DAMAGES—MOTOR VEHICLE ACCIDENT—QUANTUM—CONSIDERATION OF SUBSEQUENT EVENTS IN ASSESSING DAMAGES

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The court's task in calculating damages has been compared to that of a "blind man looking for a black cat in a dark room."[1] Many factors must be considered in making such an assessment especially in personal injury cases where the courts search to find evidence which throws light on the case in order to determine as closely as possible what the damages amount to.

> In an action for damages for personal injuries, the elements of damages are the bodily injuries sustained, pain undergone, effect upon health, suffering according to its degree and its probable duration, as likely to be temporary or permanent, expenses incidental to attempts to effect a cure or to lessen the amount of the injury, and the pecuniary loss sustained through the inability to attend to profession or business, depends on whether the injuries are of a temporary character or such as to incapacitate the plaintiff for life.[2]

All these elements need be considered in such an assessment and the courts will consider many factors so that they may calculate accurately.

It is a well known fact that the events prior to a person's injury are taken into consideration to determine the quantum of damages but it is questionable whether events subsequent to the time of injury are given the same consideration. This problem arose in a recent Alberta case, *Stene and Lakeman Construction* v. *Evans and Thibault*[3] where the plaintiff was injured in one accident and then again in a subsequent accident approximately two years later. The plaintiff was disabled 20% by the first accident and completely disabled in the second. Counsel for the defendant in the first accident contended that the court should address its mind to subsequent events to throw light upon the realities of the case and therefore urged that the plaintiff's loss of future income could not be extended beyond the date of the second accident.[4] However, Riley J. in the Alberta Supreme Court did not take cognizance of the subsequent accident and assessed damages for loss of wages beyond the second accident. This writer feels that the defendant's counsel's argument should have been considered further for the plaintiff was totally disabled after the second accident and subsequent events do help to give a more accurate state of the injured's actual loss. Ignoring the subsequent event only shuts the court's eyes to reality and substitutes a matter of speculation.

The defendant's counsel relies on two cases, *Williamson* v. *John I. Thornycroft and Co.*[5] and a House of Lords decision, *Carslogie SS Co. Ltd.* v. *Royal Norwegian Gov't,*[6] but Riley J. disposes of them by stating they have no application to the facts and circumstances in the case at bar. He further states the latter is not a personal injury case. However, it is contended that since there are very few cases similar to the facts of the *Stene* case, the cases

[1]Goddard L. J. in *Mills* v. *Stanway Coaches* [1940] 2 ALL E.R. at 594.

[2]*Casey* v. *Kennedy* 52 D.L.R. 326.

[3](1957) 22 W.W.R. 599.

[4]The case also deals with the test for implied consent under *The Vehicles and Highway Traffic Act* R.S.A. 1955. c. 356, sec. 102, but this will not be dealt with by this writer.

[5][1940] 2 K.B. 658.

[6][1952] A.C. 292; [1952] 1 All E.R. 20.

relied upon by defendant's counsel should have been given further consideration.

The *Carslogie* case states that "it is well established that in considering the damages occasioned by a wrongful act, all the facts which have actually happened down to the date of trial must be taken into account."[7] It is submitted that this statement is of general application to the law of damages and therefore applicable to personal injury cases.

The *Williamson* case involved a claim by a wife under the *Fatal Accidents Act*. However, the wife died after the action was commenced but before the trial. The trial court held that in assessing damages that they should ignore the widow's death, but the Court of Appeal held that while the damages were assessed at the date of the husband's death, the court was entitled to inform itself of subsequent events throwing light upon the realities of the case. However, the damages were held not to be excessive.

It might be contended that the *Williamson* case applies only to actions under the *Fatal Accidents Act* and not to a personal injury case, but damages under this Act are often determined along with claims for pain and suffering under the *Trustee Act*. The factors determining the damages under both Acts are often the same. An action cannot be brought under the *Fatal Accidents Act* unless the deceased himself could have brought the action had he only been injured. Therefore, the factors determining damages in a *Fatal Accident* claim such as the *Williamson* case may also be applied to a personal injury action. Halsbury supports this argument by stating that —

> the difficulty of estimating future and contingent loss may in some cases be reduced by the facts which have actually happened down to the date of the trial, for while assessments should normally be at the breach of duty, notice can be taken at the trial of subsequent realities which reduce the limit of speculation.[8]

If it is contended that the *Williamson* case has no application to the *Stene* case because it is a *Fatal Accident* claim, it is respectfully submitted that the taking into account of subsequent events should also apply in a personal injury action, as it will be noted that the statement is classified under the "*General Rule*" of damage rather than damage under the *Fatal Accidents Act*.

The *Williamson* and *Carslogie* cases have led many writers to comment that subsequent events throw light on the realities of a case. Instead of applying the general rule that damages be assessed when the cause of action vests, the court will recognize circumstances which have arisen since the action was commenced. The comments are best summarized by one writer who states that "although the measure of damages must be determined at the date of death,

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[7]Ibid p. 23. The facts are briefly as follows: The "Carslogie", a ship, collided with a second ship lying in anchor. The second ship was authorized to go to Glasgow for temporary repairs and then to the United States for permanent repairs. The second ship on the crossing of the Atlantic received such heavy damage that it took 30 days for the original repairs. The House of Lords held that the owners of the "Carslogie" were not responsible for the 10 days detention as they were part of the 30 days and therefore there was no loss of profit time.

[8]Halsbury's Laws of England 3rd ed. No. 11 at 227.
See also page 238 " . . . whereas on a claim for damages for tort the court is not precluded from taking notice of events subsequent to the wrong act which make easier the assessment of the loss incurred."

the court should consider any subsequent events, occurring before the trial which make more certain the calculation of the loss."[9]

The American view appears to recognize that events happening after the cause of action accrued but before the trial should be considered in assessing the damages, for the "amount of damages to which a person is entitled is determined in the light of *all the evidence* which the parties present *before the end of the trial* as the total harm which has resulted . . . ."[10] The time for estimating damages is not merely at the time of the injury but at the date of the trial, and events occurring during the interval are therefore to be considered. "In determining the physical condition of the plaintiff at the time of the tort, all relevant facts known at the trial are considered, including facts not known at the time of the tort."[11] This view adopts the method of looking at subsequent events to assess the damages.

Damages have been lessened in cases where a wife brings an action for loss of her husband under the *Fatal Accidents Act* and subsequently remarries before the trial or has a possibility of remarriage.[12] Why should the courts close their eyes to known facts after the time of injury and resort to estimate when the subsequent events crystallize into a more accurate picture? Both elements, fact and estimation, must be looked at, for "the amount of damages allowed . . . . must be determined upon the particular facts under consideration in each case and, in part, must be a matter of estimate, even conjecture."[13] It only seems reasonable then, that first the fact, if known, should be examined to throw light on the picture and then, in part, one should resort to estimate and guess-work.

Subsequent events have been taken into consideration in assessing damages in other cases as well. A father and his children sued for the death of his wife, but before the damages were assessed the father died. It was held that the risk that the children's father might die became an "actuality sounding in increased damages" and ought to have been taken into consideration.[14] Where an action has been delayed for eight years from the time of the accident, in assessing the damages "it is impossible to shut one's eyes to what actually happened by way of payment of pensions and other sums of a like nature, since, although the damage is to be assessed at the time of the accident, what was an uncertainty has been turned into certainty in so far as money

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[9]E.R.E. Carter "Assessment of Damages for Personal Injuries or Death" 32 Can. Bar. Rev. See also: Street on Torts at page 426.

The Law of Torts — Fleming at 687 . . . "It follows that if, at the time of the action, prospective loss or diminution of damage has become actual and speculation as to the probable occurrence of these facts has been replaced by knowledge of what actually happened it is necessary to have regard to the position as it is now known to exist."

Kemp and Kemp, "The Quantum of Damages" No. 2 at 64.

[10]American Law Institute — Restatement of the Law, Torts Vol. IV at p. 560 (Damages).

[11]Ibid p. 635.

[12]*Mear* v. *Clarke Chapman & Co. Ltd.* [1956] 1 All E.R. 44.
Roberts v. *Semchyshyn* (1956) 18 W.W.R. 641.
Home v. *Corbeil* [1956] 2 D.L.R. 543.
Fleming v. *Markovich* [1942] 4 D.L.R. 287 (*Williams* case applied but damages increased for some other contingencies).

[13]*Marsden Kooler Transport* v. *Pollock* [1953] 1 S.C.R. 66 at 71.

[14]*Glasgow Corp.* v. *Kelly* [1951] 1 T.L.R. 345.

received by the claimants."[15] These cases illustrate that events occurring after the time the action accrues play an important part in assessing damages and are taken into consideration by the courts to give them a clearer picture of the actual loss sustained.

The court in the *Stene* case might have looked at two other Western Canada decisions, one from Alberta, to help decide whether subsequent events should be recognized. The first, *Tinsley* v. *Can. West Coal Co.*[16] involved a miner who was suffering from cancer and later was injured in a mining accident. In the action for damages the court directed a new trial for the assessment of damages respecting the injuries, but before rehearing the plaintiff died of cancer. Stuart J. in the new trial[17] stated that it was "agreed by the parties that I should consider the evidence of the former trial as presented on the second trial" but he nevertheless went on to say that when assessing damages "I am in a better position than the former jury to this extent that I now know that the plaintiff *has in fact died and when he died.*" Stuart J. did not overlook the death in assessing damages even though the parties agreed on the facts prior to trial.[18]

The second case is very close in facts to the *Stene* case. In *Creemur* v. *Englund*,[19] a child of four years was injured by a car but killed in another accident. The administrator sued for the child's injuries in the first accident. Although the case does not explicitly state that damages for pain and suffering shall end at the date of the second accident, the case relies on another case[20] where a girl was injured when a car overturned and she died several months later. There it was said that "the injured person is fully entitled to . . . recover all the damages down to the date of death . . . " The *Stene* case involves a subsequent injury, not death, and only differs in that respect, but since it was an injury totally incapacitating the plaintiff, the damages for loss of income in the first accident should stop at the date of the second accident.

If Stene were to collect damages for loss of income beyond the date of the second accident he would in fact be collecting damages for a period when he was incapacitated and unable to earn any income. The Court should not close its eyes to this fact. This led the defendant's counsel to argue that the plaintiff should not be allowed to "collect double". However, Riley J. dismissed the argument by stating that the first accident should be considered when assessing damages on the second and not the reverse situation. This writer contends the two accidents should be considered in light of each other for the following two reasons.

The second accident may have been so severe as to injure the plaintiff to a degree of total disability even if there has not been a first accident (and that

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[15]*Bishop* v. *Cunard White Star Co. Ltd.* [1950] P. 249 at 249.

[16]9 W.L.R. 706.

[17]*McGarry* v. *Can. West Coal Co.* 11 W.L.R. 597 at 598 (the executor brought the action on deceased's behalf).

[18]The case deals primarily with the hastening of death but nevertheless does involve the recognition of the death subsequent to the commencement of the action.

[19][1933] 3 W.W.R. 277 (reversed on facts without reasons in [1934] 2 W.W.R. 339).

[20]*Bowler* v. *Blake* (1929) 64 O.L.R. 499.

may have been the case here). Then if the damages are assessed for loss of future income beyond the second accident, the plaintiff would in fact be collecting double compensation. This writer does not ignore the fact that if the damage to a person can be differentiated and attributed to the first accident, then damages for pain and suffering might be carried beyond the date of the second accident. However, damages for loss of future income should not go beyond the date of the second accident for we know in fact that the plaintiff is totally disabled and receives compensation for something we know he will not be able to carry out anyway.

The second reason for considering the two accidents in light of each other involves the theory of *restitutio in integrum*. The general principle in all actions for damages is that a money payment will put the injured person back into a position in which he would have been were it not for the defendant's wrongful act—*restitutio in integrum*.[21] This is easily applied to damages to inanimate things but in injuries to a person one cannot accurately measure injuries in money's worth. "The award must be fair, just, commensurate with the injury sustained and sufficiently adequate to put the injured party so far as money can place him in the same position if he had not been wronged, but not in a better one."[22] If the plaintiff were assessed damages by multiplying his annual earning by the number of years which he could be expected to have worked, had he not been injured, then that type of simple calculation ignores the many contingencies which might operate to reduce the plaintiff's future earning and he would get more than full compensation for his loss. When a fact arises which obliterates the probabilities it should not be ignored but given full consideration, for the court should try to achieve certainty and should not ignore a fact which leads to that conclusion in assessing the quantum of damages.

Riley J. states rather than the defendant in the first accident being able to take advantage of accident number two, the matters are just reversed and the award of the first accident should be taken into consideration by the court in accident number two. He further states that action as a result of the second accident has not come to trial and recovery on that accident is plain speculation. However, the writer feels that this should not be a rigid rule. If there was some delay in the court's procedure and the action on the first accident had been heard after the second claim, then the court would probably address its mind to the subsequent accident to enable them to assess the damages more accurately. For that reason it is submitted that the second accident should be considered even though not tried, for it does nevertheless help assess the damages more accurately.

In *Morgan* v. *The City of Edmonton*,[23] McCarthy J. laid down the rules for assessing damages for injuries. The plaintiff is entitled to: (1) The expenses incurred in consequence of the injury sustained, (2) The value of his time in whole or in part up to the time of his trial, (3) A fair compensation for the reduction of his probable future earnings, having regard to his health, habits,

[21] *Livingstone* v. *Rawyards Coal Co.* (1880) 5 A.C. 25 at 39.
[22] Ibid p. 716.
[23] [1917] 2 W.W.R. 591.

occupation, to the fact they will not be as great in later years, to the fact that he may voluntarily retire from his profession, or may be overtaken by sickness or other inevitable accident, (4) A reasonable sum by way of compensation for his bodily or mental sufferings. These rules have been adopted and followed in our courts in personal injury claims.[24]

The whole difficulty in assessing the proper amount of damages presents itself in the third head of Mr. Justice McCarthy's classification. The damages under this head are arrived at to a large extent by an attempt to make an accurate guess. The compensation is fair and not perfect and all circumstances which may be legitimately pleaded in diminution of the damages should be considered. It would be unrealistic to refuse to admit evidence that a particular person, because of some physical disability, cannot be expected to live the normal life expectancy. Where specific evidence is available to the court with regard to the contingencies of life of the particular claimant, this evidence should be taken into consideration in arriving at the quantum of damages. Stene's critical injuries in the second accident and the fact that his life expectancy has been or may have been thereby substantially curtailed should be considered in assessing the loss of earning power in the first accident.

Determining personal injury claims is indeed a difficult task for it is impossible to estimate the damages accurately because of existing contingencies. If a contingency can be eliminated by a known fact it is submitted that the court should not close its eyes to the known fact. If the courts were to give an annuity in the sum of the plaintiff's average income for the remainder of his life, the courts would be disregarding some contingencies and the damages assessed would be far from accurate. The courts should look at the situation in the light of all the facts to give a proper estimate. The recent case of *Carlson* v. *Johnson*[25] takes a very logical approach when the court might have been tempted to ignore a fact. There a husband and wife were killed in the same accident and when assessing damages for their children the court did not ask what loss the husband sustained for the loss of his wife, and the infants sustained for the loss of their father and then the mother independently, but instead the court looked it it realistically and asked what would be a reasonable quantum of damages for loss of both father and mother at the same time. The assessment must be looked at reasonably in the light of all circumstances. The court or judge "must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury but must take a reasonable view of the case, and *give what they consider, under all circumstances, a fair compensation.*"[26]

This writer feels that this reasonable approach should be applied in assessing personal injury claims and that the courts should consider "all circumstances" instead of ignoring factors which throw light on the situation. This approach seems fair and reasonable and if followed in the *Stene* case

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[24]*Battagan* v. *Bird* [1937] 2 W.W.R. 365 and [1938] S.C.R. 70.

[25](1956) 19 W.W.R. 515.

[26]Ibid., p. 518.

it would have led to the realistic approach of considering the subsequent event to throw light on the matter and to help estimate the damages more accurately.[27]

[27]The decision of Riley J. was affirmed by the decision of McBride J.A. of the Appellate Division of the Supreme Court of Alberta (1958) 24 W.W.R. 592 on the question of damages. McBride J. A. states that in order for the subsequent accident to lower the assessment of damages it must be shown that the second accident shortened the life of Stene and this was not proved by the evidence of the case. The *Carslogie* case and *Williamson* case are held not to be applicable to the case at bar and therefore the comments of this writer on the decision of Riley J. may be applied to the decision of the Appellate Division.