

IN THE SUPREME COURT OF JUDICATURE

IN COMMON LAW

SUIT NO. C. L. G004/1974

Between	Fe Torreda Grenier (Administratrix Estate Alain Grenier-deceased)	Plaintiff
A n d	Athol Chin Eric Shaw	Defendants

SUIT NO. C. L. G011/1974

Between	Fe Torreda Grenier	Plaintiff
A n d	Athol Chin Eric Shaw	Defendants.

Dennis Goffe and John Graham of Myers Fletcher and Gordon, Attorneys-at-law for plaintiff.

Enos Grant and Lorna Omess Brown for defendants.

Heard: 19th, 20th and 30th May, 1980

Handed down on: 2nd October, 1980

MORGAN J:

On the 3rd February, 1973 the plaintiff Fe Torreda Grenier, a nurse and her husband Alain, an engineer were visiting Jamaica on a holiday from Quebec, Canada, when an accident occurred on the main road in the parish of St. Ann in which her husband/died and she herself received injuries. She now brings an action under the Fatal Accidents Act in her capacity of Administratrix of the estate of Alain Grenier her late husband as well as in her personal capacity for negligence and/or breach of statutory duty. The claims were consolidated and the circumstances are set out in the Statement of Claim.

The question of liability has been settled and the issue which is before me is the assessment of damages. Subsequent to the filing of the action, the widow remarried and so the effect of the fact of remarriage consumed a substantial part of the argument. The Attorneys were however, able to arrive at a satisfactory agreement on various points which has considerably narrowed down the matters to be determined by me.

The following matters were agreed with points contested as set out:

1670

Funeral Expenses	-	\$2,131.34 (Ca)
Administration Expenses were not recoverable	-	\$1,000.00 (Ja)
The annual dependency at date of death of deceased <u>contested</u> as not being recoverable in respect of the period after remarriage	-	\$5,500.00 (Ca)
Period prior to remarriage	-	3½ years

At the time of remarriage the annual dependency of the deceased husband would have increased by \$900.00, added to \$5,500 making a total of \$6,400.00

A multiplier of 12 if the period after remarriage is taken into account.

The loss to the wife after remarriage is the second husband's annual contribution agreed at \$3,780.00 deducted from the deceased husband's annual contribution of \$6,400.00 = \$2,620.00 p. a. (Ca)

The plaintiff is the sole beneficiary.

A Dodge Motor Car appearing in the inventory is not a benefit accruing to the widow.

The contract of marriage was executed between the two parties.

The issues which arise from these concessions and which I now have to determine are:

1. The effect of remarriage on the dependency
2. The effect of the various pecuniary benefits on the award
3. The amount of award for personal injuries

THE EFFECT OF REMARRIAGE

This produced some very interesting argument by Counsel on both sides as it was agreed there were no authorities to be cited on the point and the necessity for a decision may never arise again in view of the statutory provisions in the amendment to the Fatal Accidents Act 23 of 1979 which reads:

Section 4, ss (5) (c):

" In the assessment of damage under ss. (4) the court shall not take into account the remarriage or prospect of remarriage of the widow of the deceased person. "

This amendment however is not applicable to this case.

Mr. Goffe puts his case in this way - the widow should be restored to her financial status quo as best as possible as she was at the time of her husband's death - that the fact of her remarriage is only a mitigating circumstance and the court is entitled to assess the extent to which her marriage has benefitted her and compare it with her situation had her husband been living - that when the plaintiff remarried she sustained a loss and to the extent of this loss she has suffered a loss of dependency which the court can assess and award. He placed reliance on several cases none of which was on all fours with the point but argued by analogy that in each there was a consistency of conduct by the Judges which clearly indicated that marriage per se did not terminate the widow's dependency but rather supported his point.

I will refer to three of these cases. In examining them I shall address my mind to the defendant's reply that in each of these cases the court was embarking on a different enquiry and therefore anything which was said must be regarded as obiter.

(1) Mead vs. Clarke Chapman and Co. Ltd. (1956) 1 W.L.R. 76

This action was brought by the plaintiff under the Fatal Accidents Act on behalf of herself and her infant daughter and was reported on the question of whether or not the dependency of the child ceased wholly on the plaintiff's remarriage.

Here the widow remarried 8 months after the death of her husband, a welder. Her second husband was a lorry driver earning at the date of the trial the same sum as her first husband had been earning at the time of his death. Singleton L. J. observed that no notice was taken of the difference of $4\frac{1}{2}$ years between his death and the date of trial, and the prospect of her first husband being in a better earning position at the date of trial had he lived, and had this been explained it might be that his earnings would have shown an increase and the widow would have been seen to have suffered a financial loss. However, the court noted that the fact of both husbands earning the same was taken without objection and accepted that the dependency of the wife on her deceased husband ceased on remarriage and that no damages should be given to her in respect of any time subsequent to her remarriage.

What can be derived from this case is if the $4\frac{1}{2}$ years had been taken into account and it had brought the income of the deceased to a point in excess of the income of the second husband at the date of trial, then a financial loss to the wife would be evident. The value of this bit of evidence could only be a for the purpose of assessing whether or not she was entitled to a benefit if indeed a loss was shown - which benefit would have accrued to the child.

(2) Curwen vs. James (1963) 2 All E. R. 619 C. A.

This case is reported on the power of the Court of Appeal to receive further evidence and as to the reduction of damages under the Fatal Accidents Act consequent on remarriage.

Here the widow brought an action under the Fatal Accidents Act on her own behalf. At the trial her chances of remarriage were taken into account by the Court and a deduction was made in the amount of damages awarded even though no evidence on the possibility of remarriage was given. She however remarried before the time for notice of appeal had expired. The defendant sought and was granted leave to adduce further evidence to show that by her remarriage she had not lost the financial support considered by the Judge. No evidence was tendered as to whether she had gained a benefit or if there was diminution in her financial position, or whether she was in the same position. The Court of Appeal reduced the damages to a figure which they thought the trial Judge might have awarded had he known of the likelihood of early remarriage on the assumption that the fact of marriage indicated a financial benefit. At p. 622 Sellers L. J. observed

" I find it is unsatisfactory (and it has a very direct bearing on this case) that although the Court has the information now that the plaintiff has remarried, it has no information as to the amount by which the remarriage is benefitting her. "

From these remarks of the learned Lord Justice, one is likely to conclude that if there was information as to whether or not there was a financial loss to the plaintiff such information would be taken into account in arriving at a figure for an award.

His Lordship speaks of "the fact of marriage", as by itself indicating a financial benefit but I would add with great respect that that is

speculative and is in fact no longer so today. However, in this case there has been a remarriage and the facts are known so it becomes no longer a matter of speculation because whether or not there is a benefit or loss is a fact which can or has actually been determined with certainty.

Neither of these two cases referred to is on all fours with Mr. Goffe's submission though the inference to be drawn in each case to support it is strong.

The third case to which I will refer is from the Court of Appeal, Ontario, Canada.

(3) Flemming vs. Markovich (1942) 4 D. L. R. 287. No facts are set out in the judgment but it is clear from the report that the widow remarried 11 months after the death of her husband and it was assumed that the second husband was able to provide for her in the same manner as the first. The trial judge confined the damages to 11 months only.

The Court of Appeal held that because of the uncertainties which surround a marriage, damages in excess of the amount appropriate to the period of widowhood (11 months) should "not be entirely disregarded". The damages were accordingly increased, the principal factor being the uncertainty of the capability of the second husband being able to provide for her at that level.

The court was more precise in enunciating the principle that where a court is not certain how long the second husband will remain able to provide for her, then damages in respect of the period after remarriage should be considered.

Mr. Grant for the defendant in reply urged and relied heavily on the statement in Munkman on Damages for Personal Injuries and Death - 5th Edition at page 161 para. 1 heading "Damages on Death".

" Dependence on the prospective earnings of the deceased comes to an end if the widow marries again"

Mr. Grant emphasizes the total absence of any authorities - none which contradicts the statement of Munkman or supports the plaintiff. He submitted that all the cases cited, were reported in respect of some other

principle and that whatever was said with regard to the widow was obiter. He looked on the change in the 1971 English Amendment (equivalent to our 1979 amendment) and brings it forward as proof that that amendment allows the court to do now what the plaintiff is urging on the court, that is, to see whether there is a continuing loss and make an award. Therefore, if the law operates as the plaintiff urges there would be no need for an amendment.

He rejects the method of calculating urged by the plaintiff - suggests that the court could arrive at a figure based on the period of widowhood or use the Common Law approach and look at the full amount and then reduce it substantially.

He cites Nunk vs. Cocksedge Ltd. Kemp and Kemp on the Quantum of Damages 2nd Edition p. 87 C. A.

In that case it was thought by the trial Judge that the widow had a very good chance of remarriage, and proceeded to make a substantial reduction on the figure he would otherwise have awarded. Denning L. J., as he then was, found that too much weight had been put on the chances of this widow's remarriage by the trial judge and increased the figure. Mr. Grant calls this the empirical approach and urges it for this purpose.

I must confess that the arguments were both very persuasive though the principles in the cases give some guide as to the approach of the courts and seem to suggest support in the plaintiff's case. Some assistance may be derived from the case of Goodburn vs. Thomas Cotton Ltd. (1968) 1 All E. R. 518 at pages 522 - 523 which was not cited before me. The facts are not pertinent to this matter and it is sufficient to say that it concerns the possibility of a deceased's widow remarrying and whether it is a factor that should be taken into account and what weight should be attributed to it. At page 523 Edmund Davies L. J. said:

" In the unreported case of Woodroff vs. National Coal Board decided by this Court in 1954 Lord Goddard C. J. said that on remarriage a widow:
' would then cease to be the dependent of her late husband, she would then be the dependent of her new husband'
That, however, is by no means the same as saying, that, if marriage eventuates, the widow must be regarded perforce as restored to the same financial position as she was during her first marriage. To assert that would be to go much too far. The widow may marry a man earning substantially less than her husband did.

The widow may marry a shirker, or a man with more extravagant personal tastes, or perhaps a man who subsequently walks out on her. If she remarries at all it may be to a man whose expectation of life (either by reason of his greater age or poorer health) is not equal to that of her deceased husband. Some-how all these chances of life must be borne in mind, and real injustice may be done to the widow by applying to this complex problem the over-simplified approach that, if there seems a real prospect of remarriage, she must ipso facto be treated as likely to be in exactly the same financial position as she was during her first marriage. "

At letter F (supra) he quotes from Munkman on Damages for personal injuries and Death (3rd Edition) p. 122.

" In the circumstances of a given case, a judge (or even a jury) might well feel justified in saying that for all practical purposes the adverse contingencies were negligible and no reduction should be made. The law is that the contingencies must be taken into account not that a deduction is obligatory. "

In the judgment of Davies L. J. he concurred in that view at p. 522 where he said:

" It involves the consideration of many imponderable matters. It does not necessarily follow that, if a widow remarries, so far as dependency is concerned her right to financial support from those who killed her deceased husband necessarily comes to an end. Matters like the means of the husband or the potential husband, have to be considered, the question whether the marriage will last has to be considered. All the manifold chances and changes of life have to be considered. It is indeed a task which many judges have disliked, and which many people have said that judges ought not to be called on to perform. But, as the Law stands, that is the position. "

Their Lordships after considering all the contingencies proceeded to reduce the amount awarded to the widow because speculation as to her marriage prospects seemed good.

It is clear that the principle as quoted in Munkman and referred to by Mr. Grant was stated by Lord Goddard C. J., but there is no report of that case.

This point made by Mr. Grant is therefore not sustained to the extent contended by him, for that dictum of Goddard C. J., does not find support in any authority and certainly was not followed by their Lordship in this case. The trend of authorities suggest that remarriage does not inevitably put an end to dependency but that the financial standing is a very relevant consideration. The dictum of Lord Goddard with respect, lends for

an over-simplified approach and ought not to be isolated in its application. The real position is one of flexibility and not of rigid adherence.

I hold that dependency does not inevitably cease at remarriage, that the authorities as cited by the plaintiff support this view that all the possibilities, uncertainties and happenings in relation to the specific set of circumstances must be taken into account.

The widow here has remarried and stands to lose an annual dependency of \$2,620.00 (Ca). Her first husband was a civil engineer employed in a job with bright prospects and the speculative chances are that as time moved on the gap would widen as between the first and second husband - in respect of the extent of her loss. It is also apparent that he is not able to maintain her to a standard as comfortable as her first husband. A multiplier of 12 years is agreed. I would award for the period of her widowhood, $3\frac{1}{2}$ years, the agreed annual dependency of \$6,400.00 making \$22,400 and for the remaining $8\frac{1}{2}$ years a sum taxed down to \$15,300.00 making a total of \$37,700.00.

These figures are expressed in Canadian dollars.

PECUNIARY BENEFITS

The value of the benefits accruing to the widow was agreed as being those assets as were set out in the Estate's inventory as follows:

- (a) Proceeds of life insurance policy (double indemnity) \$20,000.00 (Ca)
- (b) Proceeds of life insurance policy (\$2,000.00 (Ca)
- (c) Half of a joint bank account \$1,160.93 (Ca)
- (d) Bank account in deceased's name \$670.42 (Ca)
- (e) Traveller's cheque \$150.00 (Ca)
- (f) Government Saving Bonds registered in the name of Madame Fay Grenier \$4,000.00 (Ca)
- (g) Shares in United Venture Retriever Fund valued at \$838.13 (Ca)
- (h) Shares (other) valued at \$545.66

Mr. Goffe for the plaintiff submitted broadly that as far as the life insurance policies were concerned certain deductions that is the acceleration of the payment of the policy were to be taken into account but

no other deductions from the benefits ought to be made as the deceased might well have increased his savings and his earnings and had he lived much more benefit would have accrued to his wife.

Mr. Grant in reply sticks broadly to the principle that all benefits arising out of death must be deducted from the damages except in the case of life insurance policies. His submissions are supported by arithmetical calculations which on his case leaves the widow regrettably, he admits, with an award of \$98.64 plus funeral expenses after all deductions are made. He relies on the case of Hicks vs. Newport Abergavenny vs. Hereford Rly Co. (1865) 4 B and S - 403 followed in Grand Trunk Rly Co. of Canada vs. Jennings (1888) 13 A. C. 800.

Hicks vs. Newport Abergavenny vs. Hereford Rly Co. is an unreported case but Lord Campbell's directions to the jury appear in a note to the reported case of Pym Administratrix vs. The Gt. Northern Rly Co. in In this note, his directions as to how life insurance policies left by deceased persons should be dealt with, His Lordship said that if there was an insurance of £1,000 by some Co. that insured him against accidents against railways and the plaintiff is entitled to receive £1,000 on the policy the full £1,000 ought to be deducted but as to policies of life independently of accident if any amounts were to be deducted, then only the premiums that would be paid by the family or which would have been paid by himself were it not for the fatal accident, were deductible.

I shall cite Holyrood Pearce L. J. in Daniel vs. Jones (1961) 3 All E. R. 24 at page 27 of his judgment in which he considered the assessment of benefits accruing from the death of a deceased. He commented in part:

" If counsel for the defendant is right on all his contentions, it is shown that the widow has lost nothing by her husband's death. If that be so, it is a strange result in this case. This was plainly a very happy marriage and the husband was a high-earning frugal man who saved and provided very generously for his family. If Counsel's arguments are correct and if arithmetically the conclusion must be that there is no loss in this case, arithmetic has failed to provide the answer which common sense demands. "

In arriving at my decision I propose to look at this and other authorities and for clarity will deal with each benefit separately or together where convenient.

(a) Proceeds of Life Insurance Policy (Double indemnity)
\$20,000.00 (Ca)

This is a double indemnity life insurance policy which on maturity or normal death valued \$10,000; if however the insured died by accident during the life of the policy an additional sum of \$10,000 becomes payable by virtue of the contract.

As far as the first \$10,000 goes it is agreed on both sides that the accelerated benefit is payable compensated by the future premiums deceased would have paid had he lived. The yearly premium on this policy is \$125.34 (Ca). That is all the information available. No other detail is known as to when the policy was acquired, his age at the time etc. but on certain assumptions as to age the plaintiff made calculations and arrived at a figure of \$4,136.22 which figure Mr. Grant while not acquiescing, adopted in his submissions. Because of the uncertainties I am unable to arrive at any figure of my own more suitable and hold that from the sum of \$10,000 the sum of \$4,136.22 represents an accelerated benefit and should be deducted.

Mr. Goffe for plaintiff, in respect of the other \$10,000.00, paid on the double indemnity, argued that this sum ought not to be taken into account in reducing damages as it is an accident insurance policy. He cites Bradburn vs. Gt. Western Rly Co. (1874 - 80) All E. R. (reprint) 195. This case however, concerns an accident insurance policy where on the happening of an accident certain weekly sum or a lumpsum is paid to the insured. Such sum was held to be non-deductible on the basis that in personal injury cases the award is for compensation for damages suffered by the plaintiff whereas under the Fatal Accidents Act the award is for pecuniary loss suffered by the dependents. This I find is not the case here. His argument therefore on the basis of the dictum of Pigott B. that it is the contract which entitles him to receive the money, the accident being only the contingency on which the sum is paid - therefore if anything is deductible, only the accelerated benefit should be taken into account, cannot succeed. In Bradburn's case Hick's case was considered, distinguished and accepted that an accident insurance policy as in that case is deductible in full.

But is this an accident insurance policy? Mr. Goffe says that what is here is an insurance policy on the life of the deceased and not an accident policy. True enough it is a life insurance policy from which the two benefits have accrued. Had he died a natural death the widow would have derived one benefit only. It is but for the fact that the insured died by accident creating another benefit why two lump sums have accrued. Notwithstanding does it still remain one policy, one life insurance policy on which one premium is paid with a possibly extra payment contingent on death? It seems to me a very attractive and persuasive argument. The fallacy of it arises however, when it is considered - how can future premiums be calculated on the basis of the amount of money he would have paid had he lived. It could not be calculated on the life of the policy, for certainly if he lived and paid until the policy matured the additional amount of \$10,000.00 for accident benefit would not be payable for he would not have died by accident - the contingency on which the payment is based.

Mr. Grant submitted that ^{it} is a benefit the plaintiff has received as a result of the death and the entire amount must be deducted. He cites Munkman 5th Edition at p. 166:

" If it was a life policy as distinct from an accident policy the benefit to be taken into account was the acceleration of the payment of the policy rather than its full value. "

I find it is an accident insurance policy and not a life insurance policy and hold that the full value can be deducted.

(b) Proceeds of Life Insurance Policy \$2,000.00(Ca)

No details were available on this insurance policy which had no accident feature. The future premiums which the deceased would have paid and which depended on the age of the policy and the premiums etc. cannot be decided with any certainty. No accuracy, therefore, exists and it is one of the matters in these types of cases where a judge is called upon to act on imponderables and hypotheses to arrive at a decision - highly speculative.

So to begin, I will take into account the small benefit from the policy (\$2,000.00) and use it as an indication that this policy was probably taken out early in life, before marriage, when the deceased had no concern for

anyone, but himself; that is, either when he commenced working, or taken out by his parents on his behalf before he commenced working. On these assumptions I conclude (a) the premium would be small as it is common knowledge, that premiums are calculated on one's age (b) the policy would be of some duration and would by all accounts be near maturity. Finally I take into account the fact that on a double indemnity policy with a value of \$20,000.00, by all accounts taken up later in life, the future premiums amount to only \$4,136 and on all these considerations assess the future premiums payable on this policy at \$200.00.

OTHER PECUNIARY BENEFITS

The defendant urged that the whole sum is deductible. (Grant Trunk and Hick's case (supra)).

The plaintiff urged that the deceased a man of 33 years had made substantial investments for his age. On that basis it was reasonable to assume that had he lived his investment would be doubled, and his widow stood to benefit much more. She has, therefore, lost by his death and no real benefit has come to her by reason of these cash receipts. The Court should therefore make no deductions.

The defendant relied heavily on the Grand Trunk case but this case though a Privy Council decision was severely criticized by Humphrey J. in Roughead vs. Rly Ex. (1949) 65 T. L. R. 435 as:

" a grossly way of looking at things to say that a widow benefits from her husband's premature death because she receives what he proposes to leave her. "

As the items in this case were agreed it went by way of comment, and the reference is in fact obiter but this criticism was repeated in Muirhead vs. Rly Executive (1951) C. A. No. 178 by Singleton L. J. who referred to Roughead's case and the comments of Humphrey J. on the Grand Trunk case. He agreed with these comments and said further:

" I have taken a different approach in this case I find great difficulty in knowing how one has to deal with a benefit to a wife or to a child through a portion of the deceased's man estate being received by the wife or child sooner than it otherwise would have been. There is acceleration and that may be a benefit but it is not always so. I prefer to look upon the matter by saying it is something which ought to be borne in mind in assessing pecuniary loss. "

There was unanimous agreement that there should be no deductions and in Kassan vs. Kampala Aerated Water Co. (1965), 1 W. L. R. 668 the Privy Council held that no deductions should be made.

Looking in this case at the items of the savings and investments of the deceased a man of 33 years, I see in it a pattern that had he lived, as his salary increased, he most certainly would have had substantial savings. What pattern also evolves is a solid relationship between this husband and wife, borne out by the following facts (a) a joint bank account (b) bonds bought by the husband in his wife's name (c) holidaying abroad together. It is fair in all the circumstances to assume that they were a well knit couple. I regard it as a special feature of this case as Pearson L. J. did in Daniel vs. Jones (supra).

(a) Half Joint Bank Account - \$1,160.93

In the absence of any evidence to the contrary I find it probable that the husband and wife together opened this account, that either was at all times at liberty to draw on this account, and in particular that the wife had the use of it during the lifetime of the deceased. Even if the account was opened by the husband in their joint names then there is a presumption in equity of a gift to the wife of the balance of account at the date of his death. The principle which is being applied in respect of these benefits is that deduction must be made for benefits which would not have arisen at all but for the death. I hold that she had as much benefit from this property before his death as she will derive from it now inasmuch as it is in law "a gift" she has in fact by its nature i. e., 'joint', always had and was intended to have full enjoyment of it. See Daniel vs. Jones (1961)
3 All E. R. p. 24.

(b) Bank Account in deceased's name - \$670.42

The amount here is \$67.42 (Ca). In Whittone vs. Coates (1965)
3 All E. R. p. 268 where a sum of £386 in cash was in the hands of the Estate, it was held by the Court of Appeal that this sum was so small that had the deceased lived he might have given it to his wife or they might have enjoyed it together so it should not be deducted pound for pound but be taken into consideration.

I place reliance on this authority and will take this amount into

consideration for it cannot be said that it is a benefit she would not have had but for his death.

(c) Traveller's Cheque \$150.00 (Ca)

The evidence is that the husband and wife were in Jamaica on a holiday which was cut short as a result of this fatal accident. It is clear that this represents money taken by the husband on this trip to spend for the enjoyment of his wife had they been allowed to complete the holiday. She lost her holiday. This sum is no benefit as it would have been spent on her in any event.

(d) Government Savings Bond Registered in name of Madame Fay Grenier (wife) - \$4,000.00 (Ca)

These bonds were bought in her name by her husband and though there is a presumption in his favour that he intended to obtain the beneficial interest for himself it has been held that the Court must look at it from a common sense point of view. From the relationship of this couple, the fact that he made other investments in his name only it is probable that he intended this purchase made in his wife's name, to be a gift to her, a gift which became effective at his death even though during his life it belonged beneficially to him. This is not a pecuniary benefit as a result of his death but one accelerated by his death.

(e) Shares in United Venture Retriever Fund - Value \$838.13 (Ca)

(f) Shares (other) - value \$545.66 (Ca)

It is to be observed from the authorities that the Courts have taken a very generous view in respect of benefits arising out of death, agreeing with Wilmer L. J. in Daniel vs. Jones (supra) when he said he did not agree that the value of the Estate is to be "set off pound for pound against the loss of income".

I accept and adopt the approach of Singleton L. J. in Muirhead's case (supra) when he said "it is something which ought to be borne in mind in assessing pecuniary loss".

MARRIAGE CONTRACT

One thing remains and that is the matter of the Marriage Contract.

On the 9th July, 1969 three days before their marriage

Alain Grenier the deceased and Fe Torreda (the wife) entered into a valid marriage contract which it is agreed is a common form of contract in Canada. One clause of the contract affects this issue and it is Article third para. B and reads:

" The future husband gives to the future wife thereof accepting, by way of donation inter vivos irrevocably and in absolute property, as and from the solemnization of the marriage, and under the express condition of seizability. "

(b) The sum of fifteen thousand dollars (\$15,000.00) which he obliges himself to pay during the marriage as soon and according as his means will allow him or which the future wife shall take by preference before all other out of the most liquid assets of the estate of the future husband, if the said sum has not been remitted during his lifetime. "

Mr. Grant for the defendants submitted that this sum of \$15,000 was not agreed, or listed on the Inventory of the Estate as a liability and cannot be regarded as a benefit accruing on death and should be ignored as irrelevant. It would only be relevant if the Estate amounted to under \$15,000.00 as the sum total of the Estate goes to the widow in any event, others having renounced their rights in her favour.

Mr. Goffe for the plaintiff urged that it is a contractual obligation and is relevant and must be regarded as a benefit which would come to her in any event, an amount which must be first deducted from the Estate.

I find that this is not a gift which would not have arisen at all but for death, but one which was payable in his lifetime. It is only because it was not paid inter vivos that it has become a charge on the assets of the Estate preferentially. It is a contractual obligation, I hold, which must be honoured. This action is brought by the widow the beneficiary of this gift in her capacity as Administratrix of the Estate of her deceased husband. The sum due under the contract of marriage is due to her in her personal capacity, and in my view cannot be completely dealt with in this action. I hold that the sum of \$15,000.00 is due to her on this contract and it is a factor which will have to be taken into consideration in assessing the damages.

The statutory provisions in these cases presume a trial by jury and jurors in making awards are required to adhere to certain principles. They are not required to make arithmetical calculations as such but to arrive at a round figure. A judge's duty is no higher. It is true that for the sake of consistency Judges have acquired a form of calculation which is helpful but in no way decisive. It assists only in arriving at a round figure which bears some relation to the calculation. The authorities are very clear on this. So giving the whole matter the best consideration I can and having regard to the assets of the Estate, I award a sum of \$22,500.00 (Ca) converted to \$30,073.43 (Ja) as general damages and I order that the Estate stands charged with \$15,000.00 (Ca) converted to \$22,715.62 (Ja) payable to the widow on the marriage contract.

Funeral expenses agreed at \$2,131.34 (Ca) converted to \$3,227.65 (Ja) is also awarded.

Judgment for plaintiff for \$33,301.08 being as to General Damages \$30,073.43 and as to Special Damages \$3,227.65.

Costs to plaintiff to be agreed or taxed.

PERSONAL INJURIES

The plaintiff Fe Torreda received personal injuries and has claimed in negligence. She is a registered nurse and works at the Jewish General Hospital in Canada. Her injuries were particularized in the statement of claim as amended as follows:

1. Fracture of lower left tibia and fibula
2. Posterior dislocation of right hip with fracture of acetabulum
3. Severe contusion lower third of left leg and skin loss and damage to extensor tendon
4. Concussion
5. Abrasions and contusions
6. Surgical and traumatic scars
7. Hammertoe formation of left toe
8. 4% permanent partial disability of leg.

The accident took place on the main road in St. Ann's Bay on 3rd February, 1973. She was knocked unconscious but it does not seem to have been for too long as she awoke under a bag of sugar which was being carried by defendants' truck. She spent one night in the St. Ann's Bay Hospital, was transferred to the University Hospital, St. Andrew, where her left leg was put in an 'above the knee' cast. This cast does not permit walking. She remained there for 5 days and was then transferred to the Jewish General Hospital, Canada. The hip bone was not properly aligned and by operation, it was dislocated and reduced and she was put in traction.

She then had her right leg in traction and her left leg in above the knee cast. This treatment continued from 9th February, 1973 to 31st March, 1973, almost 7 weeks and it is clear that she was bed-ridden. She went home with two crutches and a cast. On monthly checks the casts were opened, XRays taken and a new cast put on. After 3 months the bone would not heal and she was readmitted on 14th June, 1973 for further surgery. She got a sliding bone graft in her left leg and was discharged on the 14th July, 1973 - one month after - on crutches. The cast was changed on 21st November 1973. She had to undergo intensive physiotherapy thereafter which lasted $1\frac{1}{2}$ months.

Dr. Heller, the Orthopaedic Surgeon in Montreal states that he saw her at regular intervals - up to 1st February 1974 when she was walking with the use of a cane and a slight limp but otherwise satisfactory so she was advised to return to work. At Court she displayed a long visible scar on her left leg and a hammertoe formation of two toes of the left foot. These toes were crooked in formation. She complained of being unable to walk as long as normally or wear high heeled shoe, a style I think dear to the heart of young women. She complained of pains during her illness and up to 1978 when she was seen finally by Dr. Heller the Orthopaedic Surgeon she complained of an occasional ache in the left leg. She had made a good recovery.

The plaintiff does not like her scars but they have not reduced her prospect of marriage as she has since remarried. She suffers from an awareness of this disfigurement also her inability to walk far or wear high

heeled shoes.

Dr. Heller says there is a risk of weakness in case of future accidents and finds 4% permanent partial disability from the fracture with her sliding bone graft having used screws.

I find in these circumstances a suitable award for General Damages is \$20,000.00 (Ja).

The Special Damages as set out in the particulars in the Statement of Claim were agreed save and except the claims for Medical Reports, both of which I disallow as I hold that they properly come under the heading of Cost. I accordingly award for Special Damages \$13,277 (Ca) converted to \$20,106.35 (Ja) plus \$125.00 (Ja) totalling \$20,231.35.

There will be judgment for ^{the} plaintiff for \$40,231.35 being as to General Damages \$20,000.00 and as to Special Damages \$20,231.35.

Cost to plaintiff to be agreed or taxed.