

death. Here the child was an infant of 4 years of age, healthy, intelligent, and with as good a prospect of prolonged life as any infant of that age can be said to have. Was its death a damage to the parent within the meaning of the Act? Having regard to the position in life of the latter, I cannot hold that in point of law it was not, or that, in the case of a child of that description, damages to be estimated by such considerations as the decided cases warrant may not be sustained. The question is for the jury, upon the evidence. It is settled that pecuniary benefit or advantage need not have been actually derived by the beneficiary previous to the death, and therefore the then present inability of the deceased to confer such benefit or advantage is not conclusive against the right to recover. The probability of the continuance of life and the reasonable expectation that in that event pecuniary benefit or advantage would have been derived are proper subjects for consideration. . . .

I am on the whole of opinion that on the evidence a recovery is warranted by the rules or principles established in *Pym v. Great Northern R. W. Co.*, 2 B. & S. 759, and in such cases as *Franklin v. South Eastern R. W. Co.*, 3 H. & N. 211; *Dalton v. South Eastern R. W. Co.*, 4 C. B. N. S. 296; *Duckworth v. Johnson*, 4 H. & N. 653; *Wolfe v. Great Northern R. W. Co.*, 26 L. R. Ir. 548; *Blackley v. Toronto R. W. Co.*, 27 A. R. 44n.; and others. The cases of *Renwick v. Galt*, etc., *R. W. Co.*, 12 O. L. R. 35, 37, *Clark v. London General Omnibus Co.*, [1906] 2 K. B. 645, and *Jackson v. Watson*, [1909] 2 K. B. 193, may also be referred to.

The damages, though they err on the side of liberality, as they usually and perhaps inevitably do in these cases, not being capable of being estimated with exactitude, are not so large as to invite interference; and I would therefore affirm the judgment and dismiss the appeal.

GARROW, J.A.:— . . . If it appeared that the infant was a cripple or an imbecile, or if its age was so tender that there could be no reasonable evidence given of its mental or physical capacity or condition, it would be otherwise. But in the present case the evidence clearly discloses that the infant killed was a bright and capable boy, both mentally and physically; and I therefore agree—reluctantly, I admit—that there was evidence which could not have been withdrawn from the jury; and the judgment must therefore be affirmed.

MAGEE, J., concurred.

MOSS, C.J.O., and MACLAREN, J.A., dissented, for reasons stated at length by the former.