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on

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Damages for Loss of Expectation of Life

By

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S Y N O P S I S

I. 1. After the decision in Flint v. Lovell, our courts have adopted the principle of awarding damages in personal injury cases for shortened expectation of life.

2. The rules in the estimation of damages under this head as framed in Benham v. Gambling are nebulous and in practice give little assistance. The award of damages therefore tends to be arbitrary.

II. 3. Both under English Law as it stood before 1934, and under Indian Law, action for personal injuries including loss of expectation of life, do not survive.

4. English law was modified by the Law Reform (Miscellaneous Provisions) Act, 1934, whereby all actions for personal injuries (except a few like seduction etc.) including shortened expectation of life would survive for the benefit of the estate of the deceased.

5. The Supreme Court and some High Courts have followed the English decisions and interpreted S.2 of the Fatal Accident Acts, 1855 as equivalent to the provisions of the English Act of 1934. This was not warranted by the actual wording of our laws; the result is our law has unnecessarily become unsatisfactory.

III. 6. Survival of claim for shortened expectation of life is not consistent with the primary functions of Law of Torts: the shortcomings and defects in the existing law can be cured by wider interpretation of S.1-A of the Fatal Accidents Act, 1855.

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I. Origin of the Claim for Damages for Shortened Expectation of Life - Estimation of Damages

In personal injury cases, till 1935, no claim to recover damages for curtailing the expectation of life was ever entertained by courts either in England or in India. That year, the decision in Flint v. Lovell[1] added for the first time a new dimension to the claims for damages for personal injuries. In that case the Court of Appeal, while confirming the decision of the trial court, held that if aperson suffered personal injuries from negligence there could be included in the estimate of damages consideration of the fact that by the wrongful injury his normal expectation of life has been shortened. The principle has been approved by the House of Lords in Rose v. Ford.[2] There, Lord Wright projected the idea in these words:

> "/A/ man has a legal interest entitling him to complain if the integrity of his life is impaired by tortious acts, not only in regard to pain, suffering and disability, but also in regard to the continuance of life for its normal expectancy. His normal expectancy of life is a thing of temporal value, so that its impairment is something for which damages should be given."[3]

The principle is now well entrenched in English Law, and the same has been adopted by the courts in India by heavily relying on English decisions.[4]

It was by far easier to accept theoretically the right to claim damages for shortened expectation of life; but in the estimation of damages under this

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1. (1935) 1 K.B. 354. Here, the plaintiff was an old man of 70 years, wealthy and in good health and vigour for one of his age. Because of the defendant's negligence, he sustained serious injuries the result of which was, according to the medical evidence, that he was expected to live under a year while otherwise he could have lived an enjoyable, vigorous and happy life for another ten years. The trial court under this head of damages for shortened expectation of life awarded £ 4000 to the Plaintiff.
2. (1937) A.C. 826.
3. Id. at 848.
4. See Manindra Nath v. Mathura Das, A.I.R. 1946 Cal. 175. There are very few reported cases in which the plaintiff is the injured person alive at the date of trial.

head, the difficulties the courts have had to face appear to be almost endless and unsurmountable. In Flint v. Lovell itself, the apprehensions of such difficulties were echoed by Roche L.J., when he said, "Finally, this head of damage seems to me to involve inquiries and speculations in appropriate to and difficult for a court of law as for example the disposition of and outlook on life as well the material circumstances of the plaintiff."[5]

The defendant's wrongful act has curtailed the life-span of the plaintiff. By medical evidence and actuarial tests the diminution of the prospect of the length of life can be substantially measured. But what value is to be attached to life or any portion of it? Are damages to be estimated only in relation to the loss in length of life? No definite answer appears to have been given either in Flint v. Lovell or Rose v. Ford. In a later decision of the House of Lords in Benham v. Gambling[6] Vicount Simon L.C., while indicating the main considerations to be borne in mind in the assessment of damages in such cases, observed, "...the thing to be valued is not the prospect of length of days, but the prospect of a predominantly happy life. The age of the individual may, in some cases, be relevant factor ....but ... arithmetical calculations are to be avoided ... for the reason that it is no assistance to know how to put a value on years may have been lost, unless one knows how to put a value on years.... /B/efore damages are awarded in respect of the shortened life of a given individual under this head, it is necessary for the court to be satisfied that the circumstances of the individual life were calculated to lead on balance, to a positive measure of happiness, of which the victim has been deprived .... If the character or habits of the individual were calculated to lead him to a future of unhappiness or despondency, that would be a circumstance justifying a smaller award."[7] The Lord Chancellor, while considering the question of loss of expectation of happiness further held that (i) No regard must be had to financial losses or gains during the period of which the victim has been deprived; (ii) Wealth

5. (1935) 1 K.B. 354, at p.368.
6. (1941) A.C. 157.
7. Id. at pp.166-167.

and status may be ignored as happiness to be attained by a human being does not depend upon them; (iii) The capacity or ability of the plaintiff to appreciate that his further life would bring him happiness is not relevant; the test is not subjective and damages should depend on the objective estimate of what kind of future the victim might enjoy.

The method of assessing damages as was suggested in Benham's case, does not appear to be precise; on the contrary, it seems to be nebulous and variable. The decision in Benham v. Gambling has been serverely criticized for more than one reason. It has been said that "in the guise of giving guidance on the question of assessment of compensation... the House of Lords in Benham v. Gambling really varied the basic principle of the earlier case. The loss of expectation of life as such and the loss of expectation of happiness are two different ideas and must result in different values."[8] C.K. Allen commented,"....imagination reels at the difficulties which they the lower courts will experience in attempting to reduce to cash each individuals's 'prospective measure of happiness'. How shall the measure be measured. Presumably by a material standard, which in such a matter is notoriously fallacious. Happiness is a state of mind, and any copy-book will tll us that it has little to do with material circumstances. Men are not ahppy because they ought to be happy. The pampered child of fortune may regard his expectation of life with utmost weariness; the victim of persistent adversity may be extremely tenacious of what seems to others a miserable existence."[9] It has been commented, "It is this uncertainty which is the crux of the matter. Because no adequate standard can be suggested by which future happiness is to be measured, their Lordship's have fixed a very low sum. It would perhaps have been more logical if they had reached the conclusion that uncertainty was so great that no damages at all should be awarded, but they were precluded from taking this course owing to the decision in <u>Rose v. Ford</u>....in which the rule laid down in <u>Flint v. Lovell</u> was affirmed."[10]

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8. S. Ramaswami Iyer, <u>Law of Torts</u>, 6th ed. (1965), p.59.
9. C.K. Allen, <u>Is Life a Boon?</u>, (1941) 57 L.Q.R. 462, 465.
10. (1941) 57 L.Q.R. 153, 154.

Though the direction, given by the House of Lords in Behham's case, to regard happiness abstract and apart from wealth or status, might not be easy to follow or carry out, the courts is England are bound by the decision and would follow the direction in assessing damages for shortened expectation of the House of Lords, have preferred to follow it without attempting to seek other suitable alternatives. In a recent decision in Abdulkadar v. Kashinath,[11] Patel J., has questioned the propriety of some aspects of the directions given by the House of Lords in Benham's case. He says," The general principles stated by the learned Lord are unexceptional. However with great respect it is difficult to appreciate how the social position of the deceased can be disregarded ....The prospect of a happy life ... undoubtedly must vary according to the social environment of the person."[12]

The Madras High Court has adverted to the difficulties involved in following the directions given in Benhma's case, when it observed, "But the application of the principles to given set of facts is not yet free from difficulty. The balance of prospective happiness of the individual has first to be ascertained and that has to be commuted to money-value. Even the best and at least judicial endeavour to discharge this task of ascertainment of damages cannot possibly eliminate some speculation or imaginative thinking."[13] Can this speculation and guess-work be avoided by departing from the trend of English decision and by evolving new criteria for the assessment of damages for shortened expectation of life? Blind approval or disapproval of English decisions, or for that matter of any decisions, will hardly be conducive to robust growth of our law! Many a time English decisions are followed without critically examining their merits in the context of our own conditions and our own legal structure. This will be more apparent when we consider the survival of cause of action for loss of expectation of life after the death of the injured person.

II. Survival of Cause of Action for Loss of Expectation of Life.

(a) Position before 1934

In England, before the Law Reform (Miscellaneous Provisions) Act, 1934 was enacted, 'the earlier law

11. A.I.R. 1968 Bom.267.
12. Id. at p.271.
13. Krishna Gounder v. Narasingam Pillai, A.I.R.1962 Mad. 309, at p.312.

had limited the survival of actions to torts affecting property.[14]

In India, though the law was somewhat liberal regarding survival of actions, yet, as in England, here too, it did not allow survival of any cause of action for personal injuries. The Legal Representatives' Suits Act, 1855 allowed survival of action for wrongs causing pecuniary loss to the estate;[15] while section 306 of the Indian Succession Act, 1925, -- which re-enacts s.268, Indian Succession Act, 1865, and s.89, Probate and Administration Act, 1881, provides that all causes of action in favour of or against a person survive except, those for defamation, assault, as defined in the Indian Penal Code, and other personal injuries not causing the death of the party.[16] The term 'personal injury' has been understood to mean not merely physical injury but also any injury other than one to the estate of the deceased person; for instance, an action for libel or malicious prosecution would abate on death of either party.[17]

Therefore, before the (English) Act of 1934 was passed, both in England&in India, causes of action for personal injuries (including physical) injuries, and even 'the loss of expectation of life' if ever it had existed before the decision in Flint v. Lovell, did not survive after the death of the injured party. This is, so far as Indian Law is

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14. Winfield, The Law of Tort, 7th ed.(1963),p.122.
15. Section 1 of the Legal Representatives Suits Act, 1855:
"An action may be maintained by the executors, administrators or representatives of any person deceased for any wrong committed in the time of such person, which has occasioned pecuniary loss to his estate for which an action might have been maintained by such person, so as such wrong shall have been committed within one year before his death; and the damages, when recovered, shall be part of the personal estate of such person:...."
16. Section 306 of the Indian Succession Act,1925:
"All demands whatsoever and all rights to prosecute or defend any action or special proceedings existing in favour of or against a person at the time of his decease, survive to or against his executors or administrators; except causes for defamation, assault as defined in the Indian Penal Code or other personal injuries not causing death of the party, the relief sought could not be enjoyed or granting it would be nugatory."

concerned, quite obvious from Illustration(1) to S.306 of the Indian Succession Act, 1925. The illustration states - "A collision takes place on railway in consequence of some neglect or default of an official, and a passenger is severely hurt, but not so as to cause death. He afterwards dies without having brought any action.[18] The cause of action does not survive."

It is true that a plain reading of S.306 may lead us to think that the cause of action for personal injury will survive if the injury causes death. This is true in a limited sense. The sruvival of this particular cause of action is only to give full effect to the provisions of special statutes made in favour of the relatives of the deceased whole death is caused by a wrongful act. The distinction made between personal injuries on the basis of their consequences being fatal or otherwise, only suggests that the legislature while enacting s.306 has taken into account the impact of the enactments like Fatal Accidents Act, 1855. It has been observed, "In section 306 of the Indian Succession Act, 1925 (and in the earlier two Acts), the survival of the cause of action on death as a result of injuries took into account the Fatal Accidents Act, 1855, and after the workmen's Compensation Act was passed it can be said also to be comprehended in the reference in section 306 of the Indian Succession Act, 1925.[19]

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17. S. Ramaswami Iyer, op.cit.,supra note 8, atp.574; see also Rustomji v. Nurse(1920) I.L.R. 44 Mad. 357; Mahtab Singh v. Hub Lal,(1926) I.L.R. 48 All. 630; Punjab Singh v. Ramantar,(1919) 52 I.C. 348.
18. If the action is brought by the injured person who dies during the pendency of the suit, the result will not be different. The suit shall abate according to O. XXII r.1 of C.P.C. read with S.306 of the Indian Succession Act.
19. Per Hidayatullah J., in Kantilal v. Balkrishna, (1950) I.L.R. Nag.239, 266.

It is very clear that the cause of action for personal injuries not resulting in death of the injuried person, shall not survive to his legal representative. Now, if the survival clause in S.306 is to be so liberally construed as to allow the legal representative to recover damages for personal injuries caused to the deceased simply because the injuries resulted in his death, it is in substance allowing the legal representative to recover damages for wrongfully causing the death of the deceased. This result, obtained through the liberal construction, may have the effect of punishing the wrongdoer (and that too only in such cases where his wrongful act results in death), but will completely miss the main object of the law of Torts, namely, to compensate a person for losses sustained due to another's conduct. The legal representative may not have suffered any loss by the death of the deceased; and in the case there is any loss it is taken care of by the Fatal Accidents Act, 1855.

Such a liberal construction does not appear to have been favoured by any court in India before 1934. Nor does it appear from the reported cases that any such contention was ever raised by the legal representatives, though they for their loss did receive damages under S.1-A of the Fatal Accidents Act, 1955 or for pecuniary loss to the estate of the deceased, under S.2 of the said Act of 1855.

(b) Position after 1934.

The English enactment, the Law Reform (Miscellaneous Provisions) Act, 1934 provides that all causes of action vested in any person shall on his death survive for the benefit of his estate. The only exceptions made are in respect of causes of action for (i) defamation, or (ii) seduction or (iii) inducing on spouse to leave or remain apart from other or (iv) damages for adultery.[20] The Act had been the subject of judicial scrutiny in several cases, and now it is well settled that once the cause of action for shortened expectation of life vests in a person, it shall after his death survive for the benefit of his estate.[21]

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20. Section 1(1) of the Law Reform (Miscellaneous Provisions) Act, 1934:
"Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate.

It has been further held that the cause of action shall survive even if there be but a split second between the injury and ensuing death.[22] It appears that even if death is the instantaneous result of the injury as in case of an electric shock, yet the cause of action for shortened expectation of life shall survive for the benefit of the estate of the deceased.[23]

So far as survival of causes of actions for personal injuries are concerned, we have seen that before 1934, the law in England and India was the same and that such causes of actions did not survive for the benefit of the estate of the deceased. However, while in England the law has been modified by the Act of 1934 so as to allow survival of such causes of actions, Indian law on this topic continues to be the same in the absence of any statutory modifications. It is however, interesting to notice that during the last few years, courts in India have attempted to interpret our law in such a way as to incorporate in it the substance of the English enactment of 1934.[24]

The decision of the Supreme Court in Gobald Motor Service Ltd. v. Velusami[25] appears to be largely responsible for setting in this new trend. In that case, the Supreme Court while

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Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims under section one hundred and eighty-nine of the Supreme Court of Judicature (Consolidation) Act, 1925, for damages on the ground of adultery."

21. See Rose v. Ford, (1937) A.C. 157; Benham v. Gambling (1941) A.C. Yorkshire Electricity Board v. Naylor, (1967) 2 All. E.R. 1.
22. Morgan v. Scoulding, (1938) 1 K.B. 786.
23. Yorkshire Electricity Board v. Naylor, (1967) 2 All. E.R. 1.
24. See Concord of India Insurance Company v. Subramonia Iyer, A.I.R. 1964 Ker 209; G.M. Service Ltd. v. Velusami, A.I.R. 1953, Regional Director v. D.M. Breweries Ltd. A.I.R. 1958 Punj. 136; Krishna Gounder v. Narasingam, A.I.R. 1962 Mad. 309 Abdulkadar v. Kashinath, A.I.R. 1968 Bom. 267; etc.
25. A.I.R. 1962 S.C. 1.

interpreting the provisions of the Fatal Accidents Act, 1855, said - "While section 1 of the Act is in substance a reproduction of the English Fatal Accidents Act ...known as Lord Cambellis Act, section 2 therefore corresponds to a provision enacted in England by the Law Reform (Miscellaneous Provisions) Act, 1934. The cause of action under section 1 and that under section 2 are different. While under section 1 damages are recoverable for the benefit of the persons mentioned therein, under section 2 compensation goes to the benefit of the estate; whereas under S.1 damages are payable in respect of loss sustained by the persons mentioned therein, under section 2 damages can be claimed inter alia for loss of expectation of life.[26]

Section 2 of the Fatal Accidents Act, 1855 consists of two provisos only. Naturally they are to be considered as provisos to the rule rule contained in the next preceding section 1-A which deals with "suit for compensation to the family of a person for loss occasioned/it /to by his death by actionable wrong." The first proviso enjoins that not more than one action shall be broughtfor the same subject matter. The Second Proviso is:-

"Provided that in any such action or suit, the executor, administrator or representative of the deceased may insert a claim for and recover any pecuniary loss to the estate of the deceased occasioned by such wrongful act, neglect or default, which sum, when recovered shall be deemed part of the assets of the estate of the deceased."

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26. Id. at pp.6-7.

While the first proviso enjoins non-multiplicity of actions for the same subject matter, the second proviso allows to insert in the action under section 1-A a claim for any pecuniary loss to the estate of the deceased. The joinder of this claim with one under section 1-A is contemplated only if both the claims arise out of the same wrongful act.

Now, it is not easy to consider claims in respect of physical injuries (including pain and suffering and loss of expectation of life) as 'any claims for any pecuniary loss to the estate of the deceased."

In section 1 of the Legal Representatives Suits Act, 1855, which allows the legal representative of the deceased to sue the wrongdoer in respect of any pecuniary loss to the estate of the deceased, the wrods used to describe the loss are quite identical with those in section 2 of the Fatal Accidents Act, 1855. And yet, no one would ever think that the legal representative would sue under the Legal Representatives Suits Act for any pain and suffering, or loss of expectation of life, caused to the deceased before his death. This provision in the Act has been consistently understood by the courts to be applicable only in respect of wrongs done to the estate of the deceased. This Act was passed in 1855 and in the same year the Fatal Accidents Act was also passed. The legislature could hardly have intended to give different meanings to the same expression used in the two enactments passed in the very same year.

The Supreme Court has expressed the view that section 2 of the Fatal Accidents Act corresponds to a provision enacted in England by the Law Reform (Miscellaneous Provisions Act, 1934. A close look at the wording of s.2 as well as that of the English Act of 1934 will show that in fact they do not correspond with each other.

The Fatal Accidents Act is on the Statute Book for more than a century. The Act has been subject of judicial interpretation and comment in several reported decisions. But hardly there is any case, reported before 1950 in which claims in respect of physical injuries were ever entertained under S.2 of the Act.[27]

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27. For comparison, see Secretary of State v. Gokal Chand, I.L.R.(1926) 6 Lah.451.

III. - Purpose in allowing Survival of cause of action for Shortened Expectation of Life.

Apart from the question whether it is justified to interpret our existing law as to read in it the provisions of the English Act of 1934, there is another equally important consideration. Even if the construction put on our law is somewhat strained and a bit divorced from the actual wording of the law, and also may be, not quite consistent with judicial precedents, yet it should be tolerated and even welcomed, provided it serves some important social purpose and is more conducive to attain the objectives of the particular law.

The object of the law of torts is not to punish the wrongdoer. That is left to the domain of criminal law. The primary function of the law of torts is "to adjust the incidence of loss caused in the many activities of modern life and to compensate a person for losses sustained due to another's conduct."[28]

So, before one person is made to pay compensation to the other, it must be established that the other suffered some loss. If due to the wrongful act of one the other man's life-span is shortened, the wrongdoer should be asked to pay damages to the other for the loss of expectation of life. This is what the decision in Flint v. Lovell did. But what is the loss suffered by others (these may be the relatives, friends and well wishers of the deceased) when such injured person dies? If they in fact do not suffer any loss by the death, they should not be allowed to invoke the doctrine of survival of cause of action for the shortened expectation of life or for pain or suffering caused to the deceased. It may however be that some persons might be receiving support and pecuniary advantage from a person whose life is cut short by the wrongdoer. Here then is a valid case for asking the wrongdoer to make good the loss of these persons. This is excatly what is aimed at in enacting the Fatal Accidents Act, 1855. For this purpose it is unnecessary, inexpedient and inadequate to allow the personal representatives of the deceased to recover from the wrongdoer such damages as the deceased himself could have recovered if alive. For, it may happen that the dependants of the person deceased or some of them may not be the personal representatives. Secondaly the damages so recovered may not have proper relevance to the actual loss suffered by the dependants.

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28. Cecil A Wright, Abolition of Claims for Shortened Expectation of Life, (1938) 16 Can. B.R. 193, 196.

Death of a person may as well result in a different type of loss, which though not pecuniary may yet be more pinching. The pleasant relations between husband and wife, child and parent, etc. may be cut short by the death of either of them. And if the death is caused by a wrongful act, there is no reason why the other should not get damages even though that person might not have had any support or pecuniary advantage from the deceased. For instance, the parents may not in any way be dependant on the infant son or daughter; yet something much more precious than any pecuniary advantage is lost to the parents by the death of the infant. Survival of cause of action for shortened expectation of life or for pain or suffering caused to the deceased, is not the proper and adequate remedy to meet the situation, for reasons already mentioned in another context. The laws in England and India at present do not make any explicit provision to compensate such loss. However, in Abdulkadar v. Kashinath[29] a bold attempt has been made by the Bombay High Court in holding that a claim for damages on the ground of loss of consortium can be included in an action for damages under section 1-A of the Fatal Accidents Act, 1955. In that case, Patel J. of the Bombay High Court observed, "The section as worded clearly entitles all those for whose benefit the action is brought to an award of damages for the injury suffered by any one of the claimants. The word 'injury'[30] is a word of large import and cannot be restricted to mean monetary damages that the claimant has suffered; the claimant would also be entitled to compensation in respect of any other injury suffered, and one of the heads of such injury would be the loss of society of the deceased."[31] If the line taken by the High Court of Bombay is followed and further developed by other High Courts and the Supreme Court, the gap in law would be adequately filled without any necessity of the intervention of the legislature.

For all these reasons, in the ultimate analysis, it is neither necessary nor expedient to allow survival of cause

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29. A.I.R. 1968 Bom. 267
30. The word 'injury' os not used in section 1-A of the Act in relation to the dependants; the actual words used are "the court may give such damages as it may think proportionate to the loss resulting from such death to the parties respectively". This however will not affect the force of the point made by Justice Patel.
31. A.I.R. 1968 Bom. 267, at p.270.

of action for loss of expectation of life (or for that matter, even for pain and suffering, and physical injury caused to the deceased). It is respectfully submitted that the law after it was interpreted by the Supreme Court in Gobald Motor Service Ltd., v. Velusami[32] has become less rational than it was before that decision. It is to be hoped that the Supreme Court would take some opportunity to reconsider its decision referred to above, and as well give its authoritative opinion on the view taken by Patel J. in Abdulkadar v. Kashinath.[33]

It will not be out of place to mention here some of the general reactions noticed in other countries to the law relating to survival of cause of action for loss of expectation of life.

In England, almost right from the passing of the Act of 1934, the need to make suitable amendment in it was felt and often voiced.[34] Lord Devlin expressed his view in Yorkshire Electricity Board v. Naylor,[35] "It would, I think be a great improvement if this head of damage was abolished and replaced by a short Act of Parliament fixing a suitable sum which a wrongdoer whose act has caused death should pay into the estate of the deceased."

In most of the States in Canada, legislations have abolished claims for shortened expectation of life in an action by a personal representative of a deceased person.[36]

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32. AIR 1962 S.C.1
33. AIR 1968 Bom. 267; It has been observed, "It would, perhaps, have been better to enlarge the rights of the dependants under the Fatal Accidents Acts so as to include general damages for the loss they have sustained, as distinct from loss of a purely financial character".
    Winfield on Tort, 7th ed. (1963) at p.143.
34. See, (1941) 57 L.Q.R. 153; also Id. p.462.
35. (1967) 2 All E.R. 1, 12.
36. See, wright, Cases on the Law of Torts, 4th Ed. (1967) p.659.