To et al. v. Toronto Board of Education et al.

[Indexed as: To v. Toronto Board of Education]

55 O.R. (3d) 641
[2001] O.J. No. 3490
Docket No. C30952

Court of Appeal for Ontario
Osborne A.C.J.O., Austin and Laskin JJ.A.
September 6, 2001

Civil procedure -- Costs -- Solicitor-and-client -- Trial judge awarded successful plaintiffs party-and-party costs to trial and solicitor-and-client costs thereafter -- Trial judge took into account two offers to settle by plaintiffs which did not comply with rule 49.10, defendant's failure to respond to plaintiffs' request to admit and efficiency of presentation of plaintiffs' case -- Offers to settle and use of modern technology to present case efficiently did not justify award of solicitor-and-client costs -- Failure to respond meaningfully to request to admit might constitute relevant factor if it prolonged trial or otherwise added to trial costs -- Defendant's appeal from costs order allowed -- Plaintiffs awarded party-and-party costs throughout subject to direction to assessment officer to assess solicitor-and-client costs for any time that trial extended because of defendant's failure to respond appropriately to request to admit -- Ontario Rules of Civil Procedure, R.R.O. 1990 , Reg. 194, rule 49.10.

Family law -- Damages -- Wrongful death -- Loss of guidance, care and companionship -- Parents of deceased 14-year-old boy awarded damages in amount of $100,000 each for loss of guidance, care and companionship -- Deceased's 11-year-old sister awarded $50,000 -- Family particularly close -- Award to parents at upper end of scale but not so inordinately high as

to justify appellate intervention -- Assessment of $50,000 for sister outside range of reasonableness and inordinately high -- Assessment of sister's damages reduced to $25,000.

The deceased, a 14-year-old grade 9 student, was doing pull-ups on the steel crossbar of a handball net in his high school gymnasium when the net toppled over, crushing his head between the steel frame of the net and the gymnasium floor and killing him. He was survived by the plaintiffs, his parents and 11-year-old sister. The deceased and his parents immigrated to Canada from Vietnam in 1980. His sister was born in Canada three years later. The deceased excelled at school and was devoted to his parents. He helped his father, who did not read English, with his business and personal correspondence and was, in many ways, his father's contact with the English-speaking world. He was a trusted companion and adviser to his father. His relationship with his sister was extremely close -- almost paternal. His parents worked very long hours in the family business and the deceased was often required to care for his sister. The deceased's death had a devastating effect on his parents and sister. At some risk to her own health, his mother tried on two occasions to produce another son. She had complications and required a hysterectomy. After her hysterectomy, she offered to divorce her husband because she could no longer bear him a son. The plaintiffs successfully sued the defendant school board. The jury assessed damages for loss of guidance, care and companionship at $100,000 for each of the deceased's parents and $50,000 for his sister. The trial judge awarded the plaintiffs party-and-party costs to the trial and solicitor-and-client costs of the trial. In awarding solicitor-and-client costs, he took into account two offers to settle made by the plaintiffs which were for less than the amount of the judgment but which did not comply with rule 49.10 of the Rules of Civil Procedure. He also took into account the defendant's failure to respond meaningfully to the plaintiffs' request to admit, and the efficiency of the presentation of the plaintiff's case (much was made of the plaintiffs' use of PowerPoint). The defendant ap pealed the assessment of damages of loss of guidance, care and companionship and the award of solicitor-and-client costs of the trial.

Held, the appeal should be allowed in part.

It was open to the jury to conclude that the family was extremely close and that the deceased would have continued to provide guidance and companionship to his parents and guidance, care and companionship to his sister.

In circumstances where there was no error in the charge so that the jury can be taken to have considered and applied the proper factors and principles, the jury's assessment of damages must be so inordinately high (or low) as to constitute a wholly erroneous estimate of the guidance, care and companionship loss in order to justify appellate intervention. While reference to other guidance, care and companionship assessments involving deaths of children is helpful to test the reasonableness of the award, it is not determinative. Each case must be considered in light of the evidence material to the guidance, care and companionship claims in that case. The $100,000 guidance, care and companionship assessments of the deceased's parents were high, but not so inordinately high as to justify appellate intervention.

The general or accepted range of damages in sibling claims for the loss of guidance, care and companionship in roughly comparable cases is very broad but the assessments are consistently lower than $50,000. Although the deceased's sister suffered a significant loss of guidance and companionship as a result of his death, she would, in all probability, go on to establish a life of her own and a family of her own. The $50,000 assessment was inordinately high. It should be reduced to $25,000.

In some reasonably narrow circumstances, offers to settle that do not comply with rule 49.10 can be used to justify a solicitor-and-client costs order under rule 49.13. However, there was no basis here in rule 49.13 to order solicitor-and-client costs of the entire trial, since the plaintiffs' offers did not comply with the substantive requirements of rule 49.10. The fact that the plaintiffs' counsel was able to use modern technology to advance his clients' interests at trial was not a basis upon which to make the defendant pay solicitor-

and-client costs of the trial. The failure of the defendant to respond meaningfully to the plaintiffs' request to admit was a relevant matter if the failure to make reasonable admissions prolonged the trial or otherwise added to the trial costs. The costs order at trial should be varied by awarding the plaintiffs party-and-party costs throughout, subject to a direction to the assessment officer to assess solicitor-and-client costs for any time that the trial was extended be cause of the defendant's failure to appropriately respond to the plaintiffs' request to admit.

Hamilton v. Canadian National Railway Co. (1991), 47 O.A.C. 329, 80 D.L.R. (4th) 470, 50 C.P.C. (2d) 271 (C.A.); Macartney v. Warner (2000), 46 O.R. (3d) 669, 183 D.L.R. (4th) 374 (C.A.); Mason v. Peters (1982), 39 O.R. (2d) 27, 139 D.L.R. (3d) 104, 22 C.C.L.T. 21 (C.A.), affg (1980), 30 O.R. (2d) 409, 117 D.L.R. (3d) 417, 15 C.C.L.T. 1, [1981] I.L.R. 1-1344 (H.C.J.); Rintoul v. Linde Estate (1997), 32 O.R. (3d) 704 (Gen. Div.), supp. reasons (1997), 32 O.R. (3d) 713 (Gen. Div.), consd

Other cases referred to

Andrews v. Grand & Toy Alberta Ltd., [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452, 3 C.C.L.T. 225, [1978] 1 W.W.R. 577, 19 N.R. 50, 8 A.R. 182; Ashley Estate v. Goodman, [1994] O.J. No. 1672 (Gen. Div.); Frawley v. Asselstine (1990), 73 O.R. (2d) 525, 70 D.L.R. (4th) 536 (H.C.J.); Gervais v. Richard (1984), 48 O.R. (2d) 191, 12 D.L.R. (4th) 738, 30 C.C.L.T. 105, 28 M.V.R. 305 (H.C.J.); Hechavarria v. Reale (2000), 51 O.R. (3d) 364 (S.C.J.); Huggins v. Ramtej, [1999] O.J. No. 1696 (S.C.J.); Koncovy v. Hodulik, [1986] O.J. No. 864 (H.C.J.); Nielsen v. Kaufmann (1986), 54 O.R. (2d) 188, 13 O.A.C. 32, 26 D.L.R. (4th) 21, 36 C.C.L.T. 1 (C.A.), varg (1984), 28 C.C.L.T. 54 (Ont. H.C.J.); Radovini v. HOJ National Leasing Ltd., [1986] O.J. No. 196 (H.C.J.); Reidy v. McLeod (1986), 54 O.R. (2d) 661, 15 O.A.C. 200, 27 D.L.R. (4th) 317, 36 C.C.L.T. 307 (C.A.), varg (1984), 47 O.R. (2d) 313, 11 D.L.R. (4th) 411, 30 C.C.L.T. 183 (H.C.J.); Scott v. Musial, [1959] 3 All E.R. 193, [1959] 2 Q.B. 429, [1959] 3 W.L.R. 437, 103 Sol. Jo. 634 (C.A.); Thomas v.

Bell Helmets, Inc. (1999), 47 M.V.R. (3d) 303, 40 C.P.C. (4th) 31 (Ont. C.A.); Thompson Estate v. Bigham, [1985] O.J. No. 726 (H.C.J.); Thornborrow v. MacKinnon (1981), 32 O.R. (2d) 740, 123 D.L.R. (3d) 124, 16 C.C.L.T. 198 (S.C.) (sub nom. Schmidt, Re); Vahey v. Farrell, [1994] O.J. No. 459 (Gen. Div.); Vana v. Tosta (1967), [1968] S.C.R. 71, 66 D.L.R. (2d) 97; Woelk v. Halvorson, [1980] 2 S.C.R. 430, 114 D.L.R. (3d) 385, 33 N.R. 232, [1981] 1 W.W.R. 289, 14 C.C.L.T. 181; Zdasiuk v. Lucas (1987), 58 O.R. (2d) 443, 19 O.A.C. 201, 39 C.C.L.T. 1 (C.A.) (sub nom. Zdasiuk, Re)

Statutes referred to

Compensating Families of Persons Killed by Accidents, An Act for, 9 & 10 Vict., c. 93
Courts of Justice Act, R.S.O. 1990, c. C.43, s. 119
Family Law Act, R.S.O. 1990, c. F.3, ss. 61
Family Law Reform Act, 1978, S.O. 1978, c. 2, s. 60(2)
Fatal Accidents Act, 10 & 11 Vict., c. 6
Fatal Accidents Act, R.S.A. 1980, c. F-5, s. 8

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 49, 49.10, 49.13

Authorities referred to

Ontario Law Reform Commission, Report on Family Law (Toronto: Department of Justice, 1969)

APPEAL by a defendant from an assessment of damages and from an award of costs.

Jeffrey William Strype, for appellant.
Paul R. Jewell, for respondents.

The judgment of the court was delivered by

[1] OSBORNE A.C.J.O.: -- After a 28-day jury trial, in which both liability and damages were in issue, Dyson J. gave judgment for the plaintiffs further to answers to questions submitted to the jury as part of the trial judge's charge. No issue is taken with the trial judge's charge or with the jury's liability findings. What is in issue on the defendant Toronto Board of Education's appeal is the jury's assessment of damages for the loss of guidance, care and companionship under the Family Law Act, R.S.O. 1990, c. F.3, s. 61 in respect of the 14-year-old deceased's father, mother and sister. The assessments in issue are $100,000 for each of the deceased's father and mother and $50,000 for his sister.

[2] The appellant Board of Education also takes issue with the trial judge's award of solicitor-and-client costs of the trial to the plaintiffs. It seeks leave to appeal costs and if leave is granted to vary the costs order from solicitor-and-client to party-and-party costs.

Overview

[3] On February 26, 1992, Binh Hoy To (the deceased), a 14-year-old Grade 9 student, was doing pull-ups on the steel crossbar of a large European handball net in the gymnasium during a physical education class at Harbord Collegiate. He was killed when the net toppled over and crushed his head between the steel frame of the net and the gymnasium floor. He was survived by his father, Quoc Luong To (Mr. To), his mother, Kiet Linh Luong To (Mrs. To) and his younger sister, Mary To.

[4] In due course, the deceased's mother, father and sister sued the Toronto Board of Education and the vendor of the equipment in question, Sports Equipment of Toronto Limited. The defendant Queonto Ltd. did not take part in the trial.

[5] The trial commenced before Dyson J. and a jury on September 15, 1998. On October 23, 1998, in response to questions put to them, the jury returned a verdict finding negligence on the part of the Board (75 per cent) and the deceased (25 per cent). The jury found no negligence on the

part of Sports Equipment of Toronto Limited. In answer to the damages questions put to them, the jury assessed damages as follows:

-- Pecuniary loss - $11,582

-- Loss of future support (economic loss) - $0

-- Loss of guidance, care and companionship

Mr. To - $100,000

Mrs. To - $100,000

Mary To - $50,000

[6] On April 9, 1999, after hearing submissions from counsel, the trial judge awarded the plaintiffs party-and-party costs to the date the trial commenced and solicitor-and-client costs thereafter. The disposition of this issue was complicated by the fact that, despite instructions from the trial judge that the jury should not be concerned about costs, the jury added to its damages answers, "plus legal costs". After hearing counsel's submissions, the trial judge gave no weight to this jury recommendation. However, he gave the plaintiffs solicitor-and-client costs of the trial.

[7] In its appeal, the appellant Board submits that the damages assessed by the jury for guidance, care and companionship are inordinately high and that the trial judge erred in exercising his discretion on costs by awarding the plaintiffs solicitor-and-client costs of the trial even though there were no Rule 49, Rules of Civil Procedure, R.R.O. 1990, Reg. 194 offers which would support a solicitor-and-client costs order.

The Evidence

[8] Some reference to the evidence led at trial is required in order to deal with the issue of the jury's assessment of damages for guidance, care and companionship. The evidence to

which I refer largely concerns the relationship between the deceased and his mother, father and sister.

[9] The deceased was born in 1977 in South Vietnam. Shortly after his birth, his father and mother determined that as persons of Chinese descent in South Vietnam, recently overtaken by Communist North Vietnam, the To family would have a very difficult future. They thus arranged to escape from South Vietnam by travelling without the required papers to North Vietnam, from there to China and then to the South China Sea, where they arranged to board a small boat destined for Hong Kong with about 30 other people.

[10] Mr. and Mrs. To, with their young son, immigrated to Canada in 1980, where they established themselves and became independent in a financial sense by working in restaurants and eventually by becoming restaurant owners. In due course, they became Canadian citizens. Mary To, the sister of the deceased, was born shortly after the To family arrived in Canada, when the deceased was about three years old.

[11] There was considerable evidence led at trial about the particular culture into which the deceased was born, particularly with respect of the relationship between the deceased and his family. This evidence concerned, among other things, the important place occupied by a first-born son. It was expected from the outset that the deceased, as the To's first-born son, would excel scholastically and graduate from a university with a view to obtaining highly remunerative employment. It was also expected that he would be obedient and provide financial and social support for his parents and direct assistance to his sister, Mary. Mr. and Mrs. To were devoted to, and relied upon, the deceased in many ways. Their goals for him were shared and high.

[12] From the evidence adduced at trial, it is apparent that the deceased fit comfortably into the expected mould. He excelled at school, he was devoted to his parents and they to him. The deceased helped his father with both business and personal correspondence because Mr. To did not read English. The deceased was in many ways his father's contact with the

English-speaking world. By the age of 14, he had become a trusted companion and adviser to his father. There is ample evidence of both guidance and companionship in the deceased's relationship with his father and mother. I will comment on the meaning of guidance and companionship later in these reasons.

[13] The deceased's relationship with his sister, Mary, was extremely close, almost paternal. The deceased was devoted to his mother, father and sister. He recognized the need to meet his parents' high expectations. He accepted responsibility for ensuring that his sister's homework was properly completed. He also helped her with her school work. He would comfort and care for her if his parents were not at home. He was also consistently available to her to discuss problems she had. The deceased was a surrogate father to his sister and an integral part of her life.

[14] Because Mr. and Mrs. To often worked very long hours in the family business, the deceased was often required to care for his sister. Mrs. To testified that the deceased was of considerable assistance to Mary in school. In addition, there was evidence from Anh Honh Trinh that the deceased consistently helped his sister do her homework. Mrs. To testified that Mary's academic performance has declined since the deceased's death.

[15] The deceased and Mary provided considerable companionship to one another. They were inseparable until Mary was six years old. Anh Honh Trinh testified that when the family came to Canada "they are all the time together, and the brother is always taking care of the sister because the sister was much younger". She testified that when the two attended the same school, they walked home together and that even when the deceased moved to another school, they were still "always together". Mary testified that she and the deceased planned to live near each other as adults, and that they were as close as a brother and sister could be.

[16] The deceased's tragic death had a devastating effect on his mother, father and sister. He was not buried until approximately three weeks after his death, when an appropriate

date in the Chinese calendar was reached. His family moved out of the family home for about one year. After his death, the family travelled every weekend from their home to the Cam Sham Temple on Bayview Avenue in Toronto where incense was burned. Mrs. To prepared the deceased's favourite foods, which she believed his spirit could smell but not eat. At some risk to her own health, Mrs. To tried on two occasions to produce another son. She made inquiries about fertilization. In the end, she had complications, and eventually required a hysterectomy. After her hysterectomy, Mrs. To offered to divorce Mr. To because she no longer could bear him a son.

[17] Mr. To has a partnership interest in two restaurants with his older brother. His time was reasonably flexible since he was the person in charge of the administrative aspects of the business. Mrs. To did not have a fixed schedule. She regularly picked the deceased and his sister up from school to accompany them home from school, after which she prepared dinner. The deceased and his sister were almost always accompanied to and from school by one of their parents.

[18] The deceased was a fun-loving, outgoing, popular, hardworking teenager who was committed to school and who cared for his family and his friends at Harbord Collegiate. He was an excellent student. Although he was a hockey fan, he did not play hockey or any other sport because his goals did not permit him time to pursue such hobbies.

[19] On the evidence led at trial, most of which was uncontradicted, it was clearly open to the jury to conclude that the To family was extremely close and that the family's expectations were that the deceased would proceed to a university education, likely to post-graduate work and a professional career. In short, there was an abundance of evidence that the deceased provided, and would have continued to provide, guidance and companionship to his mother and father and guidance, care and companionship to his sister.

Statutory Damages for Loss of Guidance, Care and Companionship

[20] The statutory scheme permitting recovery for damages for

the loss of guidance, care and companionship became part of the law of Ontario in 1978 with the introduction of the Family Law Reform Act, 1978, S.O. 1978, c. 2. Section 60(2) of the Family Law Reform Act (now Family Law Act, s. 61(2)(e)) provided that damages recoverable in a fatal accident claim "may include" damages for the loss of guidance, care and companionship.

[21] Section 61 of the Family Law Act makes provision for compensation for the loss of guidance, care and companionship:

> 61(1) 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, . . . 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 to recover if not killed, and to maintain an action for the purpose in a court of competent jurisdiction.
>
> (2) The damages recoverable in a claim under subsection (1) may include,
>
> . . . . .
>
> (e) an amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have been expected to receive from the person if the injury or death had not occurred.

[22] The introduction of the Family Law Reform Act represented a major change in the scope of the quantum of recovery of damages in fatal accident claims. At common law, no action lay for any loss in circumstances where the tortious conduct of the defendant caused another person's death. However, in 1846, in England, through An Act for Compensating Families of Persons Killed by Accidents (9 & 10 Vict., c. 93), (made part of the law of Ontario and Quebec in 1847 with the introduction of the Fatal Accidents Act (10 & 11 Vict., c. 6), the tortfeasor was liable to an action for damages to certain

prescribed persons in particular relationships with the deceased. The Fatal Accidents Act was not interpreted to permit compensation for grief, mental distress or solatium. Companionship was limited to pecuniary loss. It was eventually held that the Fatal Accidents Act permitted the granting of compensation to a child for the loss of his/her parents' companionship. See Vana v. Tosta (1967), [1968] S.C.R. 71, 66 D.L.R. (2d) 97. The prevailing fiction was that a child's loss of a parent's companionship was a pecuniary loss.

[23] In 1969, the Ontario Law Reform Commission in its Report on Family Law (Toronto: Department of Justice, 1969) Vol. 1 at p. 109, recommended that a full study be undertaken of losses, including losses which were non-pecuniary in their character, in both personal injury and fatal accident claims. The Commission recommended in its brief report that the legislation, which was then contemplated, limit recovery of damages in fatal accident claims to pecuniary losses, as the Commission assumed was the case under the Fatal Accidents Act.

[24] The Family Law Reform Act was proclaimed in force in 1978. It provided for the recovery of "pecuniary loss" in respect of personal injury and fatal accident claims. However, s. 60(2) of the Act provided that recoverable losses by certain relatives of the deceased, expanded in the Family Law Reform Act to include siblings, may include an amount to compensate for the loss of guidance, care and companionship.

[25] The question quickly arose whether compensable damages for the loss of guidance, care or companionship, included essentially non-pecuniary losses. This court's judgment in Mason v. Peters (1982), 39 O.R. (2d) 27, 139 D.L.R. (3d) 104 (C.A.) put that debate to rest. In that case, the trial judge assessed guidance, care and companionship compensation for a mother whose 11-year-old son was killed in an accident in April 1978 at $45,000. He assessed the deceased's sister's damages at $5,000. Robins J.A., after reviewing the relatively meagre damages awarded in cases involving the death of children under the former Fatal Accidents Act, focused on companionship. He said, at p. 33 O.R.:

> Whatever the situation may have been in earlier times when children were regarded as an economic asset, in this day and age, the death of a child does not often constitute a monetary loss or one measurable in pecuniary terms. The most significant loss suffered, apart from the sorrow, grief and anguish that always ensues from such deaths, is not potential economic gain, but deprivation of the society, comfort and protection which might reasonably be expected had the child lived -- in short, the loss of the rewards of association which flow from the family relationship and are summarized in the word "companionship".

[26] Subsequent cases (decided under both the Family Law Reform Act and the Family Law Act) revealed a great disparity in guidance, care and companionship damage awards. See for example, Reidy v. McLeod (1986), 54 O.R. (2d) 661, 27 D.L.R. (4th) 317 (C.A.), varg (1984), 47 O.R. (2d) 313, 11 D.L.R. (4th) 411 (H.C.J.); Hamilton v. Canadian National Railway Co. (1991), 80 D.L.R. (4th) 470, 47 O.A.C. 329 (C.A.); and Macartney v. Warner (2000), 46 O.R. (3d) 669, 183 D.L.R. (4th) 374 (C.A.).

[27] Because guidance, care and companionship damages assessments were not consistent, in the interest of certainty, some called for conventional awards. See Gervais v. Richard (1984), 48 O.R. (2d) 191, 12 D.L.R. (4th) 738 (H.C.J.). As it turned out, the call was not heeded. Cases like Nielsen v. Kaufmann (1986), 54 O.R. (2d) 188, 26 D.L.R. (4th) 21 (C.A.) and Zdasiuk v. Lucas (1987), 58 O.R. (2d) 443, 39 C.C.L.T. 1 (C.A.) established that in assessing guidance, care and companionship damages, the particular family circumstances in each case must be taken into account by the trier of fact. Even when guidance, care and companionship damages awards were reduced on appeal, the reduction was not premised on accepted "conventional" awards. For example, in Reidy, supra, this court reduced the trial judge's assessment of guidance, care and companionship damages but it did not suggest that these assessments should be conventional.

[28] The result of a case-by-case analysis of family relationships has led to a range of guidance, care and

companionship assessments so broad as to defy description as conventional. The range of these assessments will, of course, expand if we continue to permit juries to assess these damages.

[29] I regard the existing disparity in guidance, care and companionship awards as the inevitable result of choices made by the courts and the legislature. The courts could have established conventional guidance, care and companionship awards, or could have imposed rough upper limits as the Supreme Court of Canada did in respect of non-pecuniary general damages in personal injury cases. See Andrews v. Grand & Toy Alberta Ltd., [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452. That has not happened. Alternatively, the legislature could have moved towards a legislative scheme such as exists in Alberta where the Alberta Fatal Accidents Act, R.S.A. 1980, c. F-5, s. 8 (as amended), provides that in the event of the death of a child under 18 years of age, the court is directed to award $43,000 to each of the child's parents for grief and loss of guidance, care and companionship. This is done without reference to other damages or evidence of damage.

[30] Although one might quibble with the numbers, in my view, this system merits serious consideration. However, that is a matter for the legislature. As matters now stand, as I have said, each case must be given separate consideration to measure what Krever J. viewed as "immeasurable" and "incalculable" in Gervais, supra, at p. 201 O.R. Judges and juries are left to do the best they can in each case where the assessment of damages for guidance, care and companionship is required.

The Standard of Appellate Review

[31] It is against that general background that I turn to consider the standard of appellate review as it relates to the jury's assessment of damages of the deceased's mother, father and sister for the loss of guidance, care and companionship. It is manifest, merely because I would have assessed guidance, care and companionship damages lower than the jury's assessment, does not justify this court's intervention with the jury's assessment. In the circumstances where there was no error in the charge so that the jury can be taken to have

considered and applied the proper factors and principles, the jury's assessment must be so inordinately high (or low) as to constitute a wholly erroneous estimate of the guidance, care and companionship loss. See Woelk v. Halvorson, [1980] 2 S.C.R. 430, 114 D.L.R. (3d) 385; Macartney, supra; and Scott v. Musial, [1959] 3 All E.R. 193, [1959] 2 Q.B. 429 (C.A.). While reference to other guidance, care and companionship assessments involv ing deaths of children is helpful to test the reasonableness of the award, it is not determinative. Each case must be considered in light of the evidence material to the guidance, care and companionship claims in that case. When this is done, for the reasons that follow, in my view, the $100,000 guidance, care and companionship assessments of Mr. and Mrs. To are not so inordinately high as to justify this court's interference. In my opinion, the assessment of $50,000 for the deceased's sister is outside the range of reasonableness and is inordinately high.

The Guidance, Care and Companionship Claim of the Deceased's Mother and Father

[32] This court has consistently held that the guidance, care and companionship compensation in each case must be assessed in an objective and unemotional way. See Hamilton, supra, and Macartney, supra. Since each case must be considered in light of the particular family relationship involved, assessments will, of course, vary. An appellate court will not lightly interfere with a properly instructed jury's assessment of damages; however, the reasonableness of the jury's assessment will be tested but by comparison with assessments in other cases. This latter exercise leads to establishing a range of damages. These issues were referred to by Krever and Finlayson JJ.A. in Hamilton, supra, pp. 472-73 D.L.R.:

> We are mindful that this is a jury award and that we should not lightly interfere with it. However, in viewing the evidence in this case in its totality and in a light most favourable to the claims, we are of the opinion that the quantum of damages set by the jury cannot be justified. The quantum of damages here far exceeds the general range of damages that has been awarded by our courts in cases

involving the death of minor children . . . .

(Emphasis added)

[33] In the result, in Hamilton, supra, this court (Galligan J.A. dissenting) reduced the jury's assessment of damages for the deceased's mother from $150,000 to $50,000; the assessment for the deceased's two brothers was reduced from $15,000 to $7,500 and the assessment for the deceased's sister, who was the closest to her, was reduced from $25,000 to $10,000.

[34] In Macartney, supra, a non-jury case involving the death of a 19-year-old boy, the damage assessments were alleged to be too low. Rosenberg J.A., after recognizing that the amount of guidance, care and companionship compensation in a particular case will depend on the facts and circumstances in evidence in that case, referred to an accepted range of damages at p. 674 O.R.:

> While it is my view that [the trial judge's guidance, care and companionship damages assessments] are low, they were within the accepted range for this type of case, albeit at the very bottom of that range. The limits of appellate review of damage awards are well settled. The Court of Appeal should not interfere merely because it would have come to a different conclusion . . . .

[35] In both Hamilton, supra, and Macartney, supra, there was no evidence that would take the case out of the general range of guidance, care and companionship damages that had been awarded in cases involving the death of teenage children. Both cases reveal a reluctance to interfere with a trial judge's assessment of damages. The same reluctance prevails in respect of jury assessments of damages. In Hamilton, this court did interfere because it concluded that the guidance, care and companionship assessments were higher than the accepted range. In Macartney, this court did not interfere because the damages, although low, came within the accepted range.

[36] Companionship, as it was defined in Mason v. Peters in a fatal accident context, consists of the deprivation of the

society, comfort and protection which might reasonably be expected had the child lived. Robins J.A. described it as "the loss of the rewards of association which flow from the family relationship". Care was referred to by Linden J. in Thornborrow v. MacKinnon (1981), 32 O.R. (2d) 740, 123 D.L.R. (3d) 124 (S.C.) as including "feeding, clothing, cleaning, transporting, helping and protecting another person". Thornborrow was cited with approval by Robins J.A. in Mason v. Peters. See also Huggins v. Ramtej, [1999] O.J. No. 1696 (S.C.J.). In Thornborrow, Linden J. described guidance as including such things as education, training, discipline and moral teaching.

[37] The assessments of $100,000 for each of Mr. and Mrs. To might be viewed as being at the high end of an accepted range of guidance, care and companionship damages. The question that must be considered is whether those assessments are outside the accepted range of damages. In my view, the $100,000 assessments for Mr. and Mrs. To are not outside the range. Expressed in constant dollars, the $100,000 assessments for Mr. and Mrs. To are roughly comparable to the $45,000 guidance, care and companionship assessment in Mason v. Peters. In April 1978, (the month of the Mason v. Peters accident) the consumer price index for Canada was at 54.6. In February 1992, the month of the deceased's death, the consumer price index was at 127.1. Given that increase in the consumer price index, it would take $104,753 in February 1992 dollars to purchase the same basket of goods purchased for $45,000 in 1978. I view Mason v. Peters to be an acceptable comparator for the purpose of assessing a ran ge of "accepted damages". In addition, I note that the $45,000 Mason v. Peters guidance, care and companionship assessment was referred [to] by Robins J.A. as "modest" and an assessment that could "in no sense be considered excessive". Although I think that the jury's guidance, care and companionship assessments for Mr. and Mrs. To are high, they are not so high as to justify this court's intervention. In my opinion, there was evidence in this case that would support a conclusion that damages for guidance, care and companionship in respect of the mother, father and sister were justifiably assessed at the high end of what one might describe as an accepted range of damages. There was evidence of an extremely

close relationship between the deceased and his mother and father. It was open to the jury to find that Mr. and Mrs. To suffered a substantial loss of society, comfort and protection, all benefits that flow from the family relationship. I would not give effect to this ground of appeal.

[38] I should address two further points. First, there was some confusion as to whether counsel at trial referred to the assessment of guidance, care and companionship damages in another case. This turned out to be a non-issue on the appeal; however, to avoid future problems, I should make it clear that counsel should not refer to other cases when making submissions to the jury. See Thomas v. Bell Helmets, Inc. (1999), 40 C.P.C. (4th) 31, 47 M.V.R. (3d) 303 (Ont. C.A.). This will serve only to deflect the jury from the required analysis of the evidence in the case before them. Second, the constant dollar comparison of the guidance, care and companionship assessments in this case with the Mason v. Peters assessment was the subject matter of affidavit evidence that the respondents sought to tender as fresh evidence. In my opinion, this "evidence" (the accuracy of which was accepted) is best viewed as an acceptable aid to oral argument, not as fresh evidence. Thus, I would dismiss the motion to introduce fresh evidence without costs.

The Deceased's Sister's Guidance, Care and Companionship Claim

[39] As I have said, the jury assessed the deceased's sister Mary's claim for the loss of guidance, care and companionship at $50,000. As is the case with the claim of the deceased's mother and father, Mary To's entitlement to guidance, care and companionship compensation must be considered in light of the particular relationship between her and the deceased.

[40] There is no doubt that the evidence supports a finding that Mary To suffered a loss of guidance, care and companionship as a result of her brother's death. The question then is simply whether the jury's assessment is so inordinately high as to require this court's intervention.

[41] At the time of her brother's death, Mary was 11 years

old. There was evidence that Mary and her brother were close and that the deceased was "always taking care of her". Mrs. To described her children's relationship as "very good". She said that they never fought, and that "he tried to yield to his sister". Mr. To testified that his son was a companion to all members of the family. He described the family unit as "very, very happy".

[42] The general or accepted range of damages in sibling claims for the loss of guidance, care and companionship in roughly comparable cases is very broad but the assessments are consistently lower than $50,000. The facts in Rintoul v. Linde Estate (1997), 32 O.R. (3d) 704 (Gen. Div.) are closest to this case. In Rintoul, the deceased was 16 years old when he died. He was survived by one sister who was 12 at the time of the deceased's death. The family was close and supportive. Before the tragic accident, the deceased and his sister discussed taking over the family farm together. The trial judge, Salhany J., held that the facts of that case were "unique". He concluded that the deceased's sister relied on him for guidance, even at his young age. The trial judge awarded the sister $20,000 for her guidance, care and companionship loss. In other guidance, care and companionship sibling assessment cases, the awards are lower. See for example, Frawley v. Asselstine (1990), 73 O.R. (2 [1986] O.J. No. 196 (H.C.J.); Ashley Estate v. Goodman, [1994] O.J. No. 1672 (Gen. Div.); Vahey v. Farrell, [1994] O.J. No. 459 (Gen. Div.); and Hechavarria v. Reale (2000), 51 O.R. (3d) 364 (S.C.J.).

[43] As was the case in Rintoul, supra, the deceased in this case was an older sibling and the only male child in the family, a fact that is particularly significant in Chinese culture. He was mature, responsible and enjoyed a very close relationship with his sister, Mary. He was her role model.

[44] Although Mary To suffered a significant loss of guidance and companionship as a result of the death of her brother, she will in all probability go on to establish a life of her own and likely a family of her own.

[45] As the majority stated in Hamilton, supra, the

assessment in question must fall somewhere within the range of damages established in comparable cases involving the deaths of minor children. In my opinion, a $50,000 guidance, care and companionship assessment exceeds the accepted range of damages to a degree that requires this court's intervention. To put it another way, the assessment is inordinately high.

[46] I accept that there was a very close relationship between the deceased and his sister, and that she suffered a significant loss of guidance, care and companionship as a result of her brother's death. As was the case in Rintoul, supra, the circumstances of this case support a substantial assessment of guidance, care and companionship damages for the deceased's sister. Since it would make no sense to prolong these proceedings and since this court has authority to vary the assessment in issue (see s. 119 of the Courts of Justice Act, R.S.O. 1990, c. C.43), recognizing that the jury was prepared to be generous, I would vary the assessment of Mary To's guidance, care and companionship damages by reducing it from $50,000 to $25,000.

The Costs Issue

[47] The Board submits that the trial judge erred in awarding the plaintiffs costs of the trial on a solicitor-and-client basis when there were no outstanding rule 49.10 offers at the time the trial commenced.

[48] After the trial judge granted judgment in accordance with the jury's answers to the liability and damages questions, he sought counsel's assistance on the issue of costs. After a short discussion, it was agreed that argument on the issue of costs would be adjourned for a few days. At that point, the trial judge said that he was not inclined to fix costs, as counsel for the plaintiffs had requested, and that costs would be on a party-and-party basis throughout. The critical issue at that time seems to have been who would pay the successful defendant's costs.

[49] After hearing counsel's submissions on costs, the trial judge rejected the plaintiffs' submission that the jury's

addendum to the questions submitted -- "plus legal costs" -- was a basis for ordering the unsuccessful defendant, the Board of Education, to pay solicitor-and-client costs to the plaintiffs. The trial judge then reviewed several settlement offers made by the plaintiffs and one made by the defendant Board.

[50] Two offers of the plaintiffs were for less than the amount of the judgment, but neither was a valid Rule 49 offer. Neither offer was submitted at least seven days before the commencement of the trial and both offers expired before the trial started. Nonetheless, the trial judge observed that the two offers from the plaintiffs were, "factors to be considered in the overall picture". The trial judge then referred to the failure of the defendant, Board of Education, to respond in any meaningful way to the plaintiffs' request to admit. He then commented favourably on the manner in which the plaintiffs had put their case in (much was made of the plaintiffs' use of PowerPoint). Then the trial judge stated:

> Under all the circumstances, the plaintiffs are entitled to party-and-party costs until the commencement of the trial and solicitor-and-client costs for the trial.

[51] The plaintiffs' settlement offers, the Board's failure to meaningfully respond to the plaintiffs' request to admit and the efficiency of the presentation of the plaintiffs' case were all referred to by the trial judge in his reasons dealing with costs and require brief comment.

[52] In some reasonably narrow circumstances, offers that do not comply with rule 49.10 can be used to justify a solicitor-and-client costs order under rule 49.13. See Thomas, supra, in which sequential plaintiffs' settlement offers, although not in compliance in a technical sense with rule 49.10, were held, nonetheless to justify a solicitor-and-client costs order under rule 49.13. However, I see no basis here in rule 49.13 to order solicitor-and-client costs of the entire trial, since the plaintiffs' offers did not comply with the substantive requirements of rule 49.10.

[53] The fact that the Board of Education played hardball with the plaintiffs' request to admit is a relevant matter if the failure to make reasonable admissions prolonged the trial, or otherwise added to the trial costs.

[54] Finally, in the circumstances of this case, the fact that the plaintiffs' counsel was able to use modern technology to advance his client's interests at trial is commendable. However, in my opinion, it is not a basis upon which to make a defendant pay solicitor-and-client costs of the trial.

[55] Apart from the problems attendant upon the defendant, Board of Education's refusal to meaningfully respond to the plaintiffs' request to admit, I see no basis to justify anything other than a party-and-party costs order throughout. I would direct the assessment officer to determine whether, if at all, the trial was prolonged as a result of the defendant, Board of Education's failure to respond in any meaningful way to the plaintiffs' request to admit. If the assessment officer determines that the trial was prolonged, the plaintiffs will be entitled to solicitor-and-client costs for the additional time spent at trial.

Conclusion

[56] For these reasons, I would allow the appeal in part, and direct that the assessment of guidance, care and companionship damages of Mary To be reduced from $50,000 to $25,000. I would vary the costs order at trial by awarding the plaintiffs party-and-party costs throughout, subject to a direction to the assessment officer to assess solicitor-and-client costs for any time that the trial was extended because of the defendant's failure to appropriately respond to the plaintiffs' request to admit. Success was divided, however, Mr. and Mrs. To have achieved the greater degree of success. In the circumstances, I would grant Mr. and Mrs. To 75 per cent of their costs in responding to the Board's appeal.

Appeal allowed in part.