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**FATALITY CLAIMS –
CALCULATION OF DAMAGES**

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FATALITY CLAIMS – CALCULATION OF DAMAGES

The quantification of fatality claims involves the following types of awards:

1. Damages for bereavement, as set forth in the *Fatal Accidents Act*, R.S.A. 2000, c. F-8 ("FAA");
2. Special damages for such things as funeral expenses and grief counseling, as set forth in the *FAA*;
3. Dependency loss; and
4. Loss of valuable services.

FATAL ACCIDENTS ACT ("FAA")

1. BEREAVEMENT

Bereavement damages compensate for grief and loss of care, guidance and companionship. With respect to motor vehicle accidents that occurred after November 1, 2002, bereavement damages are paid in the sum of \$75,000.00 to the surviving spouse and \$45,000.00 to each of the surviving children who fit the definition set out in the *FAA*. Section 1 of the *FAA* provides as follows:

- 1(a) "Child" includes a son, daughter, grandson, granddaughter, step son, step daughter and illegitimate child;
- (b) "Parent" includes a father, mother, grandfather, grandmother, stepfather and stepmother;

Section 8(2) of the *FAA* provides as follows:

- s. 8(2) If an action is brought under this Act, the Court, without reference to any other damages that may be awarded and without evidence of damage, shall award damages for grief and loss of guidance, care and companionship of the deceased person of:
 - (a) Subject to subsections 3 and 4, \$75,000.00 to the spouse or adult interdependent partner of the deceased person;
 - (b) \$75,000.00 to the parent or parents of the deceased person if the deceased person, at the time of death:
 - (i) was a minor or;

- (ii) was not a minor but was unmarried and had no adult interdependent partner, to be divided equally if the action is brought for the benefit of both parents; and
- (c) \$45,000.00 to each child of the deceased person who, at the time of the death of the deceased person:
 - (i) is a minor;
 - (ii) is not a minor but is unmarried and has no adult interdependent partner.

On October 7, 2004, the Alberta Court of Appeal, in the case of *Ferraiulo v. Olson*, [2004] ABCA 281, struck down the age and marital status limitation for bereavement payments under Section 8 of the *FAA*. In that case, Chief Justice Fraser stated:

When a person wrongfully kills someone, there can be no doubt that it is foreseeable that the immediate members of the victim's family – the spouse, children and parents – will suffer grief as a direct result of that wrongful death. . . . it is not unreasonable to expect that the wrong doers will be called on by a society that values life to compensate the immediate members of the victim's family, on a non-discriminatory basis, for the grief needlessly inflicted on them. That family includes all the victim's children, not just some of them.

In that case, the plaintiff was 57 years old and married. The plaintiff's mother was 84 years old when she was struck and killed by a motor vehicle while crossing the street. The plaintiff claimed damages under s. 8(2)(c) of the *FAA*. The Court stated that s. 8(2)(c) of the *FAA* created a distinction based on age and marital status that did not treat married or older children in categories excluded by that section with the respect and dignity afforded to other members of society. Accordingly, it was held that the provision breached the Charter of Rights & Freedoms.

Example:

Assume that a deceased was married with two dependent children:

- Surviving spouse - \$75,000.00
- Child 1 - \$45,000.00
- Child 2 - \$45,000.00

2. **SPECIAL DAMAGES**

Section 7 of the *FAA* provides as follows:

- s.7 If an action is brought under this Act and if any of the following expenses and fees were reasonably incurred by any of the persons by whom or for whose benefit the action is brought, then those expenses and fees, in a reasonable amount, may be included in the damages awarded:
- (a) expenses incurred for the care and well-being of the deceased's person between time of injury and death;

- (b) travel and accommodation expenses incurred in visiting the deceased between the time of the injury and death;
- (c) expenses of the funeral and the disposal of the body of the deceased, including all things supplied and services rendered in connection with the funeral and disposal;
- (d) fees paid for grief counseling that was provided for the benefit of the spouse, adult interdependent partner, parent, child, brother or sister of the deceased person.

It should be noted that the no fault Section B benefits portion of the SPF 1 provides for payment of funeral expenses up to the amount of \$5,000.00 in respect of the death of any one person. Normally the Section B payment will cover a portion of the funeral expenses, with payout pursuant to Section 7 of the *FAA* for any expenses that exceed that amount.

Example:

- Assume surviving spouse and children received counseling - \$1,500.00;
- Assume funeral expenses totaled \$20,000.00;

The claim would be in the aggregate amount of \$16,500.00 after Section B funeral expenses (\$5,000.00) are paid.

3. LOSS OF DEPENDENCY

Dependency claims are awarded to those who relied upon the financial support or contribution of the deceased. The purpose of the award is to ensure that that support remains ongoing. There is no need to compensate the dependents for all of the deceased's income, since a portion of the deceased's income would have been for the benefit of the deceased only. Accordingly, the following limitations apply:

1. The dependants in a fatal accident action are compensated for their dependency upon the deceased's after tax earnings; and
2. The dependents cannot claim the full amount of the deceased's net earnings, but only the percentage needed for them to maintain the same standard of living which they would have enjoyed had the deceased lived.

To accurately compensate the dependents, it is necessary to calculate the amount of the deceased's income that was needed in order to maintain the same standard of living. To do this, one must determine the amount of the deceased's income that would have paid for common expenditures (like taxes and mortgage payments) and the amount the deceased spent on his or her own personal expenditures (like food, clothing, etc.). In most cases, this analysis involves the use of statistical data collected by economists. Such data indicates that typically, 40% of the net income of a deceased is consumed on common expenditures and 30% on each spouse's personal expenditures. The survivor will require enough income to pay not only that individual's personal expenditures (30%), but also the common expenditures (40%). Accordingly, in most

cases, the surviving spouse is dependent on approximately 70% of the deceased's net income. Statistical data collected by economists indicates that regardless of the income class, the spousal dependency rate is 70%, plus or minus 1%. That 70% is referred to as the "dependency rate".

Statistical data also indicates that child dependency rates are typically 4% per child, up to four children. Therefore, for a surviving family of one parent and two children, the dependency rate is typically 78% (70% + 4% + 4%).

An economist will also consider negative contingencies. Negative contingencies include the possibility of separation and divorce or of remarriage that could reduce the dependency loss. For instance, if a couple had separated prior to the motor vehicle accident, then the surviving spouse has an increased likelihood of remarriage and will no longer be dependent on the deceased's income. Contingency discounts typically range from 3% - 10%.

Example:

The process of calculating the dependency losses are reflected in the following basic example. The deceased is a 40 year old, married, father of two children who were 8 and 10 years old at the time of his death. The deceased was employed as a welder and had an annual gross income of \$85,000.00. His retirement age was projected to be 62.

- Step 1: Calculate the deceased's net (after tax) income: \$65,450.00
- Step 2: Calculate the dependency rate of each dependent:
 - Spouse - 70% = \$45,815.00 /year
 - 8 year old – 4% = \$ 2,618.00 /year
 - 10 year old – 4% = \$ 2,618.00 /year
- Step 3: Calculate the present value of the stream of losses:
 - Spouse – 22 years = \$776,871.00
 - 8 year old – 10 years = \$ 23,174.00
 - 10 year old – 8 years = \$ 19,420.00
- Step 4: Discount having regard to negative contingencies such as remarriage, etc.
 - Spouse – (5% discount) = \$738,027.00
 - 8 year old – (5% discount) = \$ 22,015.00
 - 10 year old - (5% discount) = \$ 18,449.00

Please note that in the above example it was assumed that the children's dependency loss would end at the age of 18. In many cases, the dependency loss will extend into early adulthood depending upon the likely dependency of the child through post-secondary training/education.

4. LOSS OF VALUABLE SERVICES

As with claims of economic dependency (as discussed above), the dependents are entitled to damages for loss of their dependency upon the deceased's household services. This award is

based on the rationale that the deceased would have provided such services and the surviving dependents are entitled to maintain the same standard of living, including receipt of those services, as if the deceased had lived. As with economic dependency, calculation of lost services involves the application of a dependency rate. The general calculation process is as follows:

- Step 1: Quantify the number of hours the deceased spent annually on housekeeping and assign a dollar value to those activities.

This assessment involves the consideration of a record of assistance or, alternatively, use of the statistical approach. In most cases, an economist or home economist provides an opinion based on combined actual and statistical approach. The following statistics are often used:

- Average male: 7 – 11 hours per week
- Average employed female: 18 – 20 hours per week
- Average employed female with young kids: 30 hours per week
- Average female, not in labor market, no kids: 30 – 40 hours per week
- Average female not in labor market, with young kids: 40 – 50 hours per week

Service rates may vary from \$18.00 - \$30.00 per hour, depending on the nature of the services.

- Step 2: Calculation of the dependency rate.

It is regularly accepted and assumed by our Courts that some of the services provided by the deceased were for the deceased's own benefit. The percentage of the services that were not for the deceased's benefit is considered the dependency rate. The dependency rate varies between 50% - 90%. Factors that impact the dependency rate include the age of the dependents and the deceased, as well as whether some of the dependents were children.

The typical dependency rate for children is reduced to zero when the children leave home.

Example:

If we assume that the deceased provided 20 hours of services per week, and apply a 75% dependency rate, the dependents (the surviving spouse and children) would be entitled to compensation for 15 lost hours per week at a reasonable services rate of \$20.00 per hour (for the purpose of this example).

The rate of dependency must then be apportioned to each of the surviving dependents. Assuming a 50% apportionment to the surviving spouse (7.5 hrs/wk) the lost services claim would be \$7,800.00 per year. Using a cut-off date at age 65, the present value of that claim would amount to \$145,349.00.

The 8 and 10 year old children would each have a 25% dependency rate (2.5 hrs/wk each) through to the age of 18. The 8 year old would have a loss of services claim of \$34,522.00. The 10 year old would have a loss of services claim of \$28,282.00.

Economists must also factor negative contingencies into the loss of valuable services, which would reduce the amounts outlined above having regard to the same contingencies used in the economic dependency calculation. Again, a 3% – 10% contingency reduction is typically used.

- Spouse – (5% discount) = \$138,081.00
- 8 year old – (5% discount) = \$ 32,795.00
- 10 year old – (5% discount) = \$ 26,867.00

Example Summary:

The total claim in the example provided herein would result in the following damage assessment:

1. Bereavement Damages:
 - Spouse - \$ 75,000.00
 - Child 1 - \$ 45,000.00
 - Child 2 - \$ 45,000.00
 2. Special Damages:
 - Funeral expense - \$ 15,000.00
 - Grief counseling - \$ 1,500.00
 3. Dependency Loss:
 - Spouse - \$ 738,027.00
 - Child 1 - \$ 22,015.00
 - Child 2 - \$ 18,449.00
 4. Loss of Valuable Services:
 - Spouse - \$ 138,081.00
 - Child 1 - \$ 32,795.00
 - Child 2 - \$ 26,867.00
- TOTAL: \$1,157,734.00**