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COMMENTS

DAMAGES FOR SHORTENED LIFE¹

FRANCIS X. CONWAY†

During the ominous and fateful days of last December when death, raining from the skies over England, made a precarious thing of life, the highest court in that land was engaged in the business of admeasuring the damages for the "loss of expectation of life" of a boy, aged two and a half years, who had met death two years before as the result of an automobile accident. Is the continuance of human life an enjoyable thing so that the curtailment of it calls for compensation to be paid to the dead one's estate? Do worldly possessions and social position make for an enjoyable life? Was the life of this boy, snuffed out so soon after birth, going to be a happy one? These were some of the questions which the Law Lords were attempting to answer in the case of *Benham v. Gambling*,² problems strange indeed to the prosaic walls of a courtroom, "more suitable," as the Lord Chancellor, Viscount Simon, observed, "for discussion in an essay on Aristotelian ethics than in the judgment of a Court of law."

Where Injured Party Is Alive

The problem faced by the House of Lords had its inception in a decision handed down by the Court of Appeal, five years earlier, in the case of *Flint v. Lovell*.³ A review of that case and another English case, *Rose v. Ford*,⁴ will be profitable, not only in furnishing a clearer perspective to this latest pronouncement of the House of Lords on the subject, but also as a possible aid in the solution of the problem should it ever come into prominence in the courts of our own country.

1. The expression "shortened life" was chosen for use in the title of the comment as an attempt to inform the reader that it does not deal with the rather common problem of fixing the pecuniary value to other persons of a deceased person's normal life expectancy, which is encountered in suits under the various wrongful death statutes. See note 8 *infra*. The subject of this comment deals with the value to the injured person himself of that part of his life which he would probably have lived and enjoyed, and of which he has been deprived by another's wrongful act. The expression "shortened life" is, as we shall see, perhaps misleading in describing such a loss.

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2. [1940] 57 T. L. R. 177, quoted at length in Note (1941) 131 A. L. R. 1351, 1352.

3. [1935] 1 K. B. 354. For discussion of this case see: Hannigan, *Recent English Decisions in Damages for Injuries Ending in Premature Death* (1938) 18 B. U. L. REV. 275; 12 N. Y. U. L. Q. REV. 535; (1935) 51 L. Q. REV. 268; (1935) 5 C.A.M.B. L. J. 407; (1935) 1 ALTA. L. Q. 163.

4. [1937] A. C. 826, reversing the decision of the Court of Appeal, [1936] 1 K. B. 90. For discussion of this case see: (1936) 49 HARV. L. REV. 482; (1936) 6 C.A.M.B. L. J. 442; (1937) 53 L. Q. REV. 1.

In *Flint v. Lovell* the plaintiff, a rather wealthy man of 69 years, was severely injured through the negligence of the defendant. The case was tried without a jury and the trial justice, Acton, J., in fixing the plaintiff's damages, gave the following judgment:

"There is no doubt that he has lost the prospect of an enjoyable, vigorous and happy old age, which I am satisfied on the medical testimony might have gone on for a number of years if this unhappy accident had not occurred."⁵

According to the medical testimony, as a result of the injuries the plaintiff had less than a year to live,⁶ and the trial court fixed the damages at £4,000, £400 representing special damages which were admitted. Aside from the special damages, there was apparently no evidence of any other pecuniary loss, such as impairment of future earning capacity.

Now, the cutting down of life expectancy had often in the past been given somewhat incidental consideration by the fact-finding branch of the court as a circumstance in determining such a loss as the impairment of future earning capacity in actions by the injured party,⁷ so also in fixing the value of the pecuniary benefits which might have been received from a deceased where a statute, modelled after Lord Campbell's Act, permits the personal representative to bring suit for wrongful death for the benefit of the decedent's dependents.⁸ It is likewise clear that judges and juries many times included in their awards under the head of pain and suffering the deprivation of that feeling of contentedness which it may be assumed most people possess in contemplation of continued existence in this world. However, the ruling of the trial court in *Flint v. Lovell* had raised in sharp relief before an English appellate tribunal, seemingly for the first time,⁹ the novel and interesting question whether damages

5. *Flint v. Lovell* [1935] 1 K. B. 354, 355.

6. *Flint*, the plaintiff, was still alive three years later, according to information furnished to the House of Lords on the argument of the appeal in *Rose v. Ford*, [1937] A. C. 826.

7. See note 43 *infra*.

8. The original statute creating a cause of action for wrongful death, which was then non-actionable by reason of the decision in *Baker v. Bolton*, 1 Camp. 493, 170 Eng. Reprints 1033 (1808), was Lord Campbell's Act, 9 & 10 Vict. c. 93, enacted in 1846, now known in England as the Fatal Accidents Acts, 1846 to 1908. The first American statute was enacted by New York in 1847. N. Y. DEC. EST. LAW Art. 5. The damages recoverable under these statutes by the one entitled to sue are generally "such as flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received if the deceased had not died from his injuries." *Michigan Central R. Co. v. Vreeland*, 227 U. S. 59, 70 (1913). See also TIFFANY, *DEATH BY WRONGFUL ACT* (2d ed. 1913).

9. It would seem to be safe to state that the allowance of damages for loss of the expectation of life, though possibly existent in England, was, until the decision in *Flint v. Lovell*, generally not recognized. The law of England which, until Lord Campbell's Act, precluded an action for wrongful death, never obtained in Scotland and there is a line of Scottish decisions dealing with loss of life expectancy considered as a distinct harm suffered by the deceased. *Macmaster v. Caledonian Ry. Co.*, 13 R. 252 (1885); *Leigh's Executrix v.*

might be awarded, as an entirely separate item, simply by reason of the fact that an injured person's normal expectation of life had been materially shortened.

The English Court of Appeal in *Flint v. Lovell* permitted such a recovery. To evaluate that decision properly attention should be directed to two things. In the first place all members of the court agreed in their interpretation of the trial court's ruling. The noun "prospect", employed by Acton, J., in the excerpt quoted above, like its equivalent "expectation", may refer either to the act or state of the plaintiff's mind or to the object of his expectation, that is, as used here, to his future normal span of life, what lawyers and actuaries would describe as his "life expectancy." It is clear that the latter connotation was given to the word by the Court of Appeal, for it was assumed by that Court that in making the award the trial justice had treated the plaintiff's loss of the prospect of a happy old age as an independent head of damages and not merely as another element of the mental distress accompanying his pain and suffering. At least the size of the verdict would seem to justify this assumption. Secondly, the question, posed by this observation of Acton, J., in assessing damages, underwent in the Court of Appeal a transformation, possibly a superficial one, and yet one which was later the cause of considerable difficulty. The trial justice based his award on the plaintiff's loss of "the prospect of an enjoyable, vigorous and happy old age." In the Court of Appeal the question, argued by counsel and considered by that court, was whether damages might be awarded for "the shortening of life."¹⁰ At first glance this might appear to be two ways of expressing the same thought. Whether or not this is so, the expression "the shortening of life" does seem to put more emphasis on the fact of death than does the expression "loss of expectation of life," and in the Court of Appeal the principal assault made on the lower court's assessment was based on the argument that the damages had in effect been awarded because of the premature death of a human being, not yet an actuality, it is true, but apparently soon to occur.

Caledonian Ry. Co. [1913] S. C. 838; Reid v. Lanarkshire Traction Co. [1934] Sess. Cas. 79. See also 53 SCOT. L. REV. 283. In 1885 an Australian court approved a trial court's direction to the jury that "they might consider whether or not the plaintiff's life would be shortened by the assault." Bruce v. Rutherford, 1 W. N. (N.S.W.) 102. And in 1909 in assessing damages a Canadian judge answered in the affirmative his own question: "Now is a man not entitled to some compensation for having his span of life appreciably shortened, even though the period of his inevitable death may not in any case be far distant?" McGarry v. Canada West Coal Co. Ltd., 2 ALTA. L. R. 229 (1909). See also Barr v. Miller, 46 Man. L. R. 260 (1938); Stebbe v. Laird, 45 Man. L. R. 541 (1938); MacKenzie v. Harbour & B. C. Elec. Co., 53 B. C. 88 (1938).

10. Sir Frederick Pollock made the following comment in (1935) 51 L. Q. REV. 268: "Now surely the answer to the question [whether damages might be awarded for shortening of life] so put is that it is not possible for any human tribunal to attach any definite meaning to the term or, for that matter, to say whether death, when it happens, is in itself a bad or a good thing. The only way of obtaining a result is to go back to the firmer ground of considering the expectation of life as that which was diminished."

The authority chiefly relied upon by the appellant was the sweeping statement attributed to Lord Ellenborough when deciding *Baker v. Bolton*,¹¹ and reaffirmed in *Admiralty Commissioners v. Owners of S.S. Amerika*,¹² that "in a civil court, the death of a human being could not be complained of as an injury." The argument of the appellant was that if the death of a human being cannot, apart from a statute such as Lord Campbell's Act, give a right of action, then the shortening of life cannot give such a right of action or constitute an independent head of damages. One member of the Court of Appeal seemed impressed with this reasoning for, in expressing his doubts about dismissing the appeal, Roche, L. J. said:

"My doubts arise from these considerations: Firstly, on the theoretical side, though it is no doubt true that the law of England is not in all respects logical, it would seem to go to an extreme in lack of logic if, while the death of a human being does not, apart from statute, give a right of action, and does not, where a cause of action exists, found or constitute an independent right or head of damage, yet the shortening of life can give such right of action, and can found or constitute an independent right or head of damage. There would thus, as it seems to me, be allowed to the shortening of life an efficacy which is denied to its extinction, and to death in the future an efficacy which is denied to death on the instant."¹³

The other members of the Court, however, were of the opinion that Lord Ellenborough's generalization did not control on the appeal. They accepted as an explanation for the principle announced by him the dictum in the early case of *Higgins v. Butcher*¹⁴ to the effect that the civil remedy is merged in the felony.

11. 1 Camp. 493, 170 Eng. Reprints 1033 (1808).

12. [1917] A. C. 38.

13. Flint v. Lovell [1935] 1 K. B. 354, 367. Roche, L. J. was later elevated to the House of Lords and in his concurring opinion in the case of *Rose v. Lord*, note 4, *supra*, he referred to his earlier opinion and Sir Frederick Pollock's comment, note 10, *supra*, in the following language. "I take the comment to be in line with what I have tried to express—namely, that it is theoretically wrong in such a case to start from death as shortening life, but right to start with the initial bodily injuries carrying with them from the outset a diminished expectation of life which sooner or later will end with death. On this analysis of the cause of action of the deceased and of the plaintiff I am impelled to the conclusion that this cause of action is not within, and is not touched by, the rule of law laid down in *Baker v. Bolton* and the *Amerika*. This does not mean that I am not acutely sensible of an apparent contradiction or inconsistency of principle between that rule of law and the existence of the right to damages now in question." *Rose v. Lord*, [1937] A. C. 826, 857.

14. Noy. 18, 74 Eng. Reprints 989 (1606); also reported Yel. 89, 80 Eng. Reprints 61 (1606). On the adequacy of this explanation of the statement in *Baker v. Bolton* see 3 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1927) 331-335; Holdsworth, *Origin of the Rule in Baker v. Bolton* (1916) 32 L. Q. REV. 431; Winfield, *Death As Affecting Liability in Tort* (1929) 29 COL. L. REV. 239, 250-254; *Admiralty Commissioners v. Owners of S.S. Amerika* [1917] A. C. 38, especially the speeches of Lord Parker of Waddington and Lord Sumner. The merger theory was repudiated in *Hyatt v. Adams*, 16 Mich. 179, 190 (1867) by Christiancy, J., and the following explanation offered: "For myself, I think—

Since in *Flint v. Lovell* the injured party was alive and there was consequently no imputation of felony involved and since the imminent curtailment of plaintiff's life appeared to be the natural and probable consequence of the defendant's wrongful act, the appeal was dismissed.

Where Injured Party Is Dead

The effect of this decision was immediately felt in English negligence litigation. In 1934 Parliament had enacted a statute providing for the survival, for the benefit of a decedent's estate, of all causes of action (with certain exceptions immaterial to the discussion in this comment), vested in the decedent at the time of his death.¹⁵ In a number of suits brought pursuant to the 1934 Act, arising out of automobile fatalities, claims for loss of life expectancy under the authority of *Flint v. Lovell* were now put forth by personal representatives of those fatally injured.¹⁶ One of these cases, *Rose v. Ford*,¹⁷ went to the House of Lords. The deceased in that case, a young woman of twenty-three, as a result

and the form of expression in which the principle is announced by Lord Ellenborough would indicate that such was his opinion—that the reason of the rule is to be found in that natural and almost universal repugnance among enlightened nations to setting a price upon human life, or any attempt to estimate its value by a pecuniary standard, . . . ” It was decided in this case that a husband had no common law right of action for loss of his wife. The court pointed out that the early New York case, *Ford v. Monroe*, 20 Wend. 210 (N. Y. 1838), is no longer regarded as sound.

15. Law Reform (Miscellaneous Provisions) Act, 1934, 24 & 25 Geo. V, c. 41, noted in *Legis.* (1935) 48 HARV. L. REV. 1008. The effect of such a statute is to render inoperative the maxim *actio personalis moritur cum persona*. A survival statute must be distinguished from the procedural revival of actions, pending at the death of a party, where the cause of action survives, and from a wrongful death statute which creates an entirely new cause of action for the benefit of the dependents of the one wrongfully killed. See Comment (1935) 4 FORDHAM L. REV. 89. The pertinent provisions of the 1934 Act are the following:

“1—(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive . . . for the benefit of, his estate. . . .

(2) Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person:—

(c) where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate, consequent on his death. . . .

(5) The rights conferred by this Act for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependents of deceased persons by the Fatal Accidents Acts, 1846 to 1908, . . . ”

16. The view is expressed in (1935) 80 L. J. 355, that the 1934 Act was never intended to cover “a claim for loss of life as a good in itself” but a contrary view is expressed in (1937) 84 L. J. 24, 25, where the statement is made that “the intention of Parliament is to be derived from the wording of the Act, and that intention was to place a new and far higher value upon the lives of citizens than the law had hitherto recognized.” See also note 20 *infra*.

17. [1937] A. C. 826, *reus'g*, [1936] 1 K. B. 90.

of the injuries received, died four days after the accident. Suit was brought by her father as administrator to recover damages under the Fatal Accidents Acts (Lord Campbell's Act) for the benefit of her dependents and under the 1934 survival statute for the benefit of her estate. The trial justice, who heard the case without a jury, made an award of damages under the Fatal Accidents Acts and for the loss of a leg and pain and suffering under the survival statute.¹⁸ He rejected the claim for damages for loss of expectation of life, because, since the deceased girl was unconscious most of the time after the accident, he could find no evidence of any mental suffering being caused to her by reason of the shortening of her expectation of life, which he thought was the basis of the decision in *Flint v. Lovell*.¹⁹

We have seen that the *ni si prius* ruling in that case might lead to such an interpretation, but the Court of Appeal reaffirmed what was implicit in its prior decision and unanimously held that the trial justice was mistaken in his interpretation of that decision and that a person might obtain damages *simpliciter* for the shortening of his expectation of life. However, the majority of the Court of Appeal were of the opinion that the principle laid down in *Flint v. Lovell* should be confined to cases where the injured person still lived at the date of the trial. Their reasoning seems a bit obscure and it may well be that they were influenced by a desire not to extend the rather novel ruling of their earlier decision, the implications of which were causing considerable alarm among insurers. Slessor, L. J. thought that it would be essential to prove at the trial that the injured person then possessed an expectation of life which the defendant's wrongful act had curtailed, and that in any event the decision in the *S.S. Amerika* case, precluded a recovery since the girl's death converted the defendant's wrongful act into a felony which would merge the civil remedy.²⁰

18. There is involved here an incidental question of damages worth noting. The Court of Appeal, since it took the position later repudiated by the House of Lords, that the loss of a leg after death should be treated in the same category with loss of life expectancy as a loss consequent on death, ruled that the trial court was in error in basing his award of damages for loss of the leg on the assumption that the deceased would have lived as a one-legged woman for the remainder of her normal life. The House of Lords did not disturb the reduction of damages on this score, since, having held that the estate was entitled to damages for loss of life expectancy, an award of other damages for physical injuries on the basis of a life of normal length would amount to double compensation. However, in view of the fact that the trial justice denied a recovery for loss of life expectancy, his award of damages for loss of the leg, may have been correct.

19. MacKinnon, J. gave a like interpretation to *Flint v. Lovell* in the case of *Slate v. Spreag* [1936] 1 K. B. 83, 89, thinking that the damages in the former case "were awarded for the subjective effect upon the plaintiff, from his knowing that his expectation of life was shortened."

20. The English Law Revision Committee in its 1934 report recommended the abolition of the rule of *Baker v. Bolton* upon the basis of which the *Amerika* case was decided, but the Law Reform (Miscellaneous Provisions) Act, 1934, did not refer to the subject. REPORT OF LAW REFORM COMMITTEE (1934, Cmd. 4540).

Greene, L. J. expressed the view that the plaintiff's claim was in substance for loss of life and not one originally vested in a living person for loss of expectation of life and agreed with Slessor, L. J. that the decision in the *S.S. Amerika* case prevented a recovery. The House of Lords reversed and concurred with Greer, L. J. who had dissented in the Court of Appeal on this aspect of the case. The House held that the cause of action for damages due to the defendant's negligence was vested in the deceased at the time of her death and that under the 1934 Act it survived to her personal representative. The provision in Subsection 2 (c) of the 1934 Act that the damages "shall be calculated without reference to any loss or gain to his (the decedent's) estate consequent on his death" was held not to prevent a recovery, since the loss for which compensation was sought was one consequent, not upon the death of the girl, but rather upon the defendant's wrongful act.²¹ Death was merely another link in the chain of causation commencing with the wrongful act of the defendant and ending with the loss of those years of life which, but for the injury, the deceased might have lived and enjoyed. With loss of the expectation of life thus accorded a definite meaning, clearly Lord Ellenborough's much-criticized statement, which, despite its obscure and unstable foundation, had assumed the sanctity and universality of an Act of Parliament of general scope, lost all application. The defendant's wrongful act and not the death of a human being was being complained of as an injury. Whatever historical foundation still remained for the sweeping pronouncement that "in a civil court, the death of a human being could not be complained of as an injury" was neatly disposed of by the realistic approach of Lord Wright, who said:

"There is indeed here, it is admitted, no reason to suggest that the negligence of the defendant which caused the girl's death was felonious. In any event, whatever the old law may have been, the modern law is quite clear that if the act complained of constitutes a felony, the civil remedy is not drowned but merely suspended. But, however limited, the rule that the plaintiff must first prosecute in a case of felony is an anachronism now that the police prosecute or are assumed to prosecute in every case of probable felony. Nor do I see how it can ever be alleged in any case where

21. Compare the somewhat similar provision in the New York survival statute, enacted in 1935. "Where an injury causes the death of a person the damages recoverable for such injury shall be limited to those accruing before death, and shall not include damages for or by reason of death." N. Y. DEC. EST. LAW § 120. This provision would appear to exclude the head of damages under comment. REPORT OF THE NEW YORK LAW REVISION COMMISSION (1935) 204-214. A similar effect has been given to the 1910 survival amendment of the Federal Employers' Liability Act. 36 STAT. 291, 45 U. S. C. A. § 59. "It means that the right existing in the injured person at his death—a right covering his loss and suffering while he lived but taking no account of his premature death or of what he would have earned or accomplished in the natural span of life—shall survive." *St. Louis & Iron Mtn. Ry. v. Craft*, 237 U. S. 648, 658 (1914). It may have been the intention of Parliament that similar effect be given to Subsection 2 (c) of the English Act. However, the use of the word "consequent" to mean "subsequent" appears to be obsolete. FUNK & WAGNALLS, STANDARD DICTIONARY (1930) 561.

a person has been killed by negligence in driving a motor-car or by any other negligence that the act is felonious, unless or until the jury have so decided."²²

More important, for the present purpose of this comment, the principle of damages, first enunciated in *Flint v. Lovell*, received the express approval of the highest judicial tribunal in England. Again to quote from Lord Wright's excellent opinion:

"A man has a legal right that his life should not be shortened by the tortious act of another. His normal expectancy of life is a thing of temporal value, so that its impairment is something for which damages should be given."²³

In permitting an award of damages under this head the English court excluded loss of the pecuniary prospects, such as loss of earning capacity, during that period of life of which the injured party had been deprived, and restricted the damages to loss of what Lord Reading, on the argument of the appeal in *Rose v. Ford*, described as "the amenity value of life." But if the latter is held not to be a loss consequent on death, so as not to be excluded by Subsection 2 (c) of the 1934 survival statute, it would seem that the same thing must be held in regard to the former type of loss.²⁴ The most obvious reason for excluding the pecuniary loss is that it would be included in any award made under the Fatal Accidents Acts.²⁵ But such possible duplication would not exist where an action under the wrongful death statute could not be maintained because of the absence of dependents for the benefit of whom the action is brought.²⁶ Nor, theoretically at least, would an award under the wrongful death statute exclude loss of income which the deceased would have received during normal life expectancy but would not have saved for the dependents named in the statute.²⁷ Where the action is brought by the injured party who still lives, as in *Flint v. Lovell*, there is a further reason for allowing a recovery

22. *Rose v. Ford* [1937] A. C. 826, 846.

23. *Rose v. Ford* [1937] A. C. 826, 848.

24. MacKinnon, J. however, has said, obiter, that the loss of future earnings could not be recovered in view of Subsection 2 (c) of the 1934 Act. *Slater v. Spreag* [1936] 1 K. B. 83, 87.

25. Lords Wright and Roche suggest this in their speeches in *Rose v. Ford*. The problem of duplication of awards is discussed in Schumacher, *Rights of Action Under Death and Survival Statutes* (1924) 23 MICH. L. REV. 114, 126-127.

26. Lord Atkin seemed to recognize this for in *Rose v. Ford* [1937] A. C. 826, 835, he said that if the beneficiaries under the wrongful death statute do not benefit under the will or intestacy of the deceased, "there seems no reason why an increase to the deceased's estate on which they take no share should affect the measure of damages to which they are entitled under the Act." But see *Ramsdell v. Grady*, 97 Me. 319, 54 Atl. 763 (1903) where in an action under a survival statute recovery for loss of earning capacity after death was denied, even though no action could be brought under the wrongful death statute.

27. Lord Atkin also raised this question but expressed no opinion on it. Theoretically the loss of the dependents constitutes "but a segment carved from the larger loss suffered by the estate." Legis. (1931) 44 HARV. L. REV. 980.

of such prospective pecuniary loss, since in our own country where the question has been considered it has generally been held that a judgment in favor of the injured party bars any recovery under a statute permitting a suit for wrongful death to be maintained by the personal representative.²⁸

The Problem of Measuring the Damages

Recognition by the House of Lords of the principle that loss of the "amenity value of life" is a recoverable item of damages left unsolved a very practical question which continued to trouble the members of the English Bench and Bar: How are damages for this loss to be admeasured?²⁹ An examination of the reported cases involving this head of damage showed a wide variation in awards and little or no semblance of a guiding formula or yardstick appears to have been applied.³⁰ Last December the House of Lords undertook the task of indicating the main considerations to be borne in mind in assessing damages under this head in the case of *Benham v. Gambling*, the case which prompted the writing of this comment. In that case a two and a half year old infant died as a result of an accident without regaining consciousness. Apparently the only facts available to the trial justice, sitting without a jury, upon which to base an award, were that the deceased was a normal healthy child, living in a country village off the main road, where the risk of being exposed to road dangers and to certain diseases would be less than in a crowded center, and his father had steady employment and prospects of continuing in it. The trial justice fixed the value of the child's expectation of life which had been lost at £1200. The Court of Appeal affirmed, although one member thought that £350 would be an adequate award. The House of Lords, all the Lords concurring in the speech of the Lord Chancellor, reduced the award to £200. Even this figure their Lordships thought would be excessive if it were not for the fact that the circumstances of the particular infant were most favourable. The

28. *Fontheim v. Third Ave. Ry.*, 257 App. Div. 147, 12 N. Y. S. (2d) 90 (1st Dep't 1939), appeal denied, 281 N. Y. 392, 24 N. E. (2d) 95 (1939); Schumacher, *Right of Action Under Death and Survival Statutes* (1924) 23 MICH. L. REV. 114; TIFFANY, *DEATH BY WRONGFUL ACT* (2d ed. 1913) § 124.

29. The difficulty involved in the measurement of this element of loss had been urged against its allowance from the outset, frequent reference having been made to the statement of Baron Parke in *Arnsworth v. South Eastern Ry.* [1847] 11 Jur. 758, 759, that it is "impossible to form an estimate of the value of human life either to a man himself or to others connected with him."

30. MacKinnon, L. J., was outspoken in expressing his inability to apply any norm. See his frank opinions in the following cases. *Shepherd v. Hunter* [1938] 2 All. E. R. 587; *Bailey v. Howard* [1939] 1 K. B. 453; *Gambling v. Benham* [1940] 1 All. E. R. 275. Other reported cases involving the problem of admeasurement are *Rose v. Ford* [1937] A. C. 826; *Ellis v. Raine* [1939] 2 K. B. 180; *The Aizkarai Mendi* [1938] Prob. 263; *Morgan v. Scoulding* [1938] 1 K. B. 786; *Roach v. Yates* [1938] 1 K. B. 256; *Turbyfield v. Great Western Ry.* [1938] W. N. 12; *May v. McAlpine & Sons Ltd.* [1938] 54 T. L. R. 850; *Feay v. Barnwell* [1938] 1 All. E. R. 31.

Lord Chancellor made clear the desire of the House of Lords that future awards, whether in the case of children or adults, should be governed by "a lower standard of measurement than has hitherto prevailed for what is in fact incapable of being measured in coin of the realm with any approach to real accuracy."³¹

At least this last admonition, so far as the matter admitted of specific direction, could be given some practical application. However, the question remains whether the House furnished any further guidance to assessors of damages. It was hardly to be expected that, in dealing with the value of so incommensurable a thing as life expectancy, the Court could, even if it wished to, establish any exact or set standard of measurement. Nevertheless the court did suggest certain rules for future guidance. They might be summarized as follows: The statistical or actuarial test was to be avoided, since "the thing to be valued is not the prospect of length of days, but the prospect of a predominantly happy life." The value of such prospective happiness should be judged by the character and habits of the individual and his state of health and not by social position or prospects of worldly possessions, for "the damages are in respect of loss of life, not of loss of future pecuniary prospects." The subjective test should not be the guide but the award should depend "on an objective estimate of what kind of future on earth the victim might have enjoyed, whether he has justly estimated that future or not." Uncertainty of the future in the case of an infant, such as the deceased in the case at bar, called for smaller awards than in the case of one who has "passed the risks and uncertainties of childhood" and "in some degree attained to an established character and to firmer hopes."³²

Do these tests of value constitute workable rules or standards of measurement? The assessor has been told what not to consider, and viewed as rules of exclusion, the suggested tests will undoubtedly prove helpful. But it is submitted that, in the main, aside from the monition towards moderation, the House of Lords has failed—as seemingly it was bound to fail—in its task of devising a method whereby to weigh the imponderable. Baron Parke once said that it is "impossible to form an estimate of the value of human life."³³ Nevertheless, we do permit our judges and juries to prognosticate what might, but for premature death, have been the normal length of a deceased person's life and, in certain limited respects, to estimate its monetary worth.³⁴ But now in England there is bestowed upon judges and jurors an added foresight which approaches the supernatural. Necromancy and crystal-gazing seem to have been sanctioned in the law. Judges and jurors are to be veritable fortune-tellers. They may forecast one's future state of happiness and, in addition,

31. *Benham v. Gambling* [1940] 57 T. L. R. 177, 181.

32. *Id.* at 180.

33. See note 29 *supra*.

34. For instance, its value as determined by the earning capacity of the deceased.

express its value in terms of cash, with the sole condition that they be not too liberal.

It may in fact be questioned whether juries, or for that matter judges, will be able to conform to their Lordships' instructions, despite their generality. They have been advised that "such damages should not be calculated solely, or even mainly, on the basis of the length of life that is lost." But if the real loss is that of prospective happiness its duration will certainly be given great consideration. The Lord Chancellor's speech informs us that "the ups and downs of life, its pains and sorrows as well as its joys and pleasures—all that make up 'life's fitful fever'—have to be allowed for in the estimate" and that "if the character or habits of the individual were calculated to lead him to a future of unhappiness or despondency, that would be a circumstance justifying a smaller award."³⁵ And yet the injured person's own estimate of his prospective happiness is said to be unimportant. The expression of this thought may have been prompted by a desire to prevent a repetition of the view indulged in by one judge in a case where the plaintiff's mind was unbalanced as a result of the defendant's wrongful act. In that case the trial justice, in considering an award for loss of expectation of life, said:

"I myself in this case think that his mental condition is such that it is very doubtful whether he appreciates very much, if at all, the fact that his expectation of life is diminished. I think his condition is such that if he truly spoke upon the topic at all he might truthfully enough say that he was glad to think that his expectation of life had been diminished as much as possible."³⁶

Admittedly, the judge committed error in giving weight to such a consideration under the circumstances of that case, but, on the other hand, while it may be correct to discount the future of the over-optimistic, why should a stranger be permitted to place a higher value on another person's future happiness than the latter does himself? The mystic, praying for early dissolution, may hold in contempt the joys of this life. Are men of the world to tell him he is wrong? It must be remembered that, theoretically at least, the loss is sustained by the injured person, even though the estate reaps the benefit of the *solatium* awarded. Lastly their Lordships warn that "no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not of loss of future pecuniary prospects. . . . Lawyers and judges may here join hands with moralists and philosophers and declare that the degree of happiness to be attained by a human being does not depend on wealth or status."³⁷ Admitting that riches do not necessarily make for happiness, most men will agree that a pecuniary prospect, such as steady employment, goes a long way towards making life enjoyable for the average person, and the task of prescinding from pecuniary gain as an element of the

35. *Benham v. Gambling* [1940] 57 T. L. R. 177, 180.

36. *Roach v. Yates* [1938] 1 K. B. 256, 260.

37. *Benham v. Gambling* [1940] 57 T. L. R. 177, 180.

damages may demand of jurors a power of abstraction which few of them possess.

The fears all along expressed by Lord Roche³⁸ seem in a very large measure to have been justified. The principle, first enunciated in *Flint v. Lovell* and reaching its culmination in *Benham v. Gambling*, was, at least until the decision in the latter case, fast developing into a runaway doctrine. It may be questioned whether the brake which the House of Lords attempted to apply will have the desired effect, and it may require an Act of Parliament, resurrecting *wergild* as a limitation on awards for this type of loss.

The American Decisions

Inquiry naturally presents itself as to the American law on the subject. There has been very little real discussion of the problem in the American decisions. The courts of two states and a federal court, interpreting the law of Maine, have apparently ruled out this element of damages. In *Richmond Gas Co. v. Baker*,³⁹ in denying damages under this head, the court said:

"If the condition of the injured person is such that a shortening of life may be apprehended, this may be considered in determining the extent of the injury, the consequent disability to make a living, and the bodily and mental suffering which will result. This, however, falls far short of authorizing damages for the loss or shortening of life itself. The value of human life cannot, as adjudged by the common law, be measured in money. It is, besides, inconceivable that one could thus be compensated for the loss or shortening of his own life."

The authorities relied upon by the court, particularly *Hyatt v. Adams*,⁴⁰ deal wholly with the common law proposition that "in a civil court, the death of a human being could not be complained of as an injury." Of course this question was not involved in the case. The plaintiff was not attempting to recover damages for his own death. The Indiana court, however, seems to have conceived this to be the issue, having apparently slipped into the same error as did Roche, L. J. in *Flint v. Lovell*, by treating the plaintiff's claim as one for the extinguishment of his life, rather than for the shortening of his span of life. We have already seen that the indiscriminate use of these apparently interchangeable expressions may easily confuse the issue. In *Krakowski v. Aurora, E. & C. Ry. Co.*,⁴¹ an Illinois court reached the same conclusion as did the Indiana

38. In *Flint v. Lovell* [1935] 1 K. B. 354, 368, he said: "This head of damage seems to me to involve inquiries and speculations inappropriate to and difficult for a court of law," and in *Rose v. Ford* [1937] A. C. 826, 861, he confessed "to some apprehension lest this element of damage may now assume a frequency and a prominence in litigation far greater than is warranted in fact, and becoming common form may result in the inflation of damages in undeserving cases, or, more probably perhaps, may become stale and ridiculous to the detriment of real and deserving cases, such as the present."

39. 146 Ind. 600, 45 N. E. 1049, 1052 (1897).

40. 16 Mich. 179 (1867).

41. 167 Ill. App. 469 (1912). In *Atchison, T & S. F. R. Co. v. Chance*, 57 Kan. 40, 45

tribunal upon substantially similar grounds, and the same comment might be applied to a recent federal decision.⁴²

These decisions make no clear-cut distinction between diminution of life expectancy as such and loss of earning capacity during the period of life of which the injured has been wrongfully deprived. Whether we deem each of these as a separate head of damages or both as elements constituting one head of damages, in reading the decisions it becomes necessary to treat the two separately, for there are American decisions holding that where the injured party can show a probable shortening of the life span, he is entitled to compensation for the loss of earning power in the years which will be cut off.⁴³ The writer, however, has failed to discover any American decision allowing a recovery for the non-pecuniary loss of life's enjoyment in the years cut off, as a good in itself, which is recognized by the English decisions.

Conclusion

The English decisions will undoubtedly prove of value to those American courts which so far have not had occasion to pass on the question. It is this writer's opinion that, in their approach to the problem, our courts should at the outset observe the distinction, noted above, between loss of the pecuniary advantages, and the failure to enjoy the more intangible benefits and amenities, of that part of life's span which has been extinguished. Discrimination should also be made between suits by the injured party and those under the survival statutes. In actions by the injured party no apparent ground of policy or well-

Pac. 60 (1896), the deceased was permanently injured and committed suicide while his action was pending. It was revived by his widow as administratrix, and at the close of the trial in answer to an inquiry by the jury whether, in estimating the damages for permanent injury, the time should be limited to the actual life time of the deceased, the trial court instructed them that they were not so limited. The appellate court reversed and said that: "Damages for the permanent deprivation of health and of capacity to work and enjoy life should . . . be limited to the period extending from December 1, 1890 (the date of the injury) to October 18, 1891 (the date of death)."⁴³ The case is of little value as an authority since it did not appear that the suicide was proximately caused by the defendant's wrongful act.

42. *Farrington v. Stoddard*, 115 F. (2d) 96 (C. C. A. 1st, 1940). This was an action under the Maine survival statute. The court, writing by Magruder, J., said: "Where the injured person survives for a period in a conscious state, it may be that the contemplation of an impending untimely death as a result of the tort may be compensated for as a part of the victim's pain, suffering and mental distress actually experienced before his death. But where the injured person never regains consciousness, it seems a thin distinction to say that the executor cannot recover for the death, but he can recover for the shortening of the life expectancy. All one ever does in killing a person is to accelerate the moment of his death." *Id.* at 100.

43. *Olivier v. Houghton County St. Ry.*, 138 Mich. 242, 101 N. W. 530 (1904); *Prairie Creek Coal Mining Co. v. Kittrell*, 106 Ark. 138, 153 S. W. 89 (1912); *Webb v. Omaha & S. I. R. Co.*, 101 Neb. 596, 164 N. W. 564 (1917); *Galveston, H. & S. A. R. Co. v. Miller*, 191 S. W. 374 (Tex. Civ. App. 1917).

reasoned precedent exists for disallowing a claim for loss of earning capacity which probably would have been utilized, had the plaintiff lived his normal span of life.⁴⁴ Where suit is instituted by the personal representative under a survival statute, express provision of the statute or its judicial interpretation, especially where there is danger of duplicating the award made under the wrongful death statute, will most likely preclude the recovery of such a money loss.⁴⁵ However, when our courts come to deal with the enjoyment of years never to be lived, it would be well that they exercise great caution in either type of action. It seems safe to say that, in any event, juries will, consciously or unwittingly, take this loss into account as a subjective element in awarding damages for pain and suffering, no matter how carefully and precisely the court instructs them.⁴⁶ Evaluation of harms to interests of personality, such as pain and suffering and mental anguish, must necessarily rest, to a great extent, with the common sense and sound discretion of the jury, and it must be admitted that our American standard of certainty has been applied less stringently, if at all, to proof and assessment of such purely personal losses, than in cases of monetary loss. However, there is a limit, even in such cases, to the speculation permitted of juries. For instance, there is a conflict in our decisions on the question whether compensation should be allowed for impairment of the capacity to enjoy life while alive, resulting from bodily injury.⁴⁷ Courts refusing to recognize such a head of damages will, *a fortiori*, rule out the total loss of life's enjoyment. To other courts, which are not satisfied to rely on the formula that such a loss is so far conjectural and speculative as to be impossible of measurement but which believe that a court of law is not the place for such a task, the theories made popular by Dean Leon Green might furnish the solution.⁴⁸ A proper exercise of the judicial function may permit a court to hold

44. See note 43 *supra*, and McCORMICK, DAMAGES (1935) 303-304. The problem of proof is no different than in actions under the wrongful death statutes.

45. See note 21 *supra*, and *New Deemer Mfg. Co. v. Alexander*, 122 Miss. 859, 85 So. 104 (1920), refusing to hold that "the present net value of the life expectancy is recoverable where the action is limited to damages to the decedent," despite the fact that the suit was brought under Section 510 of the Code of Mississippi, which combines the features of a survival and wrongful death statute, and which provides: "In such action the party or parties suing shall recover such damages as the jury may determine to be just, taking into consideration all the damages of every kind to the decedent and all the damages of every kind to any and all parties interested in the suit." MISS. CODE ANN. (1930) § 510.

46. This fact serves as some explanation for the failure of this type of loss to gain currency as an independent head of damages.

47. See majority and minority opinions in *Hogan v. Santa Fe Trail Transportation Co.*, 148 Kan. 720, 85 P. (2d) 28 (1938). These opinions and the annotation to the case in 120 A. L. R. 535 (1939), contain a full citation of authorities on the subject. See also (1939) 52 HARV. L. REV. 838; (1939) 13 SO. CALIF. L. REV. 152; SALMOND, LAW OF TORTS (9th ed. 1936) 363.

48. GREEN, RATIONALE OF PROXIMATE CAUSE (1927).

that the law's protection of the right to live should not be extended to include within its scope, under all circumstances, every possibility of future happiness on this earth.⁴⁹

49. See the following cases cited in GREEN, RATIONALE OF PROXIMATE CAUSE (1927). *Drobner v. Peters*, 232 N. Y. 220, 133 N. E. 567 (1921) (in which the court refused to allow an infant to recover damages for an injury sustained in his mother's womb eleven days before his birth); *Connecticut Mut. Life Ins. Co. v. New York N. H. & H. Ry.*, 25 Conn. 265 (1856) (in which an insurance company was denied recovery of the amount of a policy which it had paid on account of the death of the insured caused by the defendant's negligence). This case was relied upon by the Indiana court in *Richmond Gas Co. v. Baker*, 146 Ind. 600, 45 N. E. 1049 (1897). See also *Mitchell v. Rochester Ry.*, 151 N. Y. 107, 45 N. E. 354 (1896) (denying recovery for injuries sustained from fright occasioned by the negligence of another in the absence of physical impact).