Vana v. Tosta et al.

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cifically affect the individual. Laskin J.A. would go so far as to allow the arbitrator to use the specific facts of a case as background to interpretation and deny intervention as long as the arbitrator did not make particular determinations. Judson J. seems to accept this view, Hall J. and apparently Cartwright J. do not.

If the direct result test were used, any submission to arbitration could be drafted so skillfully that individuals would be refused the right to intervene because their interests would not be ‘particularly determined’. Hall J. would allow the individual the right to intervene, no matter in what form the issue was drawn, if in fact the proceeding is ‘aimed entirely’ at him. This seems also to be the conclusion of Cartwright J. where he states:

The reason that I differ from the result at which he Judson J. arrives is that I am unable to regard the arbitration which was held as anything other than an inquiry as to a single question, that is whether or not the employer was bound to discharge the appellant.

All the judges, including Wells J.A. and Hall J. admit the concept of the ‘policy grievance’, but as a result of this case there cannot be many instances where an individual would be barred from intervening because the issue before the arbitrator is a ‘policy grievance’. The notion is, to all intents and purposes, a dead letter.

It will be interesting to see what effect this result will have on the conduct of labour arbitrations. There is bound to be some confusion at first, but probably the snags can be sorted out without too much difficulty. Hopefully, this inroad on the unions’ exclusive bargaining rights can be restricted to the arbitration proceeding and not to bargaining itself either at the negotiation of the agreement or at grievance handling preliminary to arbitration. If problems arise which threaten to inundate the usefulness of arbitration, the legislature may have to be called to the rescue.

Roderick G. Ferguson.

Vana v. Tosta et al.

DAMAGES—DEATH OF A WIFE—MOTHER—FATAL ACCIDENTS ACT.

The question of damages under the Fatal Accidents Act in the case of the death of a wife and mother is the source of great interest and confusion because the basis of the award and the items which may

51 65 D.L.R. 2d, at 648.
52 Id., at 642.
1 R.S.O. 1950 c. 132.
be claimed as damages are far from clear. Moreover, in comparison to awards made in the case of the death of a husband and to awards in the United States, damages given in Canada are very low.²

The Supreme Court of Canada was recently presented with an opportunity to clarify this area of the law and to raise the general level of awards in this country. Although the Court did neither of these things, the case of Vana v. Tosta et al.³ is of great importance because the Court implied that certain principles should be followed in assessing damages in fatal accident cases. It is the purpose of this paper to examine these principles and to question their efficacy.

Under the Fatal Accidents Act compensation is to be awarded in proportion to the injury resulting from death.⁴ One of the main problems is the question, to what injuries does the Act refer? The courts have had difficulty in drawing the line between compensation for the loss suffered as a result of the accident and compensation for loss of consortium. Because the Act attempts to compensate for the loss of future benefits which would have been received but for the accident, the courts have had to consider any contingencies which may reduce the future benefit. In doing this they have put what is felt to be undue emphasis on these contingencies with the result that awards have tended to be low in relation to the loss suffered. The combination of these factors has given rise to the unfortunate result that damages under the Act have not been based on any precise standard but in many cases appear to be a convenient amount somewhere between the minimum and the maximum award acceptable.

Before examining the Vana case it will be of benefit to review the present basis of damages under the Fatal Accidents Act, and the traditional method of computing the award as laid down by the courts. At common law the wrongful death of a human being could not be complained of as an injury and no civil action could be brought.⁵ The only recourse against the wrongdoer was by criminal action. It was therefore to the wrongdoer’s financial advantage to kill rather than maim. Due to this inequity and the growing concern over the increased deaths arising from the Industrial Revolution, Lord Campbell’s Act was passed in England and copied in many common law countries.⁶

Under the Fatal Accidents Act a new independent right of action is given to the near relatives of the deceased.⁷ While it is a right of

³ (1968) 66 D.L.R. 2d 97.
⁴ Supra, note 1, section 3.
⁷ Magill v. Moore (1919) 59 S.C. 9 at 11 per Anglin J.; “The statute gives but one action to be brought by the personal representative, or in his default, by one or more of the relatives of the class for whose benefit it may be maintained. The cause of action is single; it is for the entire damage sustained by the whole class in whose behalf the statute provides that compensation may be recovered.”
action that the deceased did not have, section 2 of the present Act makes it a condition precedent that the death must result from an injury for which the deceased could have been compensated had he lived. In this respect then, contributory negligence and limitation periods must be considered. In applying the Act, the courts have decided that the plaintiff can recover only financial or pecuniary loss. A second condition precedent is thus introduced, namely that the plaintiff must have lost a pecuniary benefit or a reasonable prospect of financial advantage as a result of the death. The courts have further decided that no amount will be allowed as solatium for the loss of society of the wife, husband or parent. In other words the statute has been interpreted as conferring a right to damage of the same nature, in consequence of the death, as at common law could have been recovered in the case of an injury which disabled but did not kill the victim.

THE MATHEMATICS OF DEATH

In calculating the amount of damages it is well established that a lump sum award will be made which, if not full compensation, is at least fair compensation for the pecuniary loss suffered. Pecuniary loss is interpreted strictly but it is clear that it is not limited to monetary loss alone, as any service of value to the relative which can be translated into monetary terms is compensable.

To arrive at the proper amount of damages the courts first work out what is called the "dependency". This may be defined as the annual contribution of the deceased to the welfare of the relatives who are claiming to have suffered as a result of the accident. In the case of the death of a husband this is calculated by using his net income or take-home pay as the basis from which the damages are

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10 DeBrincat v. Mitchell, (1958) 26 W.W.R. 534 per Ruttan J. in the Supreme Court of British Columbia at p. 635; "Pecuniary loss is the loss of some benefit or advantage which is capable of being estimated in terms of money as distinct from mere sentimental loss."
11 Supra, note 9.
12 Jones v. Tersigni (1930) 38 O.W.N. 315 per Kelly J., at 316; "An attempt should not be made to give damages to the full amount of a perfect compensation for pecuniary injury. A reasonable view should be taken of the case so that there may be given what may be considered in all the circumstances a fair compensation."
13 Berry v. Humm & Co. (1915) 1 K.B. 627 per Scrutton J. at 631: "I can see no reason in principle why such pecuniary loss should be limited to the value of money lost, or the money value of things lost, or contributions of food and clothing, and why I should be bound to exclude the monetary loss incurred by replacing services rendered gratuitously by a relative, if there was a reasonable prospect of their being rendered freely in the future but for the death."
determined. Any expenditures the deceased normally would make for his own maintenance are deducted.\textsuperscript{15}

The next step is to determine the number of years over which the deceased might have continued to make this contribution. The courts have calculated this by using a multiplier based on the joint-life expectancy of the husband and wife as determined by actuarial methods from the Canadian Life Tables.\textsuperscript{16} The multiplier is not based exclusively on these tables however, as the court is primarily interested in the period over which the contributions are made (i.e. working-life expectancy) and the tables are based on average life expectancy. Reductions or increases in the multiplier are made if evidence is led which shows a likely departure from normal working life. In some cases the courts have used a fixed multiplier which is not based on age, health or the other factors normally used but is merely an arbitrary figure.\textsuperscript{17} Fortunately this practise is dying out and it is doubtful that it would be employed by any Canadian courts today.

Using the dependency and the multiplier a capital sum is then calculated which provides an annual contribution over the estimated number of years and which will be exhausted at the end of that time. The capital sum is generally reduced to account for certain contingencies which reduce the loss which the relatives have suffered.\textsuperscript{18}

\textbf{FACTS AND BACKGROUND OF VANA v. TOSTA}\textsuperscript{19}

The case arose out of a collision between cars owned by George Vana and Stanley Tosta. Tosta was a passenger in his own car which was being negligently driven at the time by one Laxarewicz. The plaintiff's wife was killed, and he and his two children were injured. At the time of the accident Vana was 47 years old and his wife was 37. The two children, Nancy and Steven, were 13 and 10 respectively. According to actuarial evidence the joint life expectancy of the husband and wife was 25 years.\textsuperscript{20} Mrs. Vana worked part time as a waitress and brought in an estimated $30. a week to the household of which $200. a year was put into a bank account towards the education of the children. As the husband earned $93. a week, the money earned by her was of assistance in maintaining the family. After the accident, the plaintiff's mother, a 75 year old widow, kept house for Vana. He had promised to pay her $30. a week but, because of the expenses of the accident, he had been unable to pay her anything as of the date of the trial. In

\begin{itemize}
  \item \textsuperscript{15} Davies v. Powell Duffryn (1942) A.C. 601 \textit{per} Lord Wright at 605.
  \item \textsuperscript{16} Canadian Life Table is published by the Queen's Printer, Ottawa every few years and is used by the courts to establish normal life expectancies.
  \item \textsuperscript{17} \textit{See} Bishop v. Cunard White Star Ltd. (1950) 2 All E.R. 22.
  \item \textsuperscript{18} Canadian courts have occasionally used contingencies to reduce the multiplier rather than the capital sum. \textit{See} Ponyicky v. Sawyama, (1943) S.C.R. 197.
  \item \textsuperscript{19} \textit{Supra}, note 3.
  \item \textsuperscript{20} The husband's life expectancy was 26.7 years and his wife's was 40.28 years.
\end{itemize}
addition he could receive assistance by way of guidance from his 62 year old mother-in-law.

This table indicates the damages awarded by the trial and the appellate courts under the Fatal Accident Act.

<table>
<thead>
<tr>
<th>Court</th>
<th>Vana</th>
<th>Nancy</th>
<th>Steven</th>
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<tbody>
<tr>
<td>Trial</td>
<td>$20,000</td>
<td>$10,000</td>
<td>$5,000</td>
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<tr>
<td>Ontario Court of Appeal</td>
<td>10,000</td>
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<tr>
<td>Supreme Court of Canada</td>
<td>14,435</td>
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There are two major aspects to this case, which should be dealt with separately. The first consideration is the basis of compensation to be paid to a husband for the loss of his wife. The second concerns the basis of compensation to be paid to children for the loss of their mother.

WIFE

Valuation of the loss in the case of death of a wife is a problem because two conflicting, or apparently conflicting, principles cause confusion as to what should be awarded. The first principle is set out in Berry v. Humm & Co. which held that damages are not limited to the value of money lost but include the value of loss of services as well. The second principle is exemplified by a statement of Barrow J. in Gallagher v. Canada Coach Lines Ltd. et al.:

"The law is settled that compensation cannot be allowed for mental anguish and suffering or for the loss of a wife's society."24

The judiciary has been overcautious in drawing the line between these two principles and, hence, has failed to draw any definitive line at all.

One of the results of the distinction between loss of services and loss of consortium is confusion over the proper basis for calculating damages for loss of services. The term "pecuniary loss" suggests some relationship to out-of-pocket expenses and the courts have vacillated between this principle and the replacement cost as the proper basis for calculating damages. This confusion was finally resolved by the Supreme Court in the Vana cases in favour of replacement cost as the proper basis of the award.

In the Ontario High Court, Haines J. emphasized the value of a wife's services to her husband. He pointed out that very often it would take two servants to replace a wife as the person who would undertake the menial tasks of housework is rarely suited to discharge

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21 Vana v. Tosta (1964) 45 D.L.R. 2d 574.
22 Vana v. Tosta et al. (1966) 54 D.L.R. 2d 15.
23 Supra, note 15.
24 (1945) O.W.N. 202 at 203.
25 Supra, note 2 at 577: "It is difficult to estimate the cash value of the wife-mother's services, but one need not be a home economist to appreciate their worth. They are and must be worth considerable, even after making the necessary deductions because the plaintiff would not have to clothe the wife-mother substitute nor give her pocket money."
the more exacting duties such as home management and the education and training of children. With these principles in mind he then based his award on an estimate of the cost of replacing certain of those services which are performed by the wife as well as on the loss of income from the part time job. The factors, aside from income, which he relied on were:

1. The expense of employing a housekeeper and perhaps a person to care for the children.
2. The expense of providing room and board for these employees.
3. The expense of providing for the countless services rendered by a wife which are not provided by employees. The approach taken by Mr. Justice Haines is one which should have been approved by the higher courts. The only possible criticism is that he might have shown how he arrived at the final award with more precision and in greater detail.

The Court of Appeal adopted the position that replacement cost is not the prime consideration, but that compensation under the statute is limited to what may be called, out-of-pocket expenses. The Court felt that any attempt to go further would be to enter the realm of compensation for loss of consortium and this was to be avoided at all costs. In reducing the award, the Court considered the fact that the plaintiff did not intend to hire a housekeeper as these services were being provided by Vana's mother at a rate of $30 a week. Moreover, it felt that there was insufficient evidence as to the cost of providing board and lodging for employees. It was felt that this would prove less than maintaining a wife. The court then adopted the position that all mitigating factors would be given full weight and the plaintiff must prove without doubt every item of monetary loss.

The majority in the Supreme Court of Canada rejected the reasoning of the Court of Appeal and reverted to the principle of replacement cost as espoused by Mr. Justice Haines. Spence J. noted that a tortfeasor cannot claim the benefit of services donated to the injured party, such as the housekeeping of the mother in the present case. Having adopted replacement cost as the basis of valuation the Court should have gone on to calculate the damages on this basis. However, this was not done and we are given no precise statement as to what items are to be included in the award.

This failure is perhaps less the fault of the Supreme Court than it is the fault of counsel in fatal accident cases. Canadian lawyers are much more reluctant to present expert evidence as to the cost of replacing services rendered by a wife than are their counterparts in the United States. In the Vana case the only evidence as to the cost of hiring a housekeeper was hearsay evidence given by the plaintiff himself. No evidence was given as to the cost of employing a mother substitute although Haines J. in the trial court specifically asked counsel if they had evidence as to this expense. Perhaps now that replacement cost is established as the proper basis of the award, lawyers will pre-
sent expert evidence to a greater degree and Canadian awards will reflect the true loss suffered by the husband.

A second issue raised by the case is what portion of the wife's income is to included in the award as having been a benefit to the husband and family? The Court of Appeal noted that as the wife's earnings were being paid in advance they must be discounted as any number of factors could have curtailed or reduced this income. Moreover, the wife's actual contribution to the household is unknown because of insufficient evidence as to what she spent on herself. The point made by the Court is that the husband cannot have lost anything of benefit if the wife used the salary for her own maintenance. To decide what portion of the income should be included as compensation, the joint income of the husband and wife is determined and the amount spent on maintaining the wife is deducted.

The amount which must be added to the husband's income to total the remaining money from the joint account is what should be included in the award. In many cases the husband will have more of his own income left after the wife's maintenance is deducted than he would have had the accident not occurred. This is adjusted once the replacement cost of the services provided gratuitously by the wife is added.

A third issue is the effect of contingencies on awards under the Fatal Accidents Act. Because the court is attempting to award one amount for all damages which could result from the accident they have adopted the principle of reducing the capital sum to account for factors which may reduce the loss of which may have reduced the benefit to the relatives. A word should be added here concerning the onus of proof with regard to contingencies. Normally, the onus is on the party for whose benefit an allegation is made. This is not so in the case of fatal accidents. The court presumes that all contingencies apply and the burden is on the plaintiff to rebut such contingencies. Moreover, the burden is very heavy and it is likely that even if evidence is given to rebut the presumption the effect will be merely to reduce the effect of the contingency and not to nullify it entirely.

In Vana the trial judge made little mention of contingencies except to note that, in his opinion, remarriage was unlikely. The Court of Appeal seized upon this fact and used it to reduce the award drastically. The dissenting opinion of Ritchie J. in the Supreme Court agreed almost entirely with the Court of Appeal on this issue. He notes:

"I agree with the Court of Appeal that the learned trial judge erred in principle in including in his award factors which cannot properly be classified as pecuniary loss and that he failed to allow for the contingencies of life."27

The Supreme Court modified the accepted view of the effect of contingencies in its majority judgment as Spence J. warned against giving too much weight to contingencies in reducing the award.

27 Supra, note 3 at page 104.
The major contingency reducing awards in Canadian courts is the possibility of remarriage. Upon remarriage the court assumes that no further loss occurs as a result of the death of the first wife. This item has taken on major proportions in Canada and it is rare that remarriage is not considered imminent within a few years of the death of the first wife. Moreover, the effect of this contingency is to reduce the multiplier used and not simply the capital sum, so the effect is a drastic reduction of the damages. The presumption has proved to be almost irrebuttable although the court does take into consideration the age, health, religion and financial circumstances of the plaintiff as well as the number of dependent children he has to support. The court does not usually consider the possibility that the second wife will not prove to be as good a wife and mother as the first. If this was the case damages would presumably be reduced but not eliminated on remarriage. Also, it would seem fair that if the court is to assume remarriage, the plaintiff should be allowed to recover damages for the expense of courting and marrying his second wife, expenses that he would not have had to face, but for the accident.

In the *Vana* case - the trial judge found remarriage unlikely but the Court of Appeal said there was no evidence to support this assumption. This shows the heavy burden of proof on the plaintiff to rebut this contingency. The majority in the Supreme Court considered that the trial judge was in the best position to decide whether remarriage was likely or not and his finding that it was unlikely amounted to more than a personal opinion and was an opinion which should have been accepted by the Court of Appeal. Plaintiffs may benefit from the conclusion of the court that the possibility of remarriage should not be given too much weight in arriving at the amount to be awarded. It is not clear from Mr. Justice Spence's decision whether this is to be taken as a general principle or whether it was merely a comment on the decision of the lower court. Whatever the intention of the judge, possibility of reducing the contingency should be welcomed by the profession at large. As the court points out, there are many eventualities to be taken into account before the court can decide whether remarriage is likely or not, and it should not be an automatic assumption.

Hence, *Vana v. Tosta* can be viewed as an aid in determining the value of a wife for purposes of the Fatal Accidents Act because of two important principles adopted by the majority in the Supreme Court. The first and most important is that replacement cost is adopted as the proper basis of valuation for services provided by the wife. Secondly, contingencies should not be given too much weight, especially where the evidence does not warrant such emphasis.

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28 The court pointed out that he has a good job and his injuries would not preclude remarriage.

29 *Supra*, note 3 at page 112.

30 The age, religion, physical condition, financial status, and the number of children he has to support are only a few of these factors.
The second area opened up by the Vana case is that of compensation to children for the loss of their mother. The leading Canadian case on the subject is St. Lawrence and Ottawa Railway Co. v. Lett. In this case “injury” under the Fatal Accidents Act was defined as meaning substantial loss as opposed to sentimental loss and substantial loss was not to be confined to a pecuniary interest. As Ritchie C.J. pointed out, the statute does not use the term pecuniary and so, such a narrow and confining term should not be read into the statute. He stated that, in the case of the death of a mother, compensation should be awarded for:

“The greatest injury it is possible to conceive a child can sustain, namely, in being deprived of the care, education and training of a mother.”

The dissent in this case expressed the fear that because these services are neither procured nor procurable with money they are not susceptible to having a pecuniary value attached to them. To attempt to do so would result in highly speculative awards. In spite of this fear however, the Lett case has been followed and approved almost without exception throughout Canada.

Mr. Justice Haines echoed the Lett decision when he stated that:

“In their mental, moral, and physical development they were entitled to the assistance and guidance of both parents. Now they have only one, and I consider the loss of their mother one of the greatest losses these children could sustain.”

It is evident that Haines J. has strong views with respect to damages under these circumstances. At page 62 of the Examination-in-Chief of George Vana he observed:

“I have very definite views in respect of this in fatal accident claims . . . It does seem to me that we have overlooked one thing, it is logical to have the advantage of mother love for the care and guidance of children, something we have avoided . . . I am quite prepared to blaze new trails in that direction. It does seem to me there is very often a real loss in the absence of guidance. The understanding given a child by a mother, the guidance which assists development, the judgment, all those things, surely have a value and I think you will find the sociologists tell us that a proper mother substitute requires constant training. This is not loss of consortium.”

Haines J. then asked whether counsel had inquired at various social services into what it would cost to hire someone to render the

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31 (1885) 11 S.C.R. 422.
32 Supra, note 3 per Ritchie C.J. at 426.
33 Id., at page 432.
34 Supra footnote 3 per Gwynne J. at 445.
36 Supra, note 21 at 577.
37 Quoted from the appellant's factum. p. 62 of the Examination in Chief of George Vana.
services of a mother. Thus, it is quite apparent that Haines J. was concerned with discovering the replacement value of a mother and it was on his estimate of this value he based his award to the children.

The Court of Appeal purported to overrule the Lett case although it had been followed repeatedly in Canada. MacKay J. pointed out that English courts have not adopted the principle of compensation to children for the loss of the care and guidance of a mother. He felt that the Lett case was based on an improper interpretation of English cases. While the Court of Appeal appeared to be unilaterally attempting to overthrow the principles of stare decisis and declare a decision of the Supreme Court poor law, Mr. Justice MacKay did express the hope that this problem might again come before the Supreme Court for consideration.

In considering the question of damages to the children, the Supreme Court of Canada affirmed the Lett decision in very precise language. Unfortunately, from a jurisprudential point of view, the court did not say whether it considered the Lett case binding on the Supreme Court or whether it was followed because it is a good decision in principle and one which the Court wished to apply for that reason.

Significantly, the Supreme Court dismissed the necessity of finding a moderate sum as damages in such cases. The Court of Appeal was concerned with these damages becoming unduly generous. The Supreme Court pointed out that an award based on all the circumstances existing at the date of the accident could avoid excessive damages without necessarily adopting the principle of nominal damages for the substantial loss of a mother. The Supreme Court then concluded that the amount awarded by the Court of Appeal was a purely “conventional figure” was not based on the evidence and was, therefore, wrong in principle. At the same time, Spence J. held that the trial judge’s assessment was “inordinately high and amounted to a wholly erroneous estimate of the damages.” The Court then chose a figure double the amount awarded by the Court of Appeal.

Surely this award must be subject to the same “conventional assessment” charge which the Supreme Court made against the Court of Appeal. The problem is that while the Court has decided that the children’s loss is substantial it has not decided how to evaluate this loss. The husband can recover as replacement cost the value of such mother substitutes as he has to employ. The children have no such expense. Moreover, the courts have decided that actual emotional

38 Supra, note 35.
39 Supra, note 22, see especially pages 21, 25, and 27.
40 Supra, note 3 per Spence J. at p. 185: “Despite anything that was said in Grand Trunk Railway or comments made in the Australian and New Zealand cases the decision of this court in St. Lawrence is unaffected and remains good law in Canada.”
41 Id., at 116 see also Benham v. Gambling (1941) A.C. 157.
42 Id., at 117.
43 Id., at 116.
suffering is not recoverable because this is loss of *consortium.* Clearly the loss of the care and guidance of a mother is a substantial loss to the children. This should be especially so today when we have a more complete understanding of child psychology than we did at the time of the *Lett* decision. The purpose of the *Fatal Accidents Act* is to compensate for injuries resulting from the death of a near relative. It is submitted that it is almost impossible to assess this loss. What is needed is a statutory minimum to be awarded to each child on the basis of age, sex, and the sex of the deceased parent. For example, a girl will suffer more from the loss of a mother than would a boy of the same age, and yet a boy of two or three years would suffer more as a result of the loss of his mother than a girl of ten or twelve. The award should be based on minimum rather than maximum amounts because the court should have a discretion to award any amount it sees fit if there is evidence to support the extra claim. Some American jurisdictions have adopted this method and it would seem to be the best solution to the problem.

**CONCLUSION AND EVALUATION**

The *Vana* case must be considered as a disappointing judgment. The case arose in such a manner that the whole question of damages in fatal accident cases was open to review. The Court chose not to deal with the case in this manner however, and simply affirmed the *Lett* case and chose a neutral amount of damages half-way between the damages proposed by the trial court and the amount assessed by the Court of Appeal. This is a continuation of the "numbers game" so beloved by jurists and legislators alike, and bears no real relationship to the damages actually suffered as a result of the accident.

Part of the blame for the uncertainty in this area can be directed by the draftsmanship of that Act itself as no statutory definition is provided as to what damages are to be allowed. All we are told is that "such damages may be awarded as are proportioned to the injury resulting from such death." No definition of "injury" is provided and so it has been left to the courts to determine what is meant by this term. The Canadian courts, following the English example, have decided that the injury referred to in the statute is

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44 It is of interest to note that under present law in DeBrincat v. Mitchell (1958) 26 W.W.R. 634 at 636 the court disallowed a claim for extra damages to a boy who was shown to be suffering great emotional shock as this was regarded as being a loss of consortium.

45 This is due partly to Haines J's liberal approach to the question but is mainly due to the narrow view taken by the C.A.

46 An example of this is provided in the present case. We are told by the Supreme Court that the amount to be allowed for the loss of the care and guidance of a mother is to be increased to $2,000 for the girl and $1,000 for the boy. The mother also saved $200 a year for education of the children. Assuming ten years of such savings, as does the trial judge and, we assume, the Supreme Court this means that a sum of $1,000 per child plus interest is available for their education. Yet the Supreme Court awarded each child $1,000 more than this figure and we are left with no rational basis for the award except for the gnawing suspicion that the award was calculated by doubling the figure awarded by the Court of Appeal.

47 *Supra,* note 1, section 3(1) of the Act.
pecuniary loss and that no amount should be allowed for pain and suffering or for the loss of the society of the deceased. Assuming that this is a proper course of action, the courts should then have decided what losses are pecuniary and on what basis the amount of damages will be calculated.

If it can be said that the courts have attempted to do this at all, it is evident from the Vana case that this has been done in a very imprecise manner. Admittedly, the Supreme Court impliedly affirms the view that the proper basis on which to calculate damages should be the replacement cost. What is now required, especially in the case of the wrongful death of married women, is a judicial definition of what services are to be compensated on this basis. The plaintiff could then submit expert evidence of the replacement cost of these services at the time of the accident. In arriving at the final assessment the court should set out how much it is allowing for each item of pecuniary loss. Total damages may then be calculated on the basis of the length of time these services could be expected to be rendered. Such a method of calculating damages should result in more accurate and, hence, fairer awards.

The courts have adopted the principle of reducing the lump sum damages to allow for contingencies which cannot be foreseen with certainty at the time of the trial. While this is sound in principle the method of implementation is again vague and imprecise. The Vana case states that excessive weight must not be given to these contingencies. This is an improvement. Formerly they had a drastic diminishing effect on awards in Canada. A more serious complaint, however, is that seldom do the courts define what contingencies they take into account and, hence, it is even more seldom that any precise reduction is clearly attributable to these contingencies. The problem is that, no matter on what basis the contingencies are estimated, they can never be more than a calculated guess. A solution might be the abandonment of the lump sum award in favour of periodic payments based on the principles used in alimony cases. This would allow for a reduction or curtailment of the award if circumstances change to warrant a revision of the award, such as on the remarriage of the husband or wife. Some contingencies, of course, could be considered.

48 Flynne "Damages—Deaths of Wives and Children in the Culture Today" (1966) 38 N.Y.S.B.J. 241. The article quotes an article in American Home Magazine Jan. '59 which sets out various services performed by a wife and values her services at $193.95 per week on a replacement cost basis.

49 The multiplier will vary with each individual item, depending on the nature and character of the services.

50 Supra note 3, per Spence J. at 114 "After reviewing the evidence and giving due weight to the possibility of remarriage, remote as it may be, and what it will cost to hire a housekeeper and the other factors involved, I have reached the conclusion that an award of $14,000 should be made." This statement purports to tell all but really tells us nothing. We do not know what other factors he is referring to nor what amount was allowed for the factors he does mention.

51 Waldron v. Rural Municipality of Elfros (1922) 3 W.W.R. 1227. Here the jury awarded damages of $500 a year to the widow until death or remarriage. The Court of Appeal said this type of award exceeded their powers and damages had to be reassessed.
cannot be accounted for in this manner as they relate to changes which might have occurred had the deceased not been in the accident. These must be accounted for in a lump sum award and, if approached in a reasonable manner and taking all the circumstances into account, a percentage reduction in the award would be justified.

The Fatal Accidents Act purports to compensate for injuries resulting to near relatives of the deceased as a result of the accident. There is no justification for the preoccupation of the courts with pecuniary loss. It is settled that a husband may recover for the loss of consortium when his wife is incapacitated by an accident and he may recover for pain and suffering when he himself is injured. Why then is there a distinction between these cases and the case where the husband loses his wife forever? McDonald C.J.B.C. pointed out in a decision of the B.C. Supreme Court that:

"Probably the distinction turns on the theory that a bereaved husband may remarry, whereas, if his wife is incapacitated but living, he cannot".52

This explanation does not preclude damages for loss of consortium where the husband does not remarry, nor does it explain why he cannot recover for loss of consortium during the period between the accident and remarriage. Moreover, the American judiciary has adopted the attitude that a spouse may recover for loss of consortium. This seems to be working out very well, in spite of the fact that very substantial awards are given in many cases.53 The U.S. position is well stated in Spangler v. Helm's New York Pittsburgh Motor Express where the court remarked: "All these things such as companionship, society, guidance, solace, and protection which go into the vase of family happiness are things for which a wrongdoer must pay when he shatters the vase."54

In conclusion the law concerning damages under the Fatal Accidents Act is vague, imprecise, and unjust. The case of Vana v. Tosta does little to remedy this situation. The contributions made by this case are three in number. In the first place, replacement cost is now the proper basis for calculating damages for loss of services. Secondly, contingencies should not be given too much weight in calculating damages. Finally, it is now clear that children can recover for the loss of the care and guidance of a mother.

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53 Legare v. United States 195 F. Supp. 577; Here the court awarded $150,000 for the death of a mother of six children, including $25,000 for the loss of consortium.
54 553A (2d) 490 at 492.
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