another appeal which it has in this appeal. If the majority decision in *Gehrmann v. Lavoie* is applied, then the disposable income for the dependants would have been not \$7,000 but \$10,200, and the present value of that latter amount annually for 35 years at the rate of 6 per cent would have been \$147,881.64. Had that amount been utilized by the learned trial judge, then his finding of the amount to be assessed as general damages under The Fatal Accidents Act at \$120,000 would, in this case, have allowed sufficient deduction for any contingency. Since the award cannot exceed \$100,000 for the reason I have already outlined, it is not, in my view, so inordinately high as would require variation by the appellate Court.

For these reasons, I would allow the appeal and return the award to that allowed by the learned trial judge but deduct therefrom the excess over the amount of \$100,000 claimed and also the amount of \$6,500 already received under the no-fault provisions of the late Mr. Keizer's own policy to arrive at a global amount of \$93,500. Of that amount, in view of the extreme youth of the infant Mitchel Stephen Keizer, I would direct that \$15,000 be paid into Court to the credit of the infant to be paid out upon his attaining the age of 18 years. There should also be a correction of the technical error in the formal judgment of the Court of Appeal whereby the appellant was deprived of her award of \$1,600 under the provisions of The Trustee Act. That issue was not considered in the Court of Appeal.

Since drafting these reasons, I have had the opportunity of reading and considering the reasons for judgment prepared by Mr. Justice Dickson and Mr. Justice de Grandpré. I am still of the opinion that if this Court was correct in the view it adopted in *The Queen v. Jennings*, *supra*, then exactly the same course is proper in the case of an action under The Fatal Accidents Act and I said so for the majority in *Gehrmann v. Lavoie*, *supra*. If this Court is now of the opinion that such a course was in error, then the latter authority must be considered as overcome. Under such circumstances, I am still of the opinion that this appeal should be allowed and that it should be disposed of in the manner proposed by Mr. Justice Dickson for the reasons he has so clearly enunciated.

The judgment of Judson and de Grandpré JJ. was delivered by

DE GRANDPRE J. (dissenting)—I have read with great interest the reasons for judgment prepared for delivery by my brother Spence. With respect, I am unable to reach the same conclusion on the quantum of damages.

Appellant has made two submissions on this point:

- (1) the trial judge having made no error in principle in his examination of the contingencies, the Court of Appeal should not have varied the decision of the trial judge on the point;
- (2) both the trial judge and the Court of Appeal were wrong in taking into consideration the impact of the income tax on the gross earnings of the deceased.

The first submission cannot succeed. As pointed out by my brother Spence, the trial judge did commit an error in principle in his examination of the question of contingencies, thus opening the door to a full re-examination of the subject-matter by the Court of Appeal. In such circumstances, the duty of this Court is to refrain from interfering in the absence of an error in principle by the Court of Appeal. The rule has been expressed by my brother Judson in *Hossack et al. v. Hertz Drive Yourself Stations of Ontario Ltd. et al.*[10], at p. 34:

It is highly desirable that this power of review of reasonably wide scope should exist in the Court of Appeal and that this Court, if it recognizes that the case is one for review, should be slow to interfere. Everyone concerned is aware of the difficulties that surround an assessment of damages and its review in the Court of Appeal, and the volume of litigation in personal injury cases and under The Fatal Accidents Act demonstrates the need for an experienced reviewing tribunal with reasonably wide powers. The Court of Appeal has this experience. They know better than anyone else what an award should be both in the interests of justice to the particular litigants and interest of some principle of uniformity, to the extent that this is attainable. Any further reviewing tribunal should be slow to interfere unless it is convinced that there is error in principle.

One aspect of any assessment of damages is the actuarial calculation. In the case at bar, plaintiff chose to obtain expert assistance and in August 1974, through her counsel, requested The Wyatt Company to conduct the necessary investigation on data supplied by plaintiff. The report of that firm, dated September 9, 1974, some three months before the trial, was filed by consent of the parties and is the only evidence on the point. The expert assumes a compound interest of 9 and 10 per cent and plaintiff was content to submit her case on that basis. The record does not disclose any other information about these calculations.

Upon this aspect of the case, the trial judge had this to say: Actuarial tables filed as Exhibit # 1 at 9% and 10% compound interest show the present value of \$1.00 to age 65 for the male as \$9.9375 and \$9.1381 respectively. I believe a more realistic interest rate would be in the approximate amount of 6½% which would materially inflate these figures for example at 4% the factor is 18.66461.

To which the Court of Appeal added this comment:

There was no evidence before him as to the cost of an annuity in the market place, nor of the interest factor on which the purchase price of annuities was based at the relevant time.

There is no doubt that the inflationary trends of our time have in principle to be taken into consideration when determining the proper rate of interest to be used when capitalizing the loss of support. However, that principle no longer applies when as in the present instance plaintiff chooses to adduce evidence of calculations based on high interest rates, without any qualification, and enters into an agreement with the defence, the net result of which is to make that evidence the only one on the point. In these circumstances, the hands of the judges are tied and the case must be decided without recourse to other information or to prior judicial knowledge.

Thus the Court of Appeal was right in its approach to the question of damages. I cannot find any error in principle in its judgment with the possible exception of the issue of income tax to which I now turn.

In the case at bar, the deceased left a widow and one child. At the time of his death, his gross income was \$12,000 but there is a finding that two or three years later, that figure would have been \$15,000. It is on that basis that the damages have been calculated:

Gross income

\$ 15,000

Less:

Personal use and support

\$4,800

Income tax

\$3,200

\$ 8,000

Disposable income

\$ 7,000 As already mentioned, appellant takes issue with the deduction for income tax submitting that *Gehrmann v. Lavoie*[11], has decided the point in her favour. I sat in that case and expressly reserved my consideration of the matter, feeling at the time that the appeal could be dismissed on other grounds. I must now examine the question.

My starting point will be the general attitude of Bench and Bar throughout the years. An expression of that attitude is to be found in the Special Lectures of the Law Society of Upper Canada on Damages for Personal Injuries in 1958 where Stewart J. expressed, while discussing awards for personal injuries, his views on *British Transport Commission v. Gourley*[12], in very clear terms: "I will not follow it". Still another lecturer, P.B.C. Pepper, at p. 23, when discussing the calculation of damages for loss of a husband, stated unequivocally that they should be calculated on the net earnings: "By net earnings, I mean gross earnings after deduction of income tax at source".

A number of cases could be cited in support of that statement but it is not necessary to do so. Suffice it to say that the Courts have until *Gehrmann* come to the same conclusion. A very relevant example is *May et al. v. Municipality of Metropolitan Toronto*[13], where Addy J. makes a study in depth of the questions, underlining the basic distinction between the situation in personal injuries cases as decided in *The Queen v. Jennings*[14], and the situation under The Fatal Accidents Act, now R.S.O. 1970, c. 164. The following extract from p. 422 summarizes his thoughts:

I feel it is quite clear, however, that the Jennings case does not apply to the case at bar in any event, for the present case is not taken by the person who would be earning the income but by the person who would be receiving a benefit from the net income. It is obvious that the widow at no time was entitled to the income and at no time was she ever able to receive or could she count on receiving either as of right or as a gratuitous payment anything more than the net income of the deceased after deducting income tax and all of the other expenses of the deceased.

This reasoning was adopted in so many words by the Court of Appeal of Ontario in *Hawryluk et al. v. Hodgins*[15], (see *MacKay J.A.*, at p. 748). It is of interest to note that two of the three judges in *Hawryluk*, namely *MacKay* and *Kelly J.J.A.*, were also sitting in *Jennings*[16], where, in a personal injury case, they came to another conclusion, namely that the impact of the income tax on the gross earnings of the injured party should not be taken into consideration, a conclusion which was affirmed in this Court.

That there is a fundamental distinction between a personal injury claim and a fatal accident one has repeatedly been underlined in a variety of cases. A recent example involving proceedings under *The Trustee Act*, R.S.A. 1955, c. 346, s. 32, is to be found in *Crosby v. O'Reilly et al.*[17]

En passant, I would also underline that in *Canadian Pacific Limited et al. v. Gill*[18], the trial judge had, in his calculations, deducted from the gross earnings the income tax payable by the deceased. The point was not mentioned in the Court of Appeal nor in this Court where, on the question of damages, the only problem raised was that of the pension payments under the Canada Pension Plan.

It is not only in Canada that the views were unanimous on the point. *McGregor on Damages*, 13th ed., 1972, gives the situation in England which still holds true to this date:

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- (b) Injuries resulting in death. Even before *Gourley's* case it had been accepted in actions by or on behalf of a deceased's dependants under the Fatal Accidents Acts that what the deceased would have had to pay in tax must be taken into account in assessing the damages. While in a physically injured plaintiffs claim for his loss of earnings it was possible to regard any tax which would be levied on them as representing a collateral liability which should be ignored, as the claim of a deceased's dependants is for their loss of that portion of the deceased's earnings which would have been used for their support, and therefore for an amount which would already have suffered tax in the deceased's hands before it came to be applied for their benefit, no question of the liability to tax being merely collateral could ever arise.

See also *Stevenson and Orr*, "The Tax Element in Damages", 1956 *British Tax Review*, p. 6; *The Law of Torts* by *Street*, 6th ed., 1976, p. 414.

The Law of Torts by *Fleming*, 4th ed., 1971, tells us that the situation is the same in Australia (p. 586):

Compensation is due, and due only, for loss of support, measured by the claimant's reasonable expectation of pecuniary benefit. Where the person killed was the breadwinner, the principal source of pecuniary detriment is the loss of the deceased's net earnings, present and future. The basis of calculation is, therefore, the amount of his wages or other income from which must be deducted an estimated amount of what the deceased required for his own personal and living expenses.

The word "net" in footnote no. 49 is defined "income tax deducted".

In South Africa, that view appears to be accepted without question. In a note on Income Tax and Damages in Delict in *The South African Law Journal*, (1950) vol. 67, C.J.J, writes (at p. 296):

- (b) The matter also becomes of importance in cases where an action is brought by dependants for damages in respect of the death of the breadwinner. It is submitted that in these cases the income tax which would have been paid by the breadwinner must clearly be taken into account in assessing the damages to be awarded to the plaintiffs. Here the plaintiffs are entitled to damages in the amount which it is anticipated they would have received by way of support from the breadwinner but for his decease. There can, it is suggested, be no doubt but that in assessing the amount which would have been made available by the deceased for their support, the amount which he would have been obliged to devote to his own purposes, including the discharge of his obligation to pay income tax, must be taken into account by deduction from the anticipated amount of his total earnings, in arriving at the damages to be awarded to the plaintiffs.

This unanimity at first sight is very persuasive. Still the reasons behind those views must be examined. Under The Fatal Accidents Act, what must be determined is the pecuniary benefit lost by the plaintiff because of the untimely death of the deceased. *Littley et al. v. Brooks et al.*[19], at p. 470; *Proctor et al. v. Dyck et al.*[20] It seems to me that what the widow and the child have lost in this case is the support payments made by the deceased, support payments which could only come out of funds left after deducting the cost of maintaining the husband, including the amount of tax payable on his income. I cannot see how this pecuniary loss could be evaluated on any other basis than the take-home pay, that is the net pay after deductions on many items, including income tax.

In *Proctor* just mentioned, Cartwright J., as he then was, speaking for the Court, underlined that a child of the deceased, although not depending on the latter at the time of death, had nevertheless a right of indemnity if he had "a reasonable expectation of deriving pecuniary advantage" (p. 249) from his father. In the circumstances of that case, the expectation was based on the deceased's steadily increasing net worth resulting from savings and capital profits. In this context, savings can only exist after payment of income tax.

It is trite law that The Fatal Accidents Act has created a right of action which did not exist at common law and, as mentioned above, that the loss that can be recovered is the financial loss. This was not the approach in Jennings where it was stated: “The plaintiff has been deprived of his capacity to earn income. It is the value of that capital asset which has to be assessed” (Judson J., at p. 546). I cannot consider that the deceased here was a capital asset.

There is more. Respondent submits that the whole subject-matter of the impact of the income tax in a fatal accident case must be examined not only in the narrow confine of the situation in the case at bar but also by reference to other factual situations. He has submitted figures for gross incomes of \$100,000 and \$50,000 where the tax bite would have been in round figures for the year 1973, \$50,000 and \$20,000 respectively. In chart form:

Gross income

Tax

Net income

\$ 100,000

\$ 50,000

\$ 50,000

\$ 50,000

\$ 20,000

\$ 30,000

It is quite obvious that basing an award under The Fatal Accidents Act on gross income would fail to take into consideration the realities of life in a modern state and would, in some cases, give to the dependants a fund greatly in excess of their financial loss. Income tax must therefore be taken into consideration and the Court of Appeal was right in accepting the trial judge’s approach in that respect.

I now turn to a point that has no bearing on the result in the case at bar but which could be major in other cases: by what mechanics do the courts provide for the tax to be paid by the dependants on the income produced by the fund? Two approaches are to be found in the jurisprudence, one is that outlined by Chief Justice Cowan in *Spurr et al. v. Naugler*[21], and another in the decision of the House of Lords in *Taylor v. O’Connor*[22]. In the *Spurr* case, Chief Justice Cowan deducted the income tax “on that part of the gross income not available for the widow and the other dependents” (p. 110). In *Taylor*, we find the following in the speech of Lord Reid (p. 367): But take the present case. The respondent will have the £10,000 to which I have referred and damages in respect of: (a) loss of her dependency; and (b) loss of her interest in the savings which the husband would have made. The damages for the loss of dependency ought to be such that she will have available to spend each year free of tax a sum equal to the amount of the dependency. But if the damages are calculated without a reference to income tax that will not be so. Suppose

the damages are sufficient to buy an ordinary annuity for her life of that amount. Part of each year's annuity payment will be a return of capital and will not be taxable; but that part which is truly income will have to bear tax. So the amount available to her to spend will fall short of what it should be by the amount of that tax. The damages will, therefore, have to be increased by an amount necessary to counteract this shortfall. This shortfall will be increased by the present high rates of interest.

To my mind, both approaches stem from the same philosophy but the means chosen by the House of Lords are to be preferred. The method outlined in *Spurr* only gives an exact result if care is taken not to pro-rate the income tax between the deceased and the dependants. Keeping in mind the progressive feature of the taxing statute, the greater bite of the tax should be on the deceased's share because the remainder coming to the dependants attracts a lower rate. In the case at bar, the impact of the income tax on the dependants is minimal. In any event, as already underlined, the award of the Court of Appeal is generous enough.

For these reasons, I would dismiss the appeal and the cross-appeal with costs, subject to the correction of the clerical error mentioned by my brother Spence as to the sum of \$1,600 mentioned by Arnup J.A. in his reasons but not included in the formal judgment.

Appeal allowed with costs, JUDSON and DE GRANDPRÉ JJ. dissenting. Solicitors for the plaintiff, appellant: Hughes, Amys, Wigle, Monaghan, Duke & Harlock, Toronto.

Solicitors for the defendant, respondent, Herbert Lewis Hanna: Soloway, Wright, Houston, Greenberg, O'Grady & Morin, Ottawa.

Solicitors for the defendant, respondent, John Buch: Cooligan, Ryan, McNeely & Montague, Ottawa.

[1] (1975), 10 O.R. (2d) 597.

[2] [1976] 2 S.C.R. 561.

[3] [1967] 1 All E.R. 539.

[4] [1973] 2 O.R. 341.

[5] [1937] S.C.R. 341.

[6] [1966] S.C.R. 13.

[7] [1976] 2 S.C.R. 561.

[8] [1967] 1 All E.R. 539.

[9] [1976] 2 S.C.R. 561, 59 D.L.R. (3d) 634.

[10] [1966] S.C.R. 28.

[11] [1976] 2 S.C.R. 561.

- [12] [1956] A.C. 185.
- [13] [1969] 1 O.R. 419.
- [14] [1966] S.C.R. 532.
- [15] [1972] 3 O.R. 741.
- [16] 50 D.L.R. (2d) 385.
- [17] [1975] 2 S.C.R. 381.
- [18] [1973] S.C.R. 654.
- [19] [1932] S.C.R. 462.
- [20] [1953] 1 S.C.R. 244.
- [21] (1974), 50 D.L.R. (3d) 105.
- [22] [1970] 1 All E.R. 365.
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