

[HIGH COURT OF AUSTRALIA.]

PUBLIC TRUSTEE APPELLANT;
DEFENDANT,

AND

ZOANETTI RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF
SOUTH AUSTRALIA.

H. C. OF A. 1945.
ADELAIDE,
Sept. 20.
MELBOURNE,
Oct. 18.
Latham C.J.,
Starke,
Dixon and
McTiernan JJ.

Damages—Tort—Damages under “Lord Campbell’s Act”—Solatium under Wrongs Act 1936-1940 (S.A.)—Whether amount of solatium deductible from amount of damages—Wrongs Act 1936-1940 (S.A.) (No. 2267 of 1936—No. 18 of 1939—No. 48 of 1940), ss. 19, 20, 23b, 23c.

Sections 19 and 20 of the *Wrongs Act* 1936-1940 (S.A.) confer a right of action corresponding to that conferred by *Lord Campbell’s Act* (the *Fatal Accidents Act* 1846 (Imp.) 9 & 10 Vict. c. 93). In the like circumstances, s. 23b of the *Wrongs Act* renders the wrongdoer liable to pay to the surviving wife or husband of the deceased person such sum, not exceeding five hundred pounds, as the court thinks just by way of solatium for the suffering caused to the wife or husband by such death. Section 23c (1) provides that the right conferred by s. 23b shall be in addition to and not in derogation of any rights conferred on the husband or wife by any other provision of the Act.

Held, that, in assessing damages under ss. 19 and 20, an amount awarded under s. 23b should not be deducted.

Davies v. Powell Duffryn Associated Collieries Ltd., (1942) A.C. 601, distinguished.

Decision of the Supreme Court of South Australia (*Richards J.*): *Zoanetti v. The Public Trustee*, (1944) S.A.S.R. 150, affirmed.

APPEAL from the Supreme Court of South Australia.

On 17th July 1943, Walter Henry Reid feloniously injured Giosue Zoanetti with a shot-gun, and Zoanetti died from the injury. Reid

died on the same day and probate of his will was granted to the Public Trustee by the Supreme Court of South Australia on 3rd September 1943. Zoanetti's widow, who was also the administratrix of his estate, brought an action, for her own benefit and for that of the child of the deceased, against the Public Trustee. She claimed :—

- (a) Damages for herself and her child ;
- (b) Solatium for the suffering caused to her by the death of Zoanetti ;
- (c) Damages for the benefit of the estate of Zoanetti deceased.

Sections 19, 20 (so far as material), 23b and 23c of the *Wrongs Act 1936-1940* (S.A.) (the last two sections were inserted in the Act by the amending Act of 1940) are as follows :—

“ 19. Whenever the death of a person is caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death was caused under such circumstances as amount in law to felony.”

“ 20. (1) Every such action shall be for the benefit of the wife, husband, parent, brother, sister, and child of the person whose death has been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased.

(2) In every such action the court may give such damages as it thinks proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit the action is brought. . . .

(3) The amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the court finds and directs.”

“ 23b. Whenever the death of a person is caused by a wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled that person to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued, shall, notwithstanding the death of the person injured and although the death was caused in such circumstances as amount in law to felony, be liable to pay the surviving wife or husband of the deceased person such sum, not exceeding five hundred

H. C. OF A.
1945.
PUBLIC
TRUSTEE
v.
ZOANETTI.

H. C. OF A.
 1945.
 {
 PUBLIC
 TRUSTEE
 v.
 ZOANETTI.

pounds, as the court thinks just by way of solatium for the suffering caused to the wife or husband by such death.”

“ 23c. (1) The rights conferred by sections 23a and 23b shall be in addition to and not in derogation of any rights conferred on the parent, husband or wife by any other provision of this Act.

(2) In an action brought to enforce any right given under section 23a or 23b of this Act the court may in its discretion refuse to order the payment of any sum by way of solatium if, having regard to the conduct of the plaintiff in relation to the deceased person or to the relations which existed between the plaintiff and the deceased person, or for any other sufficient reason, it considers that no such payment should be made.

(3) Any cause of action conferred on any person by section 23a or 23b of this Act shall not, on the death of that person, survive for the benefit of his estate.”

Sections 2 (so far as material) and 6 of the *Survival of Causes of Action Act* 1940 (S.A.) are as follows :—

“ 2. Subject to the provisions of this Act, on the death of any person after the passing of this Act, all causes of action subsisting against or vested in him shall survive against his estate, or, as the case may be, for the benefit of his estate. . . .”

“ 6. The rights conferred by this Act for the benefit of the estate of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the *Wrongs Act* 1936-1939, and so much of this Act as relates to causes of action against the estates of deceased persons shall apply in relation to causes of action under the said *Wrongs Act* 1936-1939, as it applies in relation to other causes of action not expressly excepted from the operation of section 2 of this Act.”

In the Supreme Court of South Australia, it was argued for the defendant that any amount awarded as solatium should be deducted from damages assessed under s. 19. *Richards J.* (1), however, rejected this contention and awarded £1,990 in all, made up of £1,505 damages under s. 19 and £485 solatium.

From that decision the defendant appealed to the High Court.

Newman, for the appellant. Money payable to a widow by way of solatium must be deducted from damages recoverable by her under ss. 19 and 20 of the *Wrongs Act* (S.A.). It is well established

that any benefit accruing by reason of the death must be taken into account in assessing damages payable under *Lord Campbell's Act*. Unless there is a statutory provision against deduction, there must be a deduction of all amounts received from whatever source or on whatever account. There is no difference in principle between deduction of solatium and deduction of such amounts as charitable payments and pensions. The case is indistinguishable from *Davies v. Powell Duffryn Associated Collieries Ltd.* (1). On this argument, there is still work for s. 23c of the *Wrongs Act*, for there may be a husband or a wife who is entitled to solatium but who is not a dependant of the deceased person. [He referred to *Pym v. Great Northern Railway Co.* (2); *Hicks v. Newport, Abergavenny & Hereford Railway Co.* (3); *Grand Trunk Railway Co. of Canada v. Jennings* (4); *Baker v. Dalgleish Steam Shipping Co.* (5); *Goodger v. Knapman* (6); *Lory v. Great Western Railway Co.* (7); *Carling v. Lebbon* (8); *Drake v. Bedfordshire County Council* (9); *Johnson v. Hill* (10).]

C. T. Hargrave, for the respondent. Section 23c (1) has no operation unless solatium is cumulative on other damages. Solatium was something new added to the previous measure of damages. It was not a form of damage previously known to the law (*Arnold on Damages*, 2nd ed. (1919), p. 260; *Blake v. Midland Railway Co.* (11); *Halsbury's Laws of England*, 2nd ed., vol. 23, p. 695; *Franklin v. South Eastern Railway Co.* (12)). The case is distinguishable from *Davies v. Powell Duffryn Associated Collieries Ltd.* (1). This is a case of two different rights conferred by the same statute.

Cur. adv. vult.

The following written judgments were delivered:—

LATHAM C.J. The question which arises upon this appeal is whether an amount awarded by way of solatium for suffering to a widow under s. 23b of the *Wrongs Act* 1936-1940 (S.A.) should be deducted from an amount of damages awarded under ss. 19 and 20 of that Act. The last-mentioned sections contain the provisions commonly referred to as *Lord Campbell's Act*—the *Fatal Accidents*

H. C. OF A.
1945.

PUBLIC
TRUSTEE
v.
ZOANETTI.

Oct. 18.

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| (1) (1942) A.C. 601. | (7) (1942) 1 All E.R. 230. |
| (2) (1862) 2 B. & S. 759 [121 E.R. 1254]. | (8) (1927) 2 K.B. 108. |
| (3) (1857) 4 B. & S. 403n [122 E.R. 510]. | (9) (1944) 113 L.J. K.B. 328. |
| (4) (1888) 13 App. Cas. 800. | (10) (1945) 61 T.L.R. 398. |
| (5) (1922) 1 K.B. 361. | (11) (1852) 18 Q.B. 93 [118 E.R. 35]. |
| (6) (1924) S.A.S.R. 347. | (12) (1858) 3 H. & N. 211 [157 E.R. 448]. |

H. C. OF A.
1945.
PUBLIC
TRUSTEE
v.
ZOANETTI.
—
Latham C.J.

Act 1846, 9 & 10 Vict. c. 93. The action under *Lord Campbell's Act* is for the benefit of the wife, husband, parent, and child (as defined in the Act) of the person whose death has been caused by a wrongful act, neglect or default such as would have entitled the party injured to maintain an action and recover damages in respect thereof. In such an action, "the court may give such damages as it thinks proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit the action is brought"—s. 20 (2).

Sections 23b and 23c (1) as inserted by the amending Act of 1940 are as follows:—

"23b. Whenever the death of a person is caused by a wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled that person to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued, shall, notwithstanding the death of the person injured and although the death was caused in such circumstances as amount in law to felony, be liable to pay the surviving wife or husband of the deceased person such sum, not exceeding five hundred pounds, as the court thinks just by way of solatium for the suffering caused to the wife or husband by such death.

23c. (1) The rights conferred by sections 23a and 23b shall be in addition to and not in derogation of any rights conferred on the parent, husband or wife by any other provision of this Act."

Giosue Zoanetti was unlawfully killed by Walter Henry Reid, of whose will the Public Trustee is executor. The action brought against the Public Trustee as legal personal representative of Reid has survived by virtue of the *Survival of Causes of Action Act 1940* (S.A.) which provides in s. 2 that, subject to the provisions of the Act, on the death of any person after the passing of the Act all causes of action subsisting against or vested in him shall survive against his estate, or, as the case may be, for the benefit of his estate. This provision corresponds to the English *Law Reform (Miscellaneous Provisions) Act 1934*, s. 1 (1).

In proceedings taken by the widow of Zoanetti against the Public Trustee as personal representative of Reid, *Richards J.* awarded £485 by way of solatium under s. 23b and £1,505 by way of damages under s. 19. It was contended for the defendant that the damages under *Lord Campbell's Act* (s. 19) should be reduced by the amount of solatium awarded. *Richards J.* rejected this contention, saying:—"it is difficult to see what additional right of any value is conferred

upon a widow, or what 'solace for injured feelings' she derives, if what she gets by way of solatium is to be deducted from what she gets by way of damages for the injury resulting from the death of her husband."

The learned judge held that s. 23c (1) meant that an amount awarded by way of solatium should be added to any amount awarded by way of damages under *Lord Campbell's Act*. Thus he added the amount of solatium (£485) to the amount of damages (£1,505) giving judgment for £1,990 in respect of these matters.

The objection to this decision is based upon the contention that such a provision as s. 23c (1) does not alter the measure of damages which by a long course of judicial decision has been held to be proper under *Lord Campbell's Act*, but that the effect of the provision is only to make it clear that the right to solatium is not substituted for the rights under *Lord Campbell's Act*. It has long been established that in the assessment of damages under *Lord Campbell's Act* an account is taken of pecuniary losses and also of pecuniary gains accruing to a particular dependant by reason of the death of a person caused by a wrongful act, neglect or default of a defendant. Any benefit, whatever its source (whether from the defendant or from some other source), provided that it results from the death of the deceased, must be taken into account. What can be awarded under the Act is pecuniary loss, that is, net loss, on a balance of losses and gains: See *Grand Trunk Railway Co. of Canada v. Jennings* (1), where this rule is plainly stated. Thus, if a benefit accrues to a dependant upon the intestacy or under the will of a deceased person, that benefit must be taken into account: *Pym v. Great Northern Railway Co.* (2). So also benefits received under accident insurance policies and by way of pension must be deducted: *Baker v. Dalgleish Steam Shipping Co.* (3); *Carling v. Lebbon* (4); *Johnson v. Hill* (5).

The Parliament of the United Kingdom thought proper to alter the law with respect to insurances and pensions. The *Fatal Accidents (Damages) Act* 1908, s. 1, provides:—

"In assessing damages in any action, whether commenced before or after the passing of this Act, under the *Fatal Accidents Act*, 1846, as amended by any subsequent enactment, there shall not be taken into account any sum paid or payable on the death of the deceased under any contract of assurance or insurance, whether made before or after the passing of this Act."

(1) (1888) 13 App. Cas. 800.

(2) (1862) 2 B. & S. 759 [121 E.R. 1254].

(3) (1922) 1 K.B. 361.

(4) (1927) 2 K.B. 108.

(5) (1945) 61 T.L.R. 398.

H. C. OF A.

1945.

PUBLIC
TRUSTEE

v.

ZOANETTI.

Latham C.J.

H. C. OF A.

1945.

PUBLIC
TRUSTEEv.
ZOANETTI.

Latham C.J.

An identical provision with respect to certain pensions is contained in the *Widows', Orphans' and Old Age Contributory Pensions Act* 1936, s. 40. The South Australian Parliament did not, in s. 23c (1), adopt the language of either of these provisions, which clearly prevent any deduction in the cases to which they apply.

The *Law Reform (Miscellaneous Provisions) Act* 1934, s. 1 (5), provides that the rights conferred by that Act shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by *Lord Campbell's Act*—a provision which is the same in its terms as s. 23c (1) of the *South Australian Wrongs Act* 1936-1940. In *Davies v. Powell Duffryn Associated Collieries* (1), the House of Lords considered the effect of this provision. In that case damages were given to dependants under *Lord Campbell's Act* and also under the *Law Reform Act* for the benefit of the estate of the deceased for shortened expectation of life. The widow who brought the action was entitled to the whole of the estate of the deceased, and therefore received the benefit of those damages under the *Law Reform Act*. That amount of damages was deducted from the damages awarded under *Lord Campbell's Act*, and it was held unanimously in the House of Lords, affirming a unanimous decision of the Court of Appeal affirming the decision of the primary judge, that the deduction was rightly made. Lord Wright said, referring to *Lord Campbell's Act*:—"The damages are to be based on the reasonable expectation of pecuniary benefit or benefit reducible to money value. In assessing the damages all circumstances which may be legitimately pleaded in diminution of the damages must be considered: *Grand Trunk Railway Co. of Canada v. Jennings* (2). The actual pecuniary loss of each individual entitled to sue can only be ascertained by balancing, on the one hand, the loss to him of the future pecuniary benefit, and, on the other, any pecuniary advantage which from whatever source comes to him by reason of the death" (3). This is an authoritative decision upon a provision in terms which are identical with those of s. 23c (1), and it provides impressive support for the appellant in the present case.

The question is whether the *Powell Duffryn Case* (1) can be distinguished from the present case.

I do not agree with the argument that, if an amount given by way of solatium is deducted from damages given under *Lord Campbell's Act*, the solatium provisions are deprived of all effect. Solatium for mental suffering of parent, husband or wife may be awarded even though the claimant is not a dependant of the deceased, and

(1) (1942) A.C. 601.

(2) (1888) 13 App. Cas. 800, at p. 801.

(3) (1942) A.C., at p. 611.

therefore is unable to claim any damages under *Lord Campbell's Act*. Similarly, if the sum awarded as solatium is greater than the damages under *Lord Campbell's Act*, a larger sum will be recoverable than could be awarded before the enactment of s. 23c (1). Thus it is inaccurate to say that the application of the principle of the *Powell Duffryn Case* (1) completely destroys the provision for solatium.

It is further argued that a sum awarded by way of solatium is given in respect of the mental suffering experienced by a dependant and that it should not be regarded as a benefit accruing to the dependant by reason of the death. In my opinion, this suggested ground of distinction cannot be supported. The suffering cannot, I think, be regarded as a source of benefit independent of the death. In cases where the deceased made a will or died intestate or was insured against accident or where the claiming dependant received a pension, it was the death plus the will or the intestacy or the contract of insurance or the provision for pension which produced the benefit which, it has been held, must be deducted. In the present case, it is the death plus the suffering which produces the benefit by way of solatium in the same manner as in the other cases mentioned.

There is, however, a ground of distinction which, in my opinion, can be supported. The *Powell Duffryn Case* (1) relates to a provision under the *Law Reform Act* which, in its relevant application in that case, enabled damages to be given for the benefit of the estate of the deceased for loss of expectation of life. The result was to increase the value of that estate. If the claiming dependant gained a benefit by such increase of value (as beneficiary under a will or as next-of-kin under an intestacy) the application of well established principles brought about the result that such benefit must be taken into account in estimating damages under *Lord Campbell's Act*. But, in the case of solatium, there is no benefit to the estate of the deceased. The solatium goes direct to the dependant. Thus the principle upon which the *Powell Duffryn Case* (1) was decided may be said to be irrelevant in the present case. Upon this ground, though, I admit, with some degree of doubt, I reach the conclusion that the *Powell Duffryn Case* (1) does not prevent the Court from holding that s. 23c (1) means that an additional right to receive damages, ultra damages previously recoverable, is given to a dependant who is entitled to claim solatium. I express my conclusion shortly by saying that it has long been the

H. C. OF A.
1945.

PUBLIC
TRUSTEE
v.
ZOANETTI.
—
Latham C.J.

H. C. OF A.
 1945.
 PUBLIC
 TRUSTEE
 v.
 ZOANETTI.
 Latham C.J.

law that *Lord Campbell's Act* did not allow a compassionate allowance to be given to a dependant: See, e.g., *Royal Trust Co. v. Canadian Pacific Railway Co.* (1)—and that s. 23c (1) may fairly be construed as intended to alter the law in this respect.

Accordingly, in my opinion, the appeal should be dismissed.

STARKE J. The plaintiff in this action, Metilde Zoanetti, the widow and administratrix of Giosue Zoanetti, recovered judgment in the Supreme Court of South Australia against the defendant, the Public Trustee, the executor of Walter Henry Reid deceased, for the sum of £1,990, being £485 by way of solatium to the plaintiff and £1,505 damages for her sole personal benefit. The sum of £1,505 was awarded pursuant to the provisions of the *Wrongs Act* 1936-1940 (S.A.), ss. 19 and 20 (which correspond with the statute commonly known in England as the *Fatal Accidents or Lord Campbell's Act*), and the *Survival of Causes of Action Act* 1940 (S.A.) (which corresponds with the English statute known as the *Law Reform (Miscellaneous Provisions) Act* 1934). The sum of £485 was awarded pursuant to the provisions of the *Wrongs Act* 1936-1940, s. 23b, as solatium for the suffering caused to the plaintiff, Metilde Zoanetti, by the death of her husband—a cause of action which survived against the defendant by reason of the *Survival of Causes of Action Act* 1940.

The sole question for the decision of this Court is whether the sum of £485 should be deducted from the damages awarded to the plaintiff pursuant to the provisions of ss. 19 and 20 of the *Wrongs Act* 1936-1940 mentioned above. So far as material, the provisions of ss. 23b and 23c are as follows:—

“23b. Whenever the death of a person is caused by a wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled that person to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued, shall, notwithstanding the death of the person injured and although the death was caused in such circumstances as amount in law to felony, be liable to pay the surviving wife or husband of the deceased person such sum, not exceeding five hundred pounds, as the court thinks just by way of solatium for the suffering caused to the wife or husband by such death.”

“23c (1). The rights conferred by section . . . 23b shall be in addition to and not in derogation of any rights conferred

on the parent, husband or wife by any other provision of this Act.

(2) In an action brought to enforce any right given under section . . . 23b . . . the court may in its discretion refuse to order the payment of any sum by way of solatium if, having regard to the conduct of the plaintiff in relation to the deceased person, or to the relations which existed between the plaintiff and the deceased person, or for any other sufficient reason, it considers that no such payment should be made.

(3) Any cause of action conferred on any person by section . . . 23b of this Act shall not, on the death of that person, survive for the benefit of his estate."

Under the provisions of the statute, corresponding to *Lord Campbell's Act*, "the measure of damages, where the claim is for a person killed, is not the same as where a man is injured and claims for himself." Under the statute referred to, compensation can only be recovered for the actual pecuniary loss suffered. And "since it was only in respect of the pecuniary benefit which has been extinguished by the death of the deceased that the Act afforded a remedy damages were not recoverable" as a solatium for mental suffering or loss of companionship or funeral expenses or medical expenses occasioned by the injury from which death resulted. If no pecuniary damage were sustained, the action failed. And because damages were only awarded for the pecuniary loss sustained by reason of the death of the deceased, any pecuniary benefit accruing to a dependant in consequence of the death was taken into account in assessing damages. "It is the net loss on balance which constitutes the measure of damages," the position of each dependant being considered separately (*Davies v. Powell Duffryn Associated Collieries Ltd.* (1)). Sections 19, 20 and 23b of the *Wrongs Act* all deal with the same matter, the tortious killing of a deceased person. Under ss. 19 and 20, the sum recoverable is payable to specified dependants by way of damages whereas under s. 23b the surviving husband or wife is entitled to the sum by way of solatium and so that the right thereto does not survive for the benefit of that person's estate. In the one case, the sum recoverable is the actual pecuniary loss, whilst in the other the sum is a solatium for the suffering caused by the death of the deceased, which could not, as already mentioned, have been recovered under the provisions of ss. 19 and 20. Thus it is apparent, and s. 23c (1) provides, that the solatium is an additional right to that conferred by ss. 19 and 20 but subject to the exercise of the court's discretion

H. C. OF A.

1945.

PUBLIC
TRUSTEE

v.

ZOANETTI.

Starke J.

H. C. OF A.
1945.

PUBLIC
TRUSTEE
v.
ZOANETTI.
Starke J.

pursuant to s. 23c (2). The plain intendment of the statute, gathered from its language and the subject matter, is that the husband or wife shall have by way of solatium a sum which is not recoverable under the other provisions of the Act. It is not compensation for a pecuniary loss but for mental suffering. It is said, however, that the measure of damages under ss. 19 and 20 of the *Wrongs Act* is the loss or gain accruing to a person by reason of the death of the deceased, but the loss or gain, I apprehend, must be some pecuniary loss or gain arising from the death and not a sum payable by way of solatium for mental suffering. In such a case, there is no duplication in the compensation recoverable. The case of *Davies v. Powell Duffryn Associated Collieries* (1) is not, I think, an authority to the contrary. There was a claim in that case under the *Fatal Accidents Act*, or *Lord Campbell's Act*, and also under the *Law Reform (Miscellaneous Provisions) Act*, in respect of the deceased's shortened expectation of life. The rights conferred by the *Law Reform Act* were rights to maintain after the death of a deceased person all causes of action vested in him for the benefit of his estate. The widow of the deceased sued as administratrix on behalf of her husband's estate, and, in the circumstances, whatever was awarded under the Act went to her on administration as widow for her own benefit since the estate was under £1,000 in value. The sum recovered under this Act accrued to her by reason of her husband's death though it came to her by a different title and under a different statute from any sum recovered under the *Fatal Accidents Act* or *Lord Campbell's Act*. The sum recovered was a benefit accruing from her husband's estate by reason of the death of her husband. But in the present case the sum accruing to the widow was by way of solatium for the suffering caused to her by the death of her husband and not in any wise from her husband's estate.

The appeal should be dismissed.

DIXON J. In estimating the damages to be recovered under legislation taken from *Lord Campbell's Act* (the *Fatal Accidents Act* 1846, 9 & 10 Vict. c. 93) two rules are clearly settled. One is that what is recoverable for the benefit of the widow or other relative of the deceased is the pecuniary loss resulting from his death and that nothing may be recovered by way of solatium for the suffering that his death caused to his widow or relative. The other is that in ascertaining the pecuniary loss resulting from his death there must be taken into consideration, on the one side, the reasonable expectations of benefit upon which the claimant would have been entitled

(1) (1942) A.C. 601.

to rely, had his life not been brought to an end, and, on the other side, the pecuniary benefits, arising on his death, to which the claimant had a reasonable expectation, whether as of right or otherwise. For example, if the deceased leaves property in which under his will or on intestacy the widow takes a share or interest, the effect upon her financial position of her so taking that share or interest must be taken into account as against her loss of those material benefits which depended upon the continuance of her husband's life.

In 1940, the Parliament of South Australia took notice of the rule first stated and enacted that the wrongdoer should be liable to pay the surviving wife or husband of the deceased person such sum not exceeding £500 as the Court thinks fit by way of solatium for the suffering caused to the wife or husband by such death.

The contention upon which this appeal depends is that, in ascertaining the pecuniary loss resulting from her husband's death, the sum to which a widow becomes entitled by way of solatium must be treated as a benefit accruing from his death and taken into account by way of deduction from the amount which would otherwise be awarded to her in respect of the pecuniary loss she has sustained through his life being brought to a premature end.

I think that to state the proposition is enough to show that it must be wrong.

For it means that, the legislature having recognized two different injurious consequences as flowing from the death, wrongfully caused, of a husband or wife, viz. the loss of the pecuniary advantages the survivor had derived from the deceased and the grief and distress caused by the death, and having directed that each shall be the subject of a compensatory award or assessment expressed in money, nevertheless intended that one of the two amounts to be assessed must be applied in reduction of the other.

The two descriptions of injurious consequences represent two different interests of a wife, to take the example of a wife, in the life of her husband, the one founded upon the economic or pecuniary advantages of the marriage, the other founded upon the affections and feelings. The legislature has recognized them both, and in the case of each has treated the destruction of the interest as the proper subject of reparation sounding in money. Yet, according to the contention, the money sum representing the reparation or compensation for one of the interests is to be regarded as a gain and treated as if received in reduction of the loss sustained by the destruction of the other interest.

H. C. OF A.

1945.

PUBLIC
TRUSTEE
v.
ZOANETTI.

Dixon J.

H. C. OF A.
1945.
PUBLIC
TRUSTEE
v.
ZOANETTI.
DIXON J.

The rule under *Lord Campbell's Act* requiring that, in estimating the pecuniary injury caused by the death of the deceased, the benefits accruing must be considered as well as the benefits lost as a result of the death is no more than a specific application of a principle governing the ascertainment of loss arising from a given occurrence in every case of legal responsibility. But when there are two interests adversely affected you cannot treat recompense for one as a gain arising from the occurrence and operating in relief of the loss of or injury to the other interest.

Indeed, even when one of two separate interests is benefited in consequence of a wrongful act, the benefit cannot be set off against an injury to the other. "Damages resulting from an invasion of one interest are not diminished by showing that another interest has been benefited" (*American Restatement of the Law Torts*, vol. iv., s. 920). It is not immaterial to notice that in describing some of the various applications given to this principle the *Restatement* includes the proposition that damages to a husband for loss of consortium are not diminished by the fact that the husband is no longer under the expense of supporting the wife.

It therefore appears to me that, if the essential elements of the situation out of which the question arises are considered without more, it is seen to be an untenable contention that the solatium must be taken into account in reduction of the pecuniary loss. It is sufficiently apparent without entering into the detailed provisions of the legislation or its history and without discussing the decisions which establish the rules for ascertaining the compensation payable to a deceased's relatives. But it would perhaps be unsatisfactory to rely only on general reasoning in dealing with a question depending upon statute and I shall now turn to the specific provisions of the legislation and also state what I understand to be the effect of the decisions.

The principle upon which the contention rests is that which requires that compensation under the provisions of *Lord Campbell's Act* shall be assessed by ascertaining the balance of the pecuniary loss to the deceased's relatives from his death over the pecuniary gains accruing from that event. It is therefore desirable to state how that principle has been applied and upon what it is based.

The legislation, including the amended provisions authorizing the award of a solatium, is contained in the *South Australian Wrongs Act 1936-1940*. Section 19, which represents s. 1 of the *Fatal Accidents Act 1846*, provides that, whenever the death of a person is caused by a wrongful act, neglect, or default, and the act,

neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death was caused under such circumstances as to amount in law to felony. Section 20, representing s. 2 of the English Act, provides that every such action shall be for the benefit of the wife, husband, parent, brother, sister and child of the person whose death has been so caused, and shall be brought in the name of the executor or administrator of the person deceased. It goes on to provide that in every such action the court may give such damages as it thinks proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit the action is brought.

Of the last paragraph, *McCardie J.*, in *Barnett v. Cohen* (1), said :—
 “ These words are but rarely cited in the decisions, but it is essential to recall them if those decisions are to be understood. Lord Campbell’s Act created a wholly new cause of action with a novel body of features as to damages : see Pollock on Torts, 11th ed., pp. 66 and 68. Nothing can be given by way of solatium for the injured feelings of the relatives : see *Blake v. Midland Ry. Co.* (2). All that can be dealt with or assessed is pecuniary loss.”

“ The basis ” (of the action) “ is not what has been called solatium, that is to say, damages given for injured feelings or on the ground of sentiment, but damages based on compensation for a pecuniary loss ” : per Lord *Haldane*, *Taff Vale Railway Co. v. Jenkins* (3). The pecuniary loss to which the damages are confined consists in the loss of material benefits or of the reasonable prospect of material benefits which depended on the continuance of the life of the deceased. What must be ascertained is whether any and what loss has been sustained by the relatives of the deceased after comparing the material benefits depending upon his life with any material gains accruing from his death. Thus it was decided that accident and life insurances must be taken into consideration if any benefit accrued from them : Cf. per *Greer J.*, *Baker v. Dalgleish Steam Shipping Co.* (4) ; see *Hicks v. Newport, Abergavenny & Hereford Railway Co.* (5) and *Bradburn v. Great Western Railway Co.* (6). In England the rule as to insurances has been changed by 8 Edw. VII. c. 7, but

H. C. OF A.
1945.

PUBLIC
TRUSTEE
v.
ZOANETTI.
—
Dixon J.

(1) (1921) 2 K.B. 461, at p. 469.

(2) (1852) 18 Q.B. 93 [118 E.R. 35].

(3) (1913) A.C. 1, at p. 4.

(4) (1921) 3 K.B. 481, at p. 485.

(5) (1857) 4 B. & S. 403 [122 E.R. 510].

(6) (1874) L.R. 10 Ex. 1.

H. C. OF A.
1945.
PUBLIC
TRUSTEE
v.
ZOANETTI.
Dixon J.

the provisions of that statute do not appear to have been enacted in South Australia.

In applying these principles, it is quite clear that it is not only legal rights to a pecuniary benefit which are to be taken into consideration. The loss, however, must be of something more than a speculative possibility of benefit ; it must be a reasonable probability of pecuniary advantage. In the same way, benefits to which a relative becomes legally entitled owing to the death of the deceased must be taken into consideration in assessing compensation. Thus the maturing of policies of insurance had to be taken into consideration. The benefit which a wife and children took under a settlement upon the death of the husband has been taken into account in reduction of the compensation. But it is not necessary that the benefits shall accrue as of right. No distinction should be drawn between an assessment of what is a reasonable expectation of benefit had the deceased person lived and what is the reasonable expectation of benefit in consequence of the deceased person's death. Both must be taken into consideration in arriving at the real loss—per *Bankes L.J.* in *Baker v. Dalgleish Steam Shipping Co.* (1).

In the case of life insurance moneys, the decisions proceeded upon the footing that the pecuniary benefit which accrues to the claimant from the deceased's premature death consists in the accelerated receipt of a sum of money, the consideration for which had already been paid out of his earnings : per Lord *Watson*, *Jennings' Case* (2) ; cf. per Lord *Porter*, *Davies v. Powell Duffryn Associated Collieries Ltd.* (3). " When a man who is paying premiums to keep alive a policy of insurance dies, his widow and family lose the support of a man who was not only maintaining them but was also providing a fund which they might reasonably expect would benefit them or some of them in the future " —per *Richards J.*, *Butler v. McLachlan* (4). He provides the fund by paying premiums and that means a reduction of what, had he lived, he would have spent upon his wife and dependants. It is that expenditure which forms the basis of the estimate of financial loss, and to deduct further the amount received under the policy would mean that at two points, and not one, in the calculation a diminution was made on account of insurance. Accordingly, it was considered that the benefit to the widow of the acceleration might be sufficiently allowed for if, from the estimated future earnings of the deceased which he would probably expend for the advantage of his wife and family a deduction was made of the premium

(1) (1922) 1 K.B. 361, at pp. 367, 368. (3) (1942) A.C. 601, at pp. 618, 619.
(2) (1888) 13 App. Cas. 800, at p. 805. (4) (1936) S.A.S.R. 152, at p. 157.

that would have become payable by him had he not been killed. A distinction was made in the case of accident insurance, where the policy moneys were deducted. "Presumably it was based on the fact that, although a man must die, there is no certainty, or even a reasonable probability, that he will suffer an accident"—per *Richards J.*, *Butler v. McLachlan* (1).

When the widow succeeds to property, whether under the will or on the intestacy of the deceased, it may be a question whether the full value is deductible. The true view may be that the devolution of the property upon her has been accelerated and not caused by his death, or, as, for example, in the case of a house in which she and her husband resided, she may have enjoyed in her life-time some of the advantages which her ownership will give: Cf. *Butler v. McLachlan* (2).

In jurisdictions where the survival of causes of action for civil wrongs has been provided for by statute, as has been done in England by the *Law Reform (Miscellaneous Provisions) Act* 1934, and in South Australia by the *Survival of Causes of Action Act* 1940, the damages recoverable by the legal personal representative of the deceased go to swell the estate in which the widow or other relative may share, whether under his will or on intestacy. It will, therefore, operate to increase the interest which, in the absence of any legislative direction to the contrary, must be taken into account by way of reduction of the pecuniary loss otherwise resulting to the widow of the deceased or his relative. In *Yelland v. Powell Duffryn Associated Collieries Ltd.* (No. 2) (3) (reported as *Davies v. Powell Duffryn Associated Collieries Ltd.* in *Dom. Proc.* (4)), *Luxmoore L.J.* explained the matter in the following passage—"A person who is entitled to any beneficial interest in the estate of the deceased, whether by reason of the testamentary dispositions of the deceased or as a result of the application of the law with regard to intestate succession, does not get any right under the Law Reform Act. His or her interest in the estate must necessarily arise outside the Law Reform Act and depends on the application of the law with regard to administration of estates as well as the law relating to testate or intestate succession. If a dependant takes a beneficial interest in the estate of a deceased person which has been increased by reason of the award of damages under the Law Reform Act,

H. C. OF A.
1945.

PUBLIC
TRUSTEE
v.
ZOANETTI.
Dixon J.

(1) (1936) S.A.S.R., at p. 159.

(2) (1936) S.A.S.R., at p. 157.

(3) (1941) 1 K.B. 519, at p. 531.

(4) (1942) A.C. 601.

H. C. OF A.
 1945.
 {
 PUBLIC
 TRUSTEE
 v.
 ZOANETTI.
 ———
 DIXON J.

the taking into account of that beneficial interest in assessing the damage suffered by that dependant under the Fatal Accidents Acts cannot be said to affect injuriously the rights of that dependant under those Acts. His or her rights under the Fatal Accidents Acts remain unimpaired. The rights of the legal personal representative under the Law Reform Act cannot possibly be affected by anything awarded to dependants under the Fatal Accidents Acts, for the damages recoverable by the legal personal representative under the Law Reform Act are limited to the loss to the deceased's estate of the value of his own expectation of life and damages for pain and suffering and pecuniary loss, and they cover nothing else except the funeral expenses. In the case of damages under the Fatal Accidents Acts, the taking into consideration of any interest derived by a dependant from the estate of the deceased does not involve setting off any right under the Law Reform Act against the rights of the dependant under the Fatal Accidents Acts, for, as already pointed out, the dependant as such has no right whatever conferred on him or her by the Law Reform Act."

In all the foregoing applications of the rules governing the assessment of compensation under the provisions of *Lord Campbell's Act*, it will be seen that the question has always been one of material or pecuniary loss, and that all elements of damage such as loss of consortium, anguish or injury to the feelings or sensibilities, what has been called emotional distress, were rigidly excluded. The South Australian legislation of 1940 altered the law by giving a right of recovery in respect of a head of damage of this description in respect of what the enactment called the suffering caused to the wife or husband by the death of the deceased. It is, I think, not unimportant to compare the terminology of the provision with the case by which it was established that all such damage fell outside *Lord Campbell's Act*, and also to notice the decision in South Australia which seems to have been the occasion of the enactment. In *Blake v. Midland Railway Co.* (1), at the trial, plaintiff's counsel had "contended that the estimate ought not to be confined to the money damage, but should include the suffering and loss in other respects; and evidence was given of the terms on which the deceased and his wife had lived together" (2). This contention was left to the jury, which found for the plaintiff for a considerable sum. *Coleridge J.*, in delivering

(1) (1852) 18 Q.B. 93 [118 E.R. 35].

(2) (1852) 18 Q.B. 93, at p. 96 [118 E.R. 35, at p. 36].

the judgment of the Court of Queen's Bench granting a new trial, said that the important question was whether under the statute the jury were "confined to injuries of which a pecuniary estimate may be made, or may add a solatium to those parties in respect of the mental sufferings occasioned by such death" (1). In deciding this question in the negative, the judgment referred again and again to a solatium. One such reference amounted in substance to a refusal to suppose without plainer language that "the Legislature had intended to go to the extreme length of giving, not only compensation for pecuniary loss, but a solatium to all the relatives enumerated" (2). Another occurs in the course of rejecting an argument based on the requirement of particulars distinguishing the nature of the damage "as if it were so much for pecuniary damage and so much for solatium" (3). "Still the third is the possibility of an award of a solatium for his mental sufferings alone, with an indemnity for his pecuniary loss" (4). In all this, there is the clearest discrimination between two possible heads of damage distinct and cumulative, and the exclusion of one. It is, moreover, expressed in language reflected afterwards in the terms of the South Australian statute of 1940. Further, there are references in the argument and judgment to another topic which is dealt with in that amendment. It is the actual relations which subsisted between the deceased and the claimant as bearing upon distress or anguish caused by the bereavement, "the terms on which they lived together".

In the cases decided since *Blake v. Midland Railway Co.* (5), the exclusion of any solatium for wounded feelings is repeatedly noticed. But what, I think, is of greater significance is the circumstance that on 2nd November 1939 the matter was adverted to in the Supreme Court of South Australia and the legislature was impliedly invited to reconsider the law. In *Matthew v. Flood* (6), a case involving the assessment of compensation under the provisions taken from *Lord Campbell's Act*, Cleland J. said:—"The damages are limited to the pecuniary loss which arises in consequence of the death, and it follows that neither the gravity of the injury preceding the death of the deceased, nor a solatium for the mental anguish or loss of society due to the death, nor the cost of mourning, nor the medical,

H. C. OF A.

1945.

PUBLIC
TRUSTEE
v.

ZOANETTI.

Dixon J.

(1) (1852) 18 Q.B., at p. 96 [118 E.R. at p. 40].

(2) (1852) 18 Q.B., at p. 110 [118 E.R., at p. 41].

(3) (1852) 18 Q.B., at p. 111 [118 E.R., at p. 41].

(4) (1852) 18 Q.B., at p. 111 [118 E.R., at p. 42].

(5) (1852) 18 Q.B. 93 [118 E.R. 35].

(6) (1939) S.A.S.R. 389, at p. 392.

H. C. OF A.
 1945.
 {
 PUBLIC
 TRUSTEE
 v.
 ZOANETTI.
 —
 Dixon J.

nor funeral expenses occasioned by the injury, are to be included in the assessment of damages. These items of real damage arising from the death must, in the light of the authorities, be disregarded unless and until the Legislature has altered that position if it should think fit to do so."

In the following year, the *Wrongs Act Amendment Act* 1940 was passed, as well as the *Survival of Causes of Action Act* 1940, based on, but varying from, the English enactment. The former, by s. 5, placed in the *Wrongs Act*, in juxtaposition with the provisions of *Lord Campbell's Act*, the following sections:—

"23a. (1) Whenever the death of an infant is caused by a wrongful act, neglect or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the infant to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall, notwithstanding the death of the infant and although it was caused under such circumstances as amount in law to felony, be liable to pay to the surviving parents or parent of the child such sum, not exceeding three hundred pounds in the aggregate, as the court thinks just by way of solatium for the suffering caused to the parents or parent by the death of the child.

(2) Where both parents bring an action to recover any sum of money payable under this section, the amount recovered after deducting the costs not recovered from the defendant, shall be divided between the parents in such shares as the court directs.

(3) Where both parents survive the child and either of them does not join in bringing an action under this section, the other may bring an action for such amount as he claims to be due to him or her.

(4) In this section 'parent' means the father or mother of a legitimate child and the mother of an illegitimate child.

23b. Whenever the death of a person is caused by a wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled that person to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued, shall, notwithstanding the death of the person injured and although the death was caused in such circumstances as amount

in law to felony, be liable to pay the surviving wife or husband of the deceased person such sum, not exceeding five hundred pounds, as the court thinks just by way of solatium for the suffering caused to the wife or husband by such death.

23c. (1) The rights conferred by sections 23a and 23b shall be in addition to and not in derogation of any rights conferred on the parent, husband or wife by any other provision of this Act.

(2) In an action brought to enforce any right given under section 23a or 23b of this Act the court may in its discretion refuse to order the payment of any sum by way of solatium if, having regard to the conduct of the plaintiff in relation to the deceased person, or to the relations which existed between the plaintiff and the deceased person, or for any other sufficient reason, it considers that no such payment should be made.

(3) Any cause of action conferred on any person by section 23a or 23b of this Act shall not, on the death of that person, survive for the benefit of his estate."

This appeal turns upon s. 23b.

It is, I think, a reasonable deduction that these amendments were prompted by the remarks of *Cleland J.* They deal with one of the very points made by him. The language in which they are expressed shows that the case law has been considered with care and that it had been decided to change the law with respect to the suffering caused by the death by providing for a solatium. Sub-section 2 of s. 23c deals specifically with the question raised in *Blake's Case* (1) concerning the relevance of the plaintiff's relations with the deceased to the assessment of the solatium. Both s. 23a and s. 23b, in describing the conditions in which, in the one case, the parents of a deceased child and the surviving spouse of a deceased spouse are entitled to a solatium, follow closely the language of s. 19 which contains the provision of s. 1 of *Lord Campbell's Act*. They are inserted as additional sections of the same statute. The clear intention is to undo the exclusion of a solatium for the distress and suffering caused by the death and to give a further right to compensation in respect of that head of actual but intangible damage. If the legislature had been prepared to give an unrestricted right to a solatium to any relative who fell within the category enumerated in s. 20, its purpose might have been served by a simple amendment to s. 20 (2). But it was prepared to give only a right

H. C. OF A.
1945.

PUBLIC
TRUSTEE

v.
ZOANETTI.

DIXON J.

(1) (1852) 18 Q.B. 93 [118 E.R. 35].

H. C. OF A.
 1945.
 {
 PUBLIC
 TRUSTEE
 v.
 ZOANETTI.
 —
 DIXON J.

to a solatium restricted in amount and to give it, not to every member of the class, but only to parents and husbands or wives of the persons killed. It was, therefore, necessary to express the change in the law in a new provision and since the maximum amounts in the case of parents and husbands or wives are not the same and since, moreover, ancillary procedural provisions were found necessary in reference to parents, two additional sections were thought desirable. If the new head of damage had been included in s. 20 (2), I imagine it would have occurred to nobody that one sum should be taken into account as a deduction from the other.

But, when you find that in the same Act, in respect of separate heads of damage which flow from the same conditions of liability consisting of the same facts, the same claimants are given rights of recovery, it is plain that the damages are cumulative. Further, it is not true that the sum awarded as a solatium is a "benefit" or "gain" resulting from the death, within the meaning of the principles worked out under the provisions found in s. 20 (2). It is a reparation in respect of what the law now recognizes as a distinct loss or damage suffered by reason of the death. Were it treated otherwise and considered deductible, strange consequences would follow. Take, for example, the case of a widow whose husband had supported her in his lifetime and suppose that, on the footing that no financial benefits accrued from his death, her pecuniary loss owing to her no longer being supported by her husband would be assessed at more than £500. Suppose further that a solatium of £500 is awarded to her. Now, if the deceased died penniless so that his widow received no financial benefit in consequence of his death, the whole solatium would be deducted from the assessment of the pecuniary loss and, in effect, she would obtain no solatium. But, if he died a wealthy man and by his will bequeathed to his widow more than she had lost owing to being deprived of his support, then there would be nothing from which to deduct the solatium and she would receive the whole solatium awarded.

None of these considerations is applicable where the widow receives in respect of her share in her husband's estate more than she otherwise would because the legal personal representative of her husband has recovered damages under the *Survival of Causes of Action Act* in respect of the wrong to him which resulted in his death. In that case, what she takes is property devolving on her by death. The damages are an asset of his estate to which, in an unliquidated

form, he was entitled at the time of his death. In other words, the damages cannot be regarded as more than an increment of the deceased's estate in which she takes her distributable share. Clearly no ground would exist, unless some definite statutory provision by way of exception or exclusion were made, for distinguishing between the funds or items of property composing the estate and refusing to take into account so much of the widow's or relative's share as was traceable to the damages obtained by the estate under the *Survival of Causes of Action Act*. Accordingly, in *Davies (or Yelland) v. Powell Duffryn Associated Collieries Ltd.* (1), it was common ground that, apart from any specific provision to the contrary, any recovery under the *Law Reform (Miscellaneous Provisions) Act* which would benefit a person having a claim under *Lord Campbell's Act* must be taken into consideration in assessing the amount recoverable on behalf of that person under the latter Act: per Lord Porter (2). In that case, sub-s. 5 of s. 1 of the *Law Reform Act* was relied upon as a specific provision to the contrary. That sub-section has not only been, in effect, transcribed in s. 6 of the South Australian *Survival of Causes of Action Act* 1940, but, so far as material and *mutatis mutandis*, in s. 23c (1) of the *Wrongs Act* set out above. Standing in the *Wrongs Act*, it would be difficult to interpret the provision otherwise than as confirmatory of the intention of the legislature that compensation given by way of solatium under s. 23a or s. 23b should be cumulative upon and not in relief of the damages for pecuniary loss recovered under s. 20, *Lord Campbell's Act*. But it would be quite another thing to interpret the provision, where it stands in the *Law Reform Act*, as operating to exclude from consideration in the assessment of the balance of pecuniary loss suffered by a widow for the purpose of compensating her under *Lord Campbell's Act* so much of what she took under her husband's will or intestacy as was attributable to the survival to his estate of a cause of action, the survival which the *Law Reform Act* brought about. In *Davies' or Yelland's Case* (1), in the King's Bench Division, the Court of Appeal and the House of Lords, such an interpretation was unanimously rejected as putting too much strain on the language of the sub-section. The grounds which were relied upon by counsel in support of such an interpretation were described thus by Lord Wright (3):—"His contentions were that these words mean that any

H. C. OF A.

1945.

PUBLIC
TRUSTEE
v.

ZOANETTI.

Dixon J.

(1) (1941) 1 K.B. 519; (1942) A.C.
601.

(2) (1942) A.C., at p. 618.

(3) (1942) A.C., at p. 614.

H. C. OF A.
1945.

PUBLIC
TRUSTEE
v.

ZOANETTI.

Dixon J.

sums recovered under the *Law Reform Act* were not to be taken into account in assessing the damages under the *Fatal Accidents Acts*, that the causes of action are distinct and independent, and the word 'rights' in s. 1, sub-s. 5, of the Act of 1934, includes all rights, including the right to recover a sum of damages, and that this right is not to be derogated from or diminished by reason of the new right of action or damages recovered under it." His Lordship then proceeded to give the basal reason for rejecting such a construction. He said (1) :—" But to accept these contentions would, in my opinion, involve changing the whole basis of the *Fatal Accidents Acts* which give a claim for damages to be assessed on the balance of profit and loss and to be proportioned to the injury resulting from the death of the individual. The injury suffered by the individual from the death cannot be computed without reference to the benefit also accruing from the death to the same individual from whatever source. The position under the *Fatal Accidents Acts* is too well and too long established to be changed without clear words. I think that s. 1, sub-s. 5, of the Act of 1934, is dealing with the cause of action under the *Fatal Accidents Acts*, not with the assessment of damages."

Lord Porter said (2) :—" Without the provisions of s. 1, sub-s. 5, of the later Act it might well be thought that the right of recovery given by that Act would put an end to the particular rights given in respect of the same death by *Lord Campbell's Act*. The provision is desirable and understandable as a safeguard against such a construction, and it is unnecessary to impart to it the more comprehensive effect claimed." His Lordship summed up the position by saying (2) :—" The words 'right' and 'in derogation of' are, I think, inappropriate to effect the purpose suggested. Those actually used are, to my mind, far from being explicit enough to bring about the result contended for."

But, if the provision in question had been entirely omitted from the *Wrongs Act Amendment Act* 1940 and ss. 23a and 23b had been placed in the *Wrongs Act* 1936-1940 without s. 23c (1), I should never have supposed that the solatium awarded under s. 23a or 23b was deductible in ascertaining the pecuniary loss under s. 20 (2). The presence of s. 23c (1) in the statute cannot operate against this conclusion, even if the language of the sub-

(1) (1942) A.C., at p. 614.

(2) (1942) A.C., at p. 620.

section is construed in precisely the same way as the similar language of s. 1 (5) of the *Law Reform Act* was construed in *Davies' Case* (1). Upon that construction, the word "rights" would be understood as restricted to the rights of recovery and not as extending to the right to have the damages measured or estimated in the way required by law.

The language of the sub-section was adopted before *Davies' Case* (1) was decided and the form and the content of the legislation, as well as the whole history of the matter, make the inference irresistible that, in adopting it, the legislature believed that it was precluding the deduction of solatium under the amendments in ascertaining pecuniary loss under s. 20 (2). Indeed, if the word "rights" is confined to rights to recover, or causes of action, as distinguished from rights to the quantification of damages, s. 23c (1) becomes no more than a direction that s. 23a and s. 23b must not be treated as repealing s. 19 and s. 20. The draftsman could hardly have thought it possible that any one would so treat them. In a different context and in relation to a different subject of compensation, I see no reason whatever for refusing to give an effect to the language of s. 23c (1) which the same or similar language fell short of producing in the context in which it was first used and in reference to an increment or benefit bearing no analogy to the solatium with which s. 23c (1) is concerned. So to interpret the provision as it stands in the *Wrongs Act* is not to depart from the decision of the House of Lords. It is but to give effect to the canon of interpretation which requires that the intention of any instrument should be ascertained from its contents and not by the transfer to it of the meaning of some other instrument. But, even if a mechanical application is made to s. 23c (1) of the interpretation placed on s. 1 (5) of the *Law Reform Act*, that cannot, in my opinion, result in displacing all the considerations, which, independently of any such provision, show that compensation by way of solatium is not to be deducted from the pecuniary loss ensuing from the death.

In my opinion, the judgment of *Richards J.* is right and the appeal should be dismissed.

McTIERNAN J. In my opinion, this appeal should be dismissed.

It is settled that a relative of a deceased person, for whose benefit an action is brought under *Lord Campbell's Act*, is not entitled to

H. C. OF A.
1945.

PUBLIC
TRUSTEE
v.
ZOANETTI.
Dixon J.

H. C. OF A.

1945.

PUBLIC

TRUSTEE

v.

ZOANETTI.

McTiernan J.

receive in that action any money compensation for mental suffering resulting from the death of the deceased. Section 2 of that Act, which provides a measure of compensation identical with that in s. 20 (2) of the *Wrongs Act* 1936-1940 (S.A.), gives a claim only for the pecuniary loss resulting to the claimant from the death, but not for a solatium for suffering caused by such death : *Blake v. Midland Railway Co.* (1).

A liability to pay a sum of money by way of solatium for suffering caused by the death of a child is created by s. 23a (1) of the above-mentioned *Wrongs Act* in favour of the child's parents and a similar liability is created by s. 23 (b) of this Act in favour of a husband or wife for suffering caused to either spouse by the death of the other. The action which is authorized by ss. 19 and 20 of the same Act may be brought for the benefit of a parent or a wife or husband. Section 23c (1) provides that the rights conferred by ss. 23a and 23b shall be in addition to and not in derogation of any rights conferred on the parent, husband or wife by any other provisions of the Act. These rights include the rights which each of these classes has under ss. 19 and 20. The liability to pay a sum by way of solatium to a parent, husband or wife is expressed to arise upon conditions which are identical with those upon which a liability to action under s. 19 is expressed to arise. The clear intention of the legislature is that if those conditions are fulfilled a parent, husband or wife should be entitled to a solatium for suffering caused to him or her by the death of a child, husband or wife, as the case may be—a right which the legislature had not formerly given—and should also be entitled to damages for the pecuniary loss, if any, resulting from the death.

The principles governing the assessment of damages for this pecuniary loss are well settled. They are conveniently stated in the reasons of *Scrutton L.J.* in *Baker v. Dalgleish Steam Shipping Co.* (2). On the one hand, the court assesses the actual or probable pecuniary loss resulting from the death, and, on the other hand, the actual or probable pecuniary benefit resulting to the claimant from the death, and the measure of the damages to which the claimant is entitled is a sum equal to the balance of the pecuniary loss.

Section 23a (1) and s. 23b say that the liability created by these sections is to pay such sum, not exceeding a maximum, as the

(1) (1852) 18 Q.B. 93 [118 E.R. 35]. (2) (1922) 1 K.B. 361, at pp. 371, 372.

court thinks just by way of solatium for the suffering caused to the claimant by the death of the relative specified in each section. The conditions of the liability are not merely the death and the prescribed relationship. Section 23c (2) provides that the court may in its discretion refuse to order the payment of any sum by way of solatium, if, having regard to the conduct of the plaintiff in relation to the deceased person or to the relations which existed between the plaintiff and the deceased, or for any other sufficient reason, it considers that no such payment should be made.

In my opinion, a sum of money recovered under these provisions is not in the nature of a pecuniary advantage which the plaintiff receives from the death. It is a payment of a different nature, that is to say, a solatium for the suffering caused by the death. This view of the payment is supported by the consideration that it is not made irrespective of the conduct of the plaintiff or the relations which existed between the plaintiff and the deceased. Compare *Baker v. Dalgleish Steam Shipping Co.* (1). As an amount awarded under s. 23a (1) or 23b is solatium for suffering caused by the death whereas an action under ss. 19 and 20 is brought to recover damages for the pecuniary injury resulting from the death to the claimant, I think that the amount of the solatium cannot be set off or taken into account in estimating the damages which should be awarded in the action.

The case of *Davies v. Powell Duffryn Associated Collieries Ltd.* (2) is not against this conclusion. It interprets s. 1 (5) of the *Law Reform (Miscellaneous Provisions) Act 1934*. The case decides that this sub-section does not affect the principles governing the estimation of damages under *Lord Campbell's Act*.

It is also true that s. 23c (1) does not affect those principles: under them a sum awarded under the *Wrongs Act* by way of solatium is not taken into account in estimating pecuniary loss resulting from death. What s. 23c (1) makes explicit is that the claimant's right to the solatium should be in addition to and not in derogation of the claimant's right to damages for the pecuniary loss: it permits both rights to be enforced.

In the present case, the respondent was awarded £485 by way of a solatium and £1,505 as damages for the pecuniary loss resulting from the death of her husband. There is nothing in the *Wrongs Act*

H. C. OF A.
1945.
PUBLIC
TRUSTEE
v.
ZOANETTI.
McTiernan J.

(1) (1922) 1 K.B. 361, at pp. 380, 381. (2) (1942) A.C. 601.

H. C. OF A.
1945.

PUBLIC
TRUSTEE
v.
ZOANETTI.

which would justify the Court in taking the amount of the solatium into account in estimating the damages for the pecuniary loss. In my opinion, it would be erroneous to do so. The decision of the learned trial judge, *Richards J.*, is, I think, right.

Appeal dismissed with costs.

Solicitors for the appellant, *Newman, Sutherland, Gillman and Sparrow.*

Solicitors for the respondent, *Knox and Hargrave.*

C. C. B.