# SURVIVAL OF CLAIMS FOR LOSS OF EXPECTATION OF LIFE

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"It is an hard law that no recompense is given to a man's wife for killing of him" wrote an English legal commentator in 1657[1]. It is indeed a hard law, but also a hardy one, for vestiges of it and its companion rule precluding recovery by the deceased person's estate have survived centuries of condemnation to appear once again in a uniform statute proposed by the Canadian Conference of Commissioners on Uniformity of Legislation.

The Conference proposes in Section 6 of the draft uniform Survival of Actions Act that the estate of a deceased person shall recover only "actual pecuniary loss" which shall "not include punitive or exemplary damages or damages for loss of expectation of life, pain and suffering, or physical disfigurement."

This section is designed, apparently, to return us to the common law situation in which a tortfeasor may escape paying some of the damages his victim has suffered, if he has the good fortune to have his victim die before the action is tried. No matter how serious has been the actual damage by way of pain and suffering or loss of expectation of life, the wrongdoer or, in most cases, his insurer, is to be relieved from payment.

Let us be clear that this statute would revive a rule which was formerly an exception in the law. If the victim could keep the spark of life alive, he could recover for each of these things. If at the trial of a personal injury action, the medical testimony is that a man who was in the prime of his life now has a life expectancy of only five years by reason of his injuries, the court will evaluate that testimony and give damages accordingly.[2] Pain and suffering or physical disfigurement would be the subject of a very substantial compensation. The exception proposed would deprive the victim of this sum if he dies, for whatever reason, before the court can compensate him. Though this provision amounts to a return to a common law situation, it is a return to a thoroughly illogical exception which was once thought to exist in the law.

Lawyers trained in the common law tradition must guard themselves against the aberration, frequently observed in the profession, of paying homage to some rule of common law merely because it is old. The rule that "in a civil court the death of a human being cannot be complained of as an injury,"[3] presents just such a danger. In *The Amerika*[4] the House of Lords explained this dogma, which offends against human experience, as being derived from an ancient rule that death cannot "be alleged without alleging felony, and, for felony, trespass would not lie."[5] In his *History of English Law*, W. S. Holdsworth deals effectively with the

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1 *England's Balme* by William Shepherd, 1657.
2 *Flint* v. *Lovell* [1935] 1 K.B. 354.
3 *Baker* v. *Boulton* (Nisi Prius 1808) 1 Camp. 493, 170 E.R. 1033.
4 *Admiralty Commissioners* v. *S. S. Amerika* (H.L. (E.)) [1917] A.C. 38.
5 Per Lord Parker at 46.

supposed rule of law and with its proponents, noble and otherwise, in these words[6]:

> "The rule as laid down by Lord Ellenborough (in *Baker* v. *Boulton, supra*) is obviously unjust; it is technically unsound because, as we have seen, it is based upon a misreading of legal history; and yet it is the law of England today, for it was upheld by the House of Lords in 1917 in the case of *The Amerika*. The House of Lords attempted to justify its decision by an appeal to legal history. But the display of historical knowledge which was made on this occasion is an object lesson both in the dangers of hastily acquiring such knowledge for a special occasion, and in the consequences of the neglect of this branch of legal learning."

The basic argument in support of the proposed uniform statute is that any award for loss of expectation of life is arbitrary, because there is no possible way of justly fixing the amount of the money award. With the utmost deference, it is suggested that all damage awards in personal injury cases are arbitrary. A short time ago in Calgary, a young professional man was blinded in a motor vehicle collision. Would anyone suggest that whatever sum a court awards to such a victim is not arbitrary? The same is true of any personal injury, for the simple reason that a dollar value cannot be ascribed for human suffering by any other process than a purely arbitrary one. Indeed, to the extent that death has resolved at least some of the doubts, the award for loss of expectation of life is less arbitrary than the usual personal injury award. In any event, the fact that damages are difficult to assess has never been an excuse for declining to do so.

It is said that these awards give a windfall where it is least deserved. It is true, of course, that where the beneficiaries of the estate are dependents, the award under The Trustee Act[7] is nothing but a book entry. That being so, in those cases the problem is not one of difficulty. On the other hand, the pain that a victim has experienced in the weeks or months before his death, and the loss of expectation of a happy life, does represent a real and actual damage—a real and actual personal right which has been taken away. When the victim loses his expectation of a happy life, he has suffered something which can be estimated in terms of money, no matter how difficult that process is. While we have a system of law which allows a man to bequeath property to his adult children or to other beneficiaries, there would seem to be no reason why those rights which are damage claims may not also be bequeathed.

It is also said that the only persons who benefit from claims under The Trustee Act are creditors and persons who are not dependents. Yet it surely cannot be considered to be a reason for declining to award damages that the money will merely be used to pay the victim's debts. Perhaps creditors have never occupied a place of honour in the law, but they have not yet reached such a low estate.[8]

The proposed uniform statute really raises the basic question whether there should be *any* difference in the applicable rules in tort actions caused by the fortuitous circumstance that either the plaintiff or defendant has died before trial. If a defamation can be the subject of a damage award to a live plaintiff, there would appear to be no logical ground to

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6 3 *H.E.L.* 336

7 Trustee Act, R.S.A. 1953 c. 346, ss. 32, 34.

8 This surprising disdain for creditors is visible even in Ontario which, to an Albertan, is their traditional home. See Wright, *The Abolition of Claims for Shortened Expectation of Life By a Deceased's Estate* (1938) 16 Can. Bar Rev. 193.

declare, as does the Trustee Act in Alberta,[9] that the same defamation should not be actionable because the victim died soon after its publication. A son may have a very human interest in clearing the name of his deceased father, and perhaps justice requires us to allow him the chance.

A recent British Columbia case illustrates the arbitrary results of such a rule of law. In *Hubert* v. *De Camillis*,[10] the court found that a grossly libellous statement had been mailed to one hundred and seventy-five customers of the plaintiff, that the statements were actuated by personal malice, and were intended to destroy the plaintiff's business. After trial, but before judgment had been given, the plaintiff died. It was held that though the plaintiff's cause of action would have ceased to exist had he died before trial, he should not be prejudiced by the act of the court in reserving judgment, and a substantial award was given. That the just administration of a statutory provision requires such ingenious reasoning is an excellent indication of the need for change.

9 Trustee Act, R.S.A. 1955, c. 346, s. 32(1).
10 (S.C., B.C. 1963) 41 D.L.R. (2d) 495.