OTLA Conference Paper

FLA FATALITY CLAIMS UPDATED

Richard C. Halpern, Partner, Thomson, Rogers
and
Veronica S. C. Rossos, Associate, Thomson, Rogers

This paper will briefly examine a dependant's right to sue in tort for damages occasioned by the accidental death of a family member pursuant to the provisions of section 61 of the *Family Law Act*, R.S.O. 1990, c. F. 3, as amended.

In light of recent developments in the case law of Ontario, it appears that the scope of recovery for *Family Law Act* claimants has been expanded beyond the traditional. This paper will focus specifically on recent case law in fatal accident claims and how these decisions have served to expand the scope of recovery.

RECOVERY IN FATALITY CLAIMS

In the case of an accident that is determined to be wholly or partially the fault of an individual other than the deceased, any eligible family member of that deceased is entitled to bring a claim, in their own name, against the at fault party for recovery of pecuniary losses pursuant to the provisions of the *Family Law Act*.

In Ontario the statutory scheme that permits an eligible family member to maintain an action for the recovery of damages as a result of a fatal accident is the *Family Law Act*.

The rights of a family member are set out in Part V of the *Family Law Act*, Dependants' Claim for Damages. Sections 61(1) and 61(2) of the *Family Law Act* read as follows:

> 61(1) Right of dependants to sue in tort – If a person is injured or killed by the fault or neglect of another under circumstances where the person is entitled to recover damages or would have been entitled if not killed, the spouse as defined in Part III (Support Obligations), same-sex partner, as defined in Part III (Support Obligations), children, grandchildren, parents, grandparents, brothers and sisters of the person are entitled to recover their pecuniary loss resulting from the injury or death from the person from whom the person injured or killed is entitled to recover or would have been entitled if not killed, and to maintain an action for the purpose in a court of competent jurisdiction.

Damages in case of injury -- s. 61(2)

> (2) The damages recoverable in a claim under subsection (1) <u>may</u> include,
>
> (a) actual expenses reasonably incurred for the benefit of the person injured or killed;
>
> (b) actual funeral expenses reasonably incurred;
>
> (c) a reasonable allowance for travel expenses actually incurred in visiting the person during his or her treatment or recovery;
>
> (d) where, as a result of the injury, the claimant provides nursing, housekeeping or other services for the person, a reasonable allowance for loss of income or the value of the services; and

> (e) an amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the person if the injury or death had not occurred. [1]

WHO CAN CLAIM PURSUANT TO THE PROVISIONS OF THE FAMILY LAW ACT?

Claims under section 61 of the *Family Law Act* are considered derivative claims.[2] These claims arise as a direct result of the bodily injury or death of a family member. The losses are occasioned to the claimant by virtue of the physical or psychological injuries sustained by their family member.

The class of persons entitled to commence an action arising out of the death of a family member pursuant to the *Family Law Act* is limited to the deceased's children, grandchildren, siblings, spouse and same-sex partner. It remains to be seen if the Ontario Court of Appeal's decision in *Halpern* v. *Attorney General of Canada*[3] will, in any way, change the definitions contained in the *Family Law Act*. Pursuant to the *Family Law Act*, spouse is defined as:

> (a) a man or woman who was married to the deceased;
>
> (b) a man or woman who had entered into a marriage with the deceased that is voidable or void, provided the person asserting the right entered into the marriage in good faith;

---

[1] R.S.O. 1990, c.F 3, as amended (emphasis added).
[2] See *Kemppainen* v. *Winter* (1997), 143 D.L.R. (4th) 760 (Gen. Div.).
[3] 65 OR (3d) 161 (C.A.).

(c) a man or a woman who was not married to then deceased but had cohabited with the deceased:

(i) continuously for a period of not less than three years, or

(ii) in a relationship of some permanence, if they are the natural or adoptive parents of a child.

Same sex partner is defined as:

two persons of the same sex who have cohabited:

(a) continuously for a period of not less than three years, or;

(b) in a relationship of some permanence, if they are the natural or adoptive parents of a child.

MARITIME LAW

The provisions of the *Family Law Act* have, historically, not applied to fatalities occasioned as a result of boating accidents; these claims were precluded under Canadian maritime law.[4] That changed with the decision of the Supreme Court of Canada in *Ordon Estate* v. *Grail*[5]. This case alters the common law in respect of a dependant's claim and serves to bring maritime law into "step with the modern understandings of fairness and justice, as well as with the 'dynamic and evolving fabric of our society'."[6]

Writing for the Court, Iacobucci, J. (as he then was) and Major, J. state:

> It is unfair to deny compensation to the plaintiff dependants in these actions based solely upon an anachronistic and historically contingent

[4] see R. M. Fernandes, "*Boating Law of Canada, Second Edition*", (Toronto: Aerospark Press, 2004) 242.
[5] [1998] 3 S.C.R. 437 (S.C.C.)
[6] *Ibid.* at para 102.

> understanding of the harm they may have suffered. This is true both for the fatal accident claimants and for the personal injury claimants. In this light, we are of the view that changing the definition of "damages" within the context of maritime accident claims is required to keep non-statutory maritime law in step with modern understandings of fairness and justice… In concluding, we note that a claim for damages for loss of care, guidance and companionship as a result of another's personal injury will succeed only where the claimant is able to establish, among the other elements, that the injury suffered was sufficiently serious that it is capable of producing a loss of guidance, care and companionship.[7]

ACTUAL EXPENSES – THE HISTORICAL CONTEXT OF "PECUNIARY LOSS"

In the seminal case *Mason* v. *Peters*[8] Robins, J., writing for the Court, held that a Family Law Act claimant's entitlement to compensation for pecuniary losses "may consist of the support, services or contributions which the claimant might reasonably have expected to receive from the deceased had he not been killed". [9] He goes on to state:

> There need be no legal right to such benefits; a reasonable expectation of deriving economic advantage from the deceased's remaining alive is sufficient to sustain a claim.

IS THE PARADIGM SHIFTING?

---

[7] *Ibid.*
[8] (1982), 39 O.R. (2d) 27 (C.A.).
[9] *Ibid.* at page 31.

In 2000 the Ontario Court of Appeal rendered its decision in *Macartney* v. *Warner*[10] which appears to have markedly expanded the scope of recovery for pecuniary losses available to *Family Law Act* claimants.

In *Macartney* the Court of Appeal considered whether pecuniary loss was limited to a claim for a pecuniary benefit that would have flowed from the deceased to the claimant had the deceased lived. In other words, the court considered whether recoverable pecuniary losses should be limited to losses related solely to the expected benefit that would have flowed to the claimant as a result and through the deceased's continued life. The majority decision appears to have fundamentally expanded the scope of what can and is considered a pecuniary loss for the purposes of section 61 of the *Family Law Act*.

The majority of the Court held in *Macartney* that the deceased's parents' loss of income, a direct result of their nervous shock suffered as a result of the death of their child, is a compensable pecuniary loss. In his decision, Laskin J. states:

> In my opinion, Mr. and Mrs. Macartney need not prove that their loss of income was caused by nervous shock to succeed with their claim under s. 61(1). They need only prove that their income loss is a pecuniary loss resulting from Jeremy's death.[11]
>
> … the ordinary meaning of the words in s. 61(1) would permit recovery for the loss claimed by Mr. and Mrs. Macartney. Their income loss is a

[10] (2000), 46 O.R. (3d) 641 (C.A.).
[11] *Ibid.* at para 40.

> pecuniary loss. Each claims to have suffered profoundly because of Jeremy's death… If Mr. and Mrs. Macartney prove the necessary facts, they can establish a pecuniary loss resulting from the… death of their son. Nothing in the wording of s. 61(1) restricts Mr. and Mrs. Macartney's recovery for pecuniary loss to the pecuniary benefits that they would have received from their son had he not been killed.[12]

The legacy of the *Macartney* decision is an expansion of the principles that guide the court in determining what a pecuniary loss is. This is in contrast to earlier decisions, cited by Rosenberg, J.A. in his dissent, which restricted recovery to losses that arise strictly by virtue of the lost relationship with the injured party.

Section 61(2) of the *Family Law Act* sets out a non-exhaustive list of the types of damages recoverable in a claim pursuant to s. 61(1) of the Act; *Macartney* appears to have altered the environment in which *Family Law Act* damages are assessed, broadening the question, while at the same time simplifying it to become one of cause and proof: can the claimant demonstrate that there is a pecuniary loss resulting from the death?

Further, it seems that those pecuniary losses that have been historically restricted to losses that would have flowed from the deceased to the claimant have been expanded and now include direct losses of the claimant provided that the claimant can demonstrate a causal nexus between the loss of the family member and the pecuniary loss suffered. The

[12] *Ibid.* at paras 46 and 47 (emphasis added).

criteria of importance appears to be that the pecuniary loss is a direct result of the death of the family member.

Recovery of a *Family Law Act* claimant's personal financial losses depends on proof that the result from the injury or death. As the Court of Appeal said, "In each case, the court will have to apply the words of the statute and ask whether this is "a pecuniary loss resulting from the injury or death." These words may well raise difficult issues of causation".[13]

In *Hechavarria* v. *Reale*[14], Nordheimer, J. accepted that losses of the nature presented in *Macartney* can be claimed pursuant to s. 61 of the *Family Law Act*. However, in *Hechevarria* the plaijntiffs were made to prove their actual quantifiable losses.

THE EVOLUTION OF CARE GUIDANCE AND COMPANIONSHIP

Courts in Ontario have consistently held that each case must be considered in light of the particular family relationship involved and that this consideration will obviously lead to a variance in the assessment of damages. Further, damages pursuant to s. 61(1)(e) of the Family Law Act are pecuniary losses and are to be calculated and assessed an "an objective and unemotional manner as possible[15]". The courts turn generally to a non-exhaustive list of factors that they take into consideration when assessing damages pursuant to the *Family Law Act*.

(i) the age, and mental and physical condition of the claimant;

[13] *Ibid.* at para 64.
[14] (2000), 51 O.R. 3d 364 (S. C. J.).
[15] (1986), 54 OR 2d 661 (C.A.) at 662.

(ii) whether the deceased lived with the claimant, and if not the frequency of the visits;

(iii) the intimacy of the claimants relationship with the deceased;

(iv) the claimants emotional self-sufficiency; and

(v) the deceased's and the claimant's joint life expectancy, or the probable length of time the relationship would have endured.[16]

In 2001 the Ontario Court of Appeal released its decision in *To* v. *Toronto Board of Education*[17]. In *To* a 14 year old Chinese boy was killed while at school. Surviving him were his parents and sister. The Court's unanimous assessment of non-pecuniary damages was significantly influenced by its consideration of cultural issues particular to this family. The family had an expectation that the deceased, as the first born son, would achieve academically and eventually provide social and financial support to his parents and sister. At trial a jury awarded damages of $100,000 to each of the surviving parents and $50,000 to his sister.

On appeal the Court of Appeal held that while each case must be assessed on its particular facts, regard must also be had to the range of damages established by other cases. The Court of Appeal, while unwilling to dramatically raise the quantum of damages available for loss of care, guidance and companionship, made a definite statement with regard to the cultural aspects specific to each family. The Court held that the $100,000 award to each parent was not outside the acceptable range having regard to

[16] See *Pitman estate* v. *Bain* (1994), 112 D.L.R. (4th) 257 (Gen. Div.), *Kollaras* v. *Olympia Airway S.A.*, [1999] O.J. No. 1447 (S.C.J.), and *Dybongco-Rimando Estate* v. *Lee,* [2001] O.J. No 3826 (S.C.J.)
[17] (2001), 55 O.R. (3d) 641 (C.A.)

earlier assessments and the impact of inflation, the sister's award was out of line with prior cases and reduced it by half.

It is however arguable that since the decision in *To*, courts in Ontario have increased their damage assessments with respect to the loss of care, guidance and companionship. In *Godin* v. *Yuke*[18] the plaintiff's son, age 18, was killed. The deceased and his father enjoyed a close relationship, although the evidence did not show the kind of anticipated reliance of the plaintiff and his son, contrary to the evidence in *To*. The court awarded $80,000.00 for non-pecuniary damages.

Awards for non-pecuniary damages pursuant to the *Family Law Act* have been seen by most claimants and plaintiff's counsel to be unduly modest. The *To* case may help in fixing that anomaly. Recent case law has made a point of stating that these awards are "not conventional", but quantum ought to be tested against awards in other cases.[19]

ECONOMIC DEPENDENCY

Where the deceased was a breadwinner and leaves behind family members who relied on the deceased for financial benefits, claims can be advanced for the loss of economic dependency. The assessment of these claims essentially involves a calculation of what part of the deceased's income was and would have been available for the benefit of his or her dependant survivors. Once that calculation is made, courts will consider how the

[18] see *Godin* v. *Yuke*, [2004] O.J. No 2656 (S.C.J.) and *Cammack* v. *Martins Estate*, [2002] O.J. No. 4983 (S.C.J.); where the court assessed the *Family Law Act* award for the father of a 19 year old killed in an accident at $80,000.00

[19] *Godin, ibid*.

resulting amount ought to be modified, if at all, for contingencies of life, such as the contingency that the surviving spouse may re-marry[20].

Assessing a surviving spouse's loss of economic dependency is not straightforward, particularly where both the deceased spouse and the surviving spouse were income earners. In the single income family the approach has been to award the surviving spouse a certain percentage of the after-tax income of the deceased spouse (usually between 50% and 70%), subject to contingencies. This has been labeled the "sole dependency approach". Dependent children will often receive 4% of the after-tax income of the deceased parent for the duration of their dependency. For two-income families, different methods of calculating the loss may apply.

The sole-dependency approach has however been used in order to assess loss of dependency in double-income families. In *Neilsen* v. *Kaufmann*[21] the Ontario Court of Appeal concluded that the dependency factor of 70% applied by the trial judge ought to be reduced to 60% to recognize the fact that there are two breadwinners and it should be recognized that some of the surviving spouse's income will no longer be going to the deceased.

For two-income families the defence often argues that the loss should be based on the cross-dependency approach, which recognizes the economic contribution of the surviving spouse. Using this method the dependency rate is applied to the anticipated joint after-

[20] see *Dybongco-Rimando Estate* v. *Lee*, [2001] O.J. No. 3826 (S.C.J.).
[21] (1986), 26 D.L.R. (4th) 21 (C.A.)

tax income of both spouses. The rationale for using this method is to recognize that some of the surviving spouse's income would have benefited the deceased spouse. The effect of this approach is to reduce the assessment for economic dependency. The cross-dependency approach to calculating loss of economic dependency is subject to criticism, particularly when the deceased spouse earned considerably less than the surviving spouse. The calculation can result in a negative number, with the absurd result that the surviving spouse is better off as a result of the death.[22]

As suggested in *Hechavarria* v. *Reale*, the method used to determine loss of economic dependency should take in to account the factual reality of the particular family affected.[23] Evidence with respect to how the income of the deceased was used is crucial to adopting the most equitable approach of calculating this aspect of the loss. In *Hechavarria*, recognizing the shortcomings of the cross-dependency approach, the court opted for the sole-dependency approach with modifications.[24]

Where the deceased provided services to the surviving claimants, a court may award damages for the cost of replacing those services.[25] In *Ashley Estate* v. *Goodman* a wife and mother was killed. The court awarded the plaintiffs the $200,000 for the cost of a nanny to care for the children. In addition, the court awarded damages for extra babysitting services, maid service and lawn and garden costs.

---

[22] supra note 14.
[23] *Ibid.*
[24] See also *Robb Estate* v. *Canadian Red Cross Society*, [2000] O.J. No. 2396 (S.C.J.)
[25] See *Neilsen* v. *Kaufmann* (1986), 26 D.L.R. (4th) 21 (C.A.) at page 29.

In *Hechavarria* v. *Reale* the court found that the plaintiffs' evidence regarding the time spent by the deceased wife was exaggerated and preferred to adopt the approach of basing the claim on statistical data. The evidence at trial was that the wife was a better than average housekeeper, resulting in an upward adjustment of the statistical numbers which only reflected averages.

CONCLUSION

The most recent case law has expanded compensation for *Family Law Act* claimants and demonstrated a willingness on the part of the courts to award larger sums where justified on the particular facts of the case. The most interesting development is the change brought about by *Macartney*. Plaintiff's lawyers should be aware of the potential causation issue that might arise in these cases. They should be addressed early in the case and relevant evidence should be gathered in support of these claims. They may prove, in some cases, to be substantial.

Care should be taken to properly plead material facts in the Statement of Claim in support of these damages. The standard pleadings used prior to the decision in *Macartney* will not do.

Further, claimants must be carefully briefed prior to Examinations for discovery. Claims of this nature will significantly broaden the scope of inquiry at discovery.